

# CHAPTER EIGHT



## The law and ethics of investigation

### Learning objectives

By the time you have completed this chapter and its exercises, you should be able to:

- Describe the rights of journalists under international human rights codes
- List the areas where investigative journalism most frequently comes into conflict with national criminal or civil law
- Describe the legal provisions related to these areas in your own national legal code
- Describe the precautions an investigative journalist should take as protection against prosecution or civil suits and potential defence if such suits are launched
- Describe the general principles guiding ethical investigative reporting
- Discuss those principles in relation to examples and case studies.

This chapter does not discuss the practical processes of conducting an investigative project except where they relate to law and ethics. If you wish to revise these, consult:

- Chapter 1 for definitions of investigative journalism
- Chapter 2 for guidance on generating story ideas
- Chapter 3 for pointers on planning an investigative project
- Chapter 4 for guidance on handling sources
- Chapter 5 for help with forensic interviewing techniques
- Chapter 6 for guidance on research tools and techniques
- Chapter 7 for help with constructing the final story.

You'll notice that in this chapter, many of the exercises are not followed by closed answers. This is because there are few right/wrong answers to ethical questions: the aim of the questions is to engage you with the issues, and help you develop a framework for dealing with such issues in your own reporting practice.

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# The law and ethics of investigation

*Maria Gonzales works for a weekly newspaper in a West African country. Her publication has recently run a story she wrote, describing how the president of the country has taken a second wife. Maria had reliable sources for her story, which drew a connection between the marriage and the awarding of a large urban development contract to the woman's father, a building magnate. It also alleged that the woman – previously married to her childhood sweetheart, an academic currently studying abroad – had her divorce rushed through barely legally to facilitate this political and financial alliance. Maria had done a telephone interview with the ex-husband, who spoke of his “shock” and “heartbreak” at this “callous treatment” by a “cruel” woman he said he “still loved”; the president's new wife refused to be interviewed.*

Now the Office of the Presidency says her paper will be taken to court under the country's insult laws, which forbid the media from 'publishing material damaging to the dignity of the President, his family or household.'

- Whose rights are involved in this situation?
- How could Maria and her paper defend themselves against the charges?
- Was it ethical to publish the story?

We'll look at these questions again at the end of the chapter.

## The law and ethics of investigation:

## international law and the rights of journalists

As well as national law codes, the media operates within an international legal framework, based on the UN Universal Declaration of Human Rights and its various supplementary codes and conventions, as well as (for Africa), the Windhoek Declaration – which highlighted ownership monopolies as a threat to press freedom – the African Charter of Human and People's Rights and later declarations adopted by the African Parliament. Countries that are signatories to these documents are expected to uphold them; even countries that are not signatories are often judged by their standards.

One key aspect of this international framework is that while interpretations may differ slightly between documents, it upholds freedom of expression and information; something that, as long ago as the 18th century, was recognised (in the words of French revolutionary Mirabeau) as “the freedom without which other freedoms cannot be gained”.

The Universal Declaration of Human Rights defines this freedom through the following clauses:

- **Article 15:** the right to form, hold, receive and impart opinions
- **Article 16:** free and equal access to information inside and outside state borders
- **Article 17:** freedom of speech and expression, equal access to all channels of communication, and no censorship (though restrictions under defamation laws are allowed; see below)
- **Article 18:** the duty to present news and information fairly and impartially
- **Article 19:** the right to freedom of expression and opinion, including “freedom to hold opinions without interference and to seek, receive and impart information through any media, regardless of any frontier...”

If they are met, these requirements are designed to set up a broadly free framework within which media organisations and other civil society bodies can operate.

The circumstances in which governments can limit these rights are outlined in Article 29 of the Universal Declaration. The Political Covenant of the Declaration details the restrictions on these rights article by article, as follows:

- To ensure respect for the rights and reputations of others (anti-defamation)
- To protect national security, *ordre public* (the circumstances necessary to keep a state governable), public health or morals
- To prevent incitement to discrimination, hostility or violence.

## What is your country signatory to?

Is your country a signatory to the relevant clauses of the UN Declaration of Human Rights? The Windhoek Declaration? The African Charter? Find out what media-relevant international commitments your government has made.

## The law and ethics of investigation: **investigation and national legal codes**

Not all African states are signatories to the relevant conventions. The international freedom of expression organisation Article 19, the Media Institute of Southern Africa and the South African Freedom of Expression Institute are among several Africa-based bodies that can provide information on your country's status.

And national constitutions – even those with freedom of expression clauses or which have signed the conventions – can limit media investigations very effectively by:

- The scope of their definition of 'official secrets'
- Provisions for declaring 'states of emergency' when normal information channels may be closed off
- The scope of anti-terrorism legislation
- The strictness of defamation, privacy or 'insult' laws
- The existence (or lack) of explicit channels for obtaining information
- The level of efficiency/organisation of official records
- Legislation governing freedom to publish or broadcast
- Legislation governing registration or licensing of journalists.

Many African countries have rules for the licensing of newspapers or broadcasters. These rules may require that the organisation or its financial backers fit certain categories, or that certain financial guarantees be in place. There may be a heavy 'stamp tax' on the paper newspapers print on, for example. Or certain types of 'special-interest groups' (for example, speakers of a certain language) may not be allowed to run radio stations. Some countries require individual journalists to be licensed, or to have specific formal qualifications such as a degree in media studies or journalism. These rules may be well-founded, and designed to ensure that media operations are run professionally and along sound business principles. But they need careful examination to ensure that they are not designed or used to restrict media freedom or as smokescreens for censorship.

Other restrictions may exist on distribution, on the right to erect radio masts or use broadcasting frequencies, or on where lucrative advertisers such as the civil service and parastatals are allowed to place advertisements.

But equally effective as restraints on free media are lack of resources and literacy in poor communities where strong investigative stories may, for these reasons, never find a voice. That's why it is important that investigative reporters think beyond snooping on the misdeeds of the rich and famous, and go to where these stories are.

The next sections will examine some of the legislation that impacts on investigative reporting. But these chapters are designed to be used in many countries across Africa, and so give generic tips and hints only. Before you go on, it will be useful if you profile your country's legislative media climate in relation to the issues listed above.

## **READ** Which laws affect the media in your country?

### **respond**

Find out what media-related provisions exist in your country's laws on the following issues. Note them here.

#### 'Official secrets':

**READ** Which laws affect the media in your country? (cont.)

**respond**

Find out what media-related provisions exist in your country's laws on the following issues. Note them here.

 Provisions for declaring 'states of emergency':

 Anti-terrorism legislation:

 Defamation, privacy or 'insult' laws:

 Explicit channels for obtaining information (e.g. Freedom of Information laws):

 Legislation governing freedom to publish or broadcast:

 Legislation governing registration or licensing of journalists:

## A barometer for democracy?

DRC journalist Sage-Fidèle Gayala provides examples of the legal provisions in his country, and suggests that the legislation around press freedom is one of the best ways of evaluating a nation's democracy.

The biggest key allowing a journalist to recognise the state of his country is the extent to which the activities of journalists are criminalised. A barometer of democracy is the pace at which these activities are decriminalised.

Take the example of the Democratic Republic of Congo where laws, including the Law on the Press in 1996 and the Criminal Code, criminalises a whole range of "press offences" and authorises the initiation of court proceedings against journalists who act counter to vague and outdated concepts introduced by ex-President Mobutu.

The law of 22 June 1996 based on the Penal Code (particularly articles 74, 75 and 77) define and punish damaging imputations, i.e. defamation and insults. For example, Article 74 (which ostensibly sets out provisions for the exercise of press freedom) defines as abuse of press freedom "any offence committed through newspapers or audiovisual media". The legislature argued that this law was necessary to protect reputations, despite the fact that it runs counter to legislation granting the public the right to know what is happening, particularly with regard to those who run the state and have public responsibilities.

The Code is clear: defamation consists in attributing to someone specific facts likely to prejudice the honour or expose the character of that person – whether or not the facts are true, and whether the person is living or dead.

Additional restrictive legislation exists in:

- Article 136 paragraph 2 and 137 of the Criminal Code which can condemn journalists for insulting members of Parliament, the Government and the Courts to a sentence ranging from three to nine months in prison and/or a fine.
- Article 193 of the Penal Code as well as regular Legislative Ordinance Number 300, December 16, 1963 provide that anyone insulting the head of state can be sentenced to imprisonment ranging from three months to two years and/or a fine.
- This is reinforced by Legislative Ordinance Number 301, December 16, 1963 which provides penalties for insults to foreign heads of state, ministers and diplomats.
- Article 184 of the penal code ordinary also makes it illegal to publish and distribute written matter without a true indication of the name and address of the author or the printer (Article 150); also illegal are publications that reveal defence secrets (punishable by death).

There are similar restrictions in many African countries. In Algeria, for example, Article 14b) of the Penal Code provides sentences of two to twelve months' imprisonment and/or fines (often exorbitant) for any publication calling into question the character of the President of the Republic in any offensive, insulting or defamatory manner. And according to various annual reports from Reporters Sans Frontières, especially that of 1997, in countries where power is characterised by "political inertia and authoritarianism," such as "the Cameroon of Paul Biya, the Gabon of Omar Bongo, the Guinea of Lansana Conte, the Equatorial Guinea of Obiang Nguema, the Rwanda of Paul Kagame, the Togo of Gnassingbe Eyadema" (now replaced by his son) and the Zimbabwe of Robert Mugabe ... the independent press is a victim of oppression."

**The law and ethics  
of investigation:**

## defining public interest

Many attacks on media freedom are refuted with the argument that the media's action was 'in the public interest'. Most courts recognise the concept – but what does it mean? Most certainly, it does not mean everything the public finds interesting, because that would include serious information as well as gossip, scandal and wild speculation!

## What constitutes public interest?

South African journalist Franz Krüger, in his text on media ethics, cites the Press Code of Professional Practice, which states: "The public interest is the only test that justifies departure from the highest standards of journalism, and includes:

- detecting or exposing crime or serious misdemeanour;
- detecting or exposing serious anti-social conduct;
- protecting public health or safety;
- preventing the public from being misled by some statement or action of an individual;
- detecting or exposing hypocrisy, falsehoods or double standards of behaviour on the part of public figures or institutions or in public institutions."

However, Krüger points out that these guidelines still provide considerable scope for argument: “How serious is serious? Who is a public figure? What is hypocrisy?” In most courts, the definitions would be those a judge believes would be made by a ‘reasonable person’ – in other words, the definitions would reflect the prevailing climate, permissive or conservative, of the society where the court sits. So, in a country where the judiciary believes that leaders should never be criticised, the ‘reasonable person’ yardstick is likely to work against fearless critical investigation.

It is also worth bearing in mind that the ‘public interest’ always has to be weighed against other interests – for example, the right of an individual to privacy, the national interest, or the right of communities to respect for their cultural practices. It is never easy to make these determinations, whether in court over legal matters, or in your own conscience when making ethical decisions.

## The law and ethics of investigation: **defamation and ‘insult’**

Defamation is the crime of publishing material that could lower the reputation of a person in the eyes of others.

In some African states, such as South Africa, there is a single, unified defamation law. In other states there are two separate laws: one covering ‘slander’ (spoken defamation, including radio broadcasts) and the other ‘libel’ (printed defamation). And in some countries there are a further set of ‘insult laws’ that govern specifically what can be said or written about presidents, prime ministers and other leading establishment figures.

In some countries only ‘natural persons’ (individuals) can be defamed; in others defamation can also apply to ‘juristic persons’ (legally-established bodies such as political parties, organisations or companies).

In some countries, defamation is a civil offence (an offence committed by one individual against another); in others it is defined as a criminal offence (committed by an individual against the laws of the state). Although damages awarded for defamation can be punitive in both cases – they have been known to close down newspapers – defining defamation as a criminal offence also means that the offending journalist risks criminal punishments, which can include imprisonment or even flogging in some African states.

### Lowering reputation

The CIJ handbook expands on the concept of lowering reputation as follows:

- Tending to lower that person in the eyes of right-thinking members of society
- Exposing someone to hatred, ridicule or contempt
- Causing someone to be shunned or avoided
- Discrediting them in their business, trade or profession.

Remember that many statements are capable of more than one meaning, and how readers or listeners respond may change over time, or in different societies. The simplest way of putting it is to ask yourself: do the words make the person written about look bad? If so, it is defamation. But beware of self-censorship: if the story is true and important, but potentially defamatory, you need to take a reasoned decision about publishing based on all these aspects, not only the risk of a law suit.

Sometimes the choice of just one word can spin a statement in a defamatory direction. If you write that someone has been ‘sacked’ from his or her job, you may know that it is a fact. But being sacked has a negative meaning. It can imply they have done something wrong to cause the employer to sack them. If you simply write they have ‘left’ the job there is no problem, because there is nothing to be inferred or implied – you are not giving any explanation or reason for their leaving: they have just ‘left’ as people do every day.

Many libel actions result from the journalist implying habitual conduct from a single incident. To describe someone as a thief or a pervert on the evidence of one incident may be strictly true, but might also imply the person makes a habit of this sort of behaviour, which may be difficult to prove, or easy for the person to disprove.

Context can also defame. The whole page taken together, or the entire broadcast, may count in a libel action. So everyone needs to know about libel law – including the person who writes the headline, lays out the page or writes the continuity links. When the late Dr Hastings Kamuzu Banda was life-president of Malawi, he fired a newspaper editor for the defamatory implications of placing a headline story on one of his speeches too close to a large photograph of a witch-doctor.

The key legal elements of any form of defamation are:

#### **1 That it has been published**

(In other words, someone other than you has read or heard it). The law exists to deal with what others may think of the defamed person, not what you the journalist may think. Insult laws tend to be the harshest here: they are sometimes even applied to private conversations overheard by state security agents in bars and offices.

Publishing on the Internet does count as publishing. Some recent legal decisions suggest that it may be even ‘more risky,

since the story has been published to a far wider audience, and this may be taken into account in deciding damages. Famously, UK *Guardian* journalist Andrew Meldrum was deported from Zimbabwe in 2002 for an article about the country published on the newspaper's website and downloaded by the Zimbabwe security service, the Central Intelligence Organisation, in Harare. A 2002 Australian High Court decision awarded a defamed Australian businessman the right to sue in any jurisdiction where the article defaming him was available, raising the spectre of global liability.

Re-publication is still publication. Simply because you picked up a story from a UK website does not make it legally safe for you to publish it in your paper somewhere in Africa. You can be sued, and every repetition of the defamatory matter counts as a fresh cause for action.

## 2 That it is 'defamatory matter'

That 'right-thinking' members of society would think less of the person after reading or hearing it. This depends on the moral climate of your country. In some places, saying a man has many sexual partners would be seen as defamatory; in other places with different ideas on masculinity and the spread of sexually-transmitted diseases, it might be seen as praise!

## 3 That the person or body suing you is the 'injured party'

The subject of your story. If your President's name is Madimba, and you wrote a satire column on the alleged misdeeds of a "Mr Masimba", that change of one letter might not protect you, particularly if other circumstances in the column pointed directly to the President. On the other hand, by suing he is taking on himself the possible truth of the allegations in the column.

## 4 That you intended to defame

If the statement seems obviously damaging, this is usually assumed; however some courts would also look into how carefully your story was researched, and the public interest dimensions of publishing it.

## 5 That what you did was unlawful

That you had no 'good or legal' reason for doing it. This is where the ability to mount a 'public interest' defence becomes important, as it gives you such a reason.

People who do not know the law assume that if your story is true, this is your easy defence against defamation charges. This is not so. Of course, your story has to be true. But you also have to be able to **prove it is true in ways that will satisfy the courts and laws in your country.** (Some African legal systems, for example, still do not accept recordings as evidence and will only place a reporter's notebook on the record.) That is why you cannot simply follow international tips and hints on defamation and hope they will protect you. You must know the law in your own country, and have a source who can give you detailed, relevant legal advice.

However, if you can meet the criteria of your country's courts, your first defence against a defamation charge is usually:

## ✓ Justification: that the story was true and in the public interest

This can be a powerful defence and also a deterrent to individuals who might sue you. If they sue you, you will present in open court evidence that they really did commit the alleged wrongdoing. More people than read the original story may read the reports of the court case. That is why many private individuals threaten to sue – but often do not do so in the end. They hope the threat will deter publication – but they actually don't want their conduct discussed in a court case. In dictatorial states that can manipulate the court process, however, powerful people are more likely to carry through their threats.

### Other possible defences are:

## ✓ That the defamation was unintentional

('An honest error' – such as a proofreader leaving the word 'not' out of the sentence "He was not a thief.") If the person really was defamed by your or your paper's carelessness, saying "It was a mistake" will probably not do you much good in court. Your paper needs to correct such errors with a full, apologetic 'matter of fact' paragraph, displayed prominently, **as soon as you notice the mistake.** If you wait until you are sued, you are suggesting a lack of good faith on your part.

## ✓ That the statement was 'privileged'

(Protected by law). Most countries protect certain types of statements from prosecution, though this may be limited to statements uttered in court or parliament.

## ✓ That the statement was 'fair comment'

(A statement of analysis or opinion reasonably based on verifiable facts and in the public interest). The bigger the amount of 'spin' you have put on the facts you have, the more risky this defence becomes. If you accurately report what some public figure has done, and then comment "Such behaviour is disgraceful" this is merely an expression of your opinion. However, if you describe the person as "guilty of disgraceful conduct," but do not describe the conduct, you do not have the same defence. Your defence has to be: the facts are true and the comment upon those facts is fair. It also has to be a consistent, sincere, honestly-held opinion, not merely

rhetoric made up for the occasion. Take care if your paper regularly attacks the opposition for corruption, but defends the right of the ruling party to brush off such charges; a lawyer could argue in court that your attacks did not, therefore, represent an 'honest opinion'.



#### **That the statement was not defamatory**

This is usually limited to something no-one could possibly believe was true, such as a ridiculous cartoon image; something most people would not consider damaging; or statements about someone with no reputation left to destroy, such as an already-convicted mass-murderer. But you can see that all these may be very subjective judgements, based on interpretations of what was published and how the audience was likely to receive it; it's quite a risky defence. It's risky even if you can prove the person named has suffered no actual damage; remember, defamation is about publishing something "likely to damage the reputation," so no damage has to be proved.

## The law and ethics of investigation: **safeguards**

There are some basic safeguards which, while they may not stop anyone from suing you for defamation, will make it easier for you to build a stronger defence in court.

- Be sure of your witnesses. You will need to keep track of where they are, possibly for several years. You should find out what the 'statute of limitations' is in defamation or insult cases in your country: the length of time after publication beyond which a defamation case cannot be brought. You need to keep notebooks, tapes, documents and current witness contact details for this whole period.
- Prepare for a challenge to your story by getting the witness to sign a statement, or at least to sign your notebook or an agreement to record an interview. This indicates their willingness to attend court if the story is challenged. By far the best is an affidavit, made before a lawyer. If the witness then refuses to appear, the court can summon them (sometimes, however, such documents can put your sources at severe risk; guard them carefully).
- There is safety in numbers – the more witnesses the better; the more central they are to the story the better; be sure of their identity and their truthfulness. Don't be afraid to test them – you are protecting the integrity of the story and your own reputation.
- Keep documentary evidence, originals rather than copies, to substantiate your story. Keep all your notebooks or recordings, clearly dated. Keep them in a safe place (which may not always be your office). Back up material on your computer and keep a copy of the disk elsewhere.
- Even without the threat of a lawsuit, you must be a slave to truth and accuracy. Even a slight inaccuracy can distract from a good story and destroy the story's aim. And it will be used to undermine your credibility and that of your news organisation.
- Your facts must be true and the burden of proving that is on you, the journalist. Or you have to prove you believed they were true – and if you didn't check, what grounds did you have for your belief? Courts may want to know what checks and safeguards your reporting process included, how many sources you used, who they were, and whether the defamed person was given the opportunity to respond.
- Don't convict someone of current wrongdoing on the basis of past behaviour. The courts are not supposed to do this and neither are you – because someone was once a bankrupt, or convicted of fraud, doesn't make them always a bankrupt or a fraudster. If you are using reports of past misdeeds in your story, you must show how and why they are still relevant.
- Beware of innuendo (implications or hints). If the target is powerful and has deep pockets, make sure that a colleague, your editor, or the company lawyer has sufficient time to read your piece and make careful suggestions. In some countries, cartoons or gossip columns are protected from defamation suits because the courts have previously ruled that the context of a piece is relevant – and accepted that gossip and cartoons do not claim to portray literal truth. But this is not the case everywhere.
- Beware of rumours. Unless you have proof, repeating the rumour is publishing a defamation. Adding "allegedly" won't necessarily reduce the sting. Nor will refuting the rumour in your story, if you start by telling it in full. You have still published it.
- Let the facts speak for themselves: show, don't tell. Adding a conclusion you can't prove may well make a story defamatory where laying out the facts does not.
- Present the facts without colour or spin: beware especially of adjectives and adverbs. Saying a rich man refused to give to a charity may be a simple description; saying he did so "callously" defames him.
- Present facts in a balanced way; let all sides speak. This is good journalistic practice (and so may help you defend your actions) although not guaranteed protection against being sued.
- Putting the defamation in a direct quote is no protection. The named source may have said it, but your news organisation published it – and defamation, remember, is a crime of publication.

## READ Avoid lawsuits or keep witnesses safe?

### respond

There are contradictions here. We've laid great stress on keeping records, tracking witnesses, and so on – but any records that exist can be accessed by people who might threaten, harm or kill your sources. So, on certain stories, you have to make a choice: is it more important to avoid a lawsuit, or to keep

witnesses safe?

When the *Rand Daily Mail* ran its 'Prisongate' story exposing conditions in apartheid's prisons, one reporter kept his notes (in a safe). The South African Security Branch found them, and on the basis of those notes, charged and jailed the paper's main source, Harold Jack Strachan. Raymond Louw, who was a reporter on the *Rand Daily Mail* at the time, says: "All the stories were published with his [Strachan's] name ... Maybe more care should have been taken with those notes, but remember, at that stage they were the only evidence we had of the accuracy of what we were writing."

#### Investigative journalist Michael Gillard says:

"By and large I put no note of any significance into a computer. I keep loose notes so, if necessary, they can go. If I'm asked ... I don't know what happened to them. If you keep very detailed notes ... you have to be aware that the forces of evil can also find those notes very useful, so you have to have a plan to deal with those. As to sources who are sensitive, you do not write their names down, you do not keep diaries ... [You have a duty to protect] the people you rely on."

Particularly risky is taking such notes and address books across borders, where you and your possessions are very vulnerable to being searched.

**How would you make the choice between protecting yourself and your publication from lawsuits, and protecting sources who might be in danger? We'll come back to this topic in the ethics section of this chapter, but take a few minutes here to think about where your own priorities would lie.**

## The law and ethics of investigation: **privacy**

Where you have used covert techniques, 'door-stepped' a target repeatedly, or revealed details of their personal lives, you may fall foul of your country's privacy laws. Privacy laws usually have two aspects: they protect a person's right to keep personal information (such as medical status, sexual orientation or children's schooling) out of the public domain and they protect the right not to have their home or personal space and passions invaded (intrusion). Sometimes a third aspect is covered: using someone's image or speech without their consent (misappropriation). An example of this last might be taking a photograph of someone reading your newspaper and using it as a promotional picture without getting a release signed for that use.

We often argue that public figures give up their right to privacy; we assume that because they get certain benefits from being powerful or in the limelight, they have – willingly or not – traded these for their privacy. Some people suggest that because "we pay the wages" (through rates and taxes) of public servants, we have a right to know everything about how they live.

But those who write about media ethics advise caution here. Where someone's private life relates to their public life, that trade-off can be argued, particularly if the information revealed is in the public interest. Where, for example, a health minister receives medical treatment that – because of the ministry's policies – is not available to ordinary patients, his or her right to privacy is weak. Where a community leader calls for hard work and discipline, but lives off his elderly mother's earnings, most of which he drinks away, then his hypocrisy has eroded his right to privacy. Where private life is irrelevant to public life (a businessman has a mistress, for example – like countless other people in his community) the same argument does not hold.

We may believe that public figures 'ought' to behave better than everyone else, because of their status as role models. Thus, they should be exposed if they stray. That is our personal belief, and the courts are not necessarily going to back it. Only where the personal and the public coincide and conflict, can exposure be held to be justified.

And we, as employees, would feel our labour rights had been seriously infringed if, merely because she "pays our wages," our boss wanted to pry into every aspect of our and our families' lives!

### A privacy test

Media ethicist Franz Krüger suggests the following 'privacy test' when your story infringes on someone's private life:

- What exactly is the public interest in this story?
- How important is it?
- How will the people involved be affected by the invasion of their privacy?
- How much protection do they deserve?
- Are there alternative approaches that might reduce any risk or harm to them?

## The law and ethics of investigation: **conspiracy**

Many countries have 'conspiracy' laws, which deal with people getting together in a group to plan and commit a crime. The usual force of conspiracy laws is to make the eventual sentence heavier than it would be for one individual acting alone. Since news organisations are by definition groups of people getting together to plan activities, they are very vulnerable to conspiracy charges, particularly in states with harsh media climates.

Protecting a news organisation from such charges – as well as keeping investigative projects confidential – often informs the decision to create an 'investigative unit'. This unit involves only essential role players, and its activities are 'off-diary'. The story is developed in direct consultation with an editor and not shared with the rest of the organisation until it is ready to be published. This does not offer complete protection, but it does limit the number of 'conspirators' and protects the organisation as a whole.

## The law and ethics of investigation: **official secrets and access to information**

All countries have some necessary 'official secrets' and national security laws to protect them. Few people would want an aggressive rival state to know exactly where or how borders could be breached, or violent criminals to have access to the plans of the prison security system.

In many countries, not only military but also industrial, economic and political information is limited on the basis of this reasoning, on grounds of 'national security'. Civil servants, from army generals to postal delivery workers, must sign an official secrets act forbidding them from talking about any aspect of their work – including their section head's drinking habits – to outsiders. Where official secrets laws are so comprehensive, journalists are often obliged to prove the impossible: that their investigative stories are not a threat to national security.

All-encompassing secrecy laws are justified by arguments that blur together many complex ideas.

The 'national interest' and the 'public interest' do not always mean the same thing. Some patriots might say: "My country, right or wrong". Others – equally patriotic – might say "I support my country when it does right, and work to improve it by criticising when it does wrong."

### Freedom of information

Mathata Tsedu, editor of *City Press*, a South African newspaper that has published stories critical of government ministers and policies, says:

*"[The South African Constitution] encapsulates the collective agreement we've reached as a nation about how our interests are defined ... as long as I'm not doing anything that is contrary to what the Constitution says, then I'm acting in the national interest."*

The SA Constitution currently contains guarantees for freedom of information and expression in its Bill of Rights. An editor in a country where the Constitution did not contain these guarantees might take a different position.

The term 'national interest' is often used to mean "the interest of the state" and then further distorted into "the interest of the ruling party" or "the interest of this current president". But supposing the president of a particular country was siphoning off donor money meant to help the poor? Revealing this would certainly be in the public interest. But it could be argued that because it attacked the president and might lead to political instability, or to donors losing faith in giving aid, publishing it was not in the national interest. Authorities often glide invisibly from arguing that harm might ensue if hostile forces found out certain information (which is valid) to arguing that the public might not fully understand the information and react in damaging ways (which is arguable).

So, 'official secrets' need to be considered in the light of all these debates. There are often clear and valid reasons for not revealing certain official information. When police ask the media not to reveal details of a murderer's methods, in order to trap the real killer and avoid time-wasting false confessions, very few journalists would argue. But there are other times when the reasons are more suspect. Radiation leaks at a nuclear power plant vitally concern people living in the area. A government deal to grow genetically-modified crops may impact on the crops of other farmers nearby. In such cases, appeals to the secrets laws or the national interest are merely a way of stopping reporters from discovering important information of public interest.

**READ** What would you do?**respond**

Your country is at war. A soldier comes to you with information that his commanding officer is submitting false figures for losses of equipment, selling the extra weapons and ammunition he receives to anyone who can pay, and pocketing the proceeds. You investigate, and discover that the information is correct, and that there is in fact a flourishing illegal arms trade in the North-East where three or four regiments seem to be involved in the same kind of arms dealing. Your editor is worried "Civilian morale is important in wartime," she says. "I'm not sure we should publish this ..."

**How would you respond? Take five minutes to think about this.**

The other side of the coin of 'official secrets' is the existence of 'freedom of information' or 'access to information' laws. If you read reports of American investigative reporting projects, you will discover that the US Freedom of Information (FOI) laws are key tools for journalists there.

South Africa was the first country in Southern Africa to introduce these types of laws in 2000 (Promotion of Access to Information Act) and 2001 (Protected Disclosures Act). These put the obligation on public institutions to make certain information available and provided (fairly weak) protection for 'whistle-blowers': insiders who tell the press about wrongdoing in their organisations.

However, the laws had certain features that made them quite difficult to use:

- They excluded certain types of information ('official secrets', private or 'commercially confidential' information)
- The process was complex, and government departments could delay their response to requests for information by up to 30 days, and in some circumstances by much more
- Bodies were allowed to charge for information.

A 2003 survey by the Open Society Institute of five developing countries worldwide that had FOI laws put South Africa's performance bottom. As well as the problems with the legislation listed above, the Open Society Institute found a major obstacle was the attitude of civil servants, who lacked the training to handle requests, and who also said they resisted requests because they felt that people had "ulterior motives" for seeking information that would be "used against the government."

This shows that statutes on the books are not enough. Genuine freedom of information emerges from a changed mindset and a deeper understanding of democracy. In addition, as we have noted before, much vital information is already in the public record; it simply needs longer, more skilful work by the journalist to put the various components together better.

**Access to information**

In 2004 military equipment contractor Richard Young won a long drawn-out legal challenge to gain access to all drafts of the South African Auditor-General's report into the country's multi-million rand arms deal. Young had been one of the tenderers not awarded a contract. Sifting through all the many complex drafts revealed inconsistencies and omissions in the final report which the media then began investigating as stories. But the case took Young more than a year to pursue: far more time than most working journalists usually have for a single story.

**The law and ethics of investigation: false news**

US jurist Oliver Wendell Holmes declared that no-one should have the right "to cry 'Fire!' in a crowded theatre". In other words, publishing certain kinds of false alarmist statements can cause damage through people's reaction to them: people get killed if there is a stampede in a crowded theatre. That is why many countries have on their statute books laws against publishing 'false reports'. The reasoning is valid. But unfortunately many regimes use these often broad and vague laws to punish journalists whose stories are in fact true, but simply inconvenient to the party in power.

We make it easier for dictatorial regimes to do this every time we fail to check a fact before publishing. Sloppy reporting makes it more likely that the public will believe allegations that the press tells lies. Cross-check everything before you go to press; keep evidence and keep it safe, and where you have made mistakes, be the first to admit and correct them.

## Justifying 'false news' is difficult

Despite the fact that it goes against all the tenets of professionalism to issue false news, international jurists still argue that specific laws targeting journalists for the offence are very hard to justify. In arguments submitted to the Zimbabwe courts in 1999 in defence of journalists Mark Chavunduka and Ray Choto, Article 19, the international centre against censorship, concluded:

*"The continued use of false news provisions as we approach the turn of the millennium is an anachronism and an unjustifiable restraint on freedom of expression and free political debate. A close analysis shows that false news provisions breach almost every element of the test for restrictions on freedom of expression. At least in the form found in Section 50 of the Zimbabwean Law and Order (Maintenance) Act, they are unacceptably vague, they serve no legitimate aim, they bear no rational connection to any aim one might posit for them, they are massively over-broad and they disproportionately limit the right to freedom of expression."*

## The law and ethics of investigation:

## sedition and anti-terror laws

Many African countries have sedition or incitement laws – ironically, often dating from the colonial era – that ban speech or acts encouraging rebellion against the authorities. In addition, since 9/11, and the extremist bombings in Tanzania and Kenya, many countries have adopted additional anti-terrorism legislation, some of it very similar to the American Homeland Security Act.

These laws can have a number of different impacts on the media climate.

- They provide for the re-definition of certain offences as much more severe if they can be proved to be 'terrorism-related'.
- They can be used to further restrict media coverage of security and defence, and to increase police powers to obstruct the media in their work and conduct raids and searches.
- They can be used to increase surveillance such as phone-tapping and tracking of internet use, and censorship of web content.
- They can be used to compel journalists to turn over any information or names of sources defined as 'terrorism-related'.
- They can be used to move 'terrorism-related' proceedings from open courts and publicly-monitored processes to secret tribunals and investigating bodies.

Civil and media rights bodies point out that – since terrorist acts are certainly criminal – countries have the option of using existing criminal law to deal with it, merely strengthening or adjusting this where needed. Where a choice is made to create special laws and processes outside the constitutional framework, it opens the door to other types of secret, extra-constitutional actions and the weakening of the rule of law in future. Journalists, and particularly those engaged in investigation, need to keep a watchful eye on these developments.

# Ethics

Ethics and law are not completely separate, but they are different. A country's laws come partly out of an ethical perspective: what law-makers believed to be right and wrong at the time the various laws were passed. Ethics are about a contemporary sense of right and wrong behaviour.

Circumstances change, and so rights and wrongs may not be everlasting or universal. Law and ethics can come into conflict. The law may say that children should be flogged for stealing bread; your personal ethics may say that it is barbaric to whip starving children, and you might help such children to escape punishment, and use them as sources in investigative stories on the need for law reform.

Ethics come into play in many of the decisions you make in the newsroom:

- How you collect information
- How you relate to your community while you do your work
- The words you choose when you write or script your stories
- How you relate to newsroom colleagues
- What news values your media organisation embraces and therefore the stories it runs and how it presents them.

The most basic ethical principle for journalists is non-negotiable, and it is very simple: accuracy. If your stories are not founded on truths, you are not a journalist. (You may be great as some other kind of writer, such as a novelist – but you are not a journalist.)

And truth-telling is not about any great spiritual or theological vision. It is simply based on collecting and verifying information as broadly, deeply and meticulously as you can, and presenting it in a way that preserves those truths.

### Are there 'African ethics'?

What about when truths are unpalatable, disturbing or disrespectful? Some African commentators have suggested that the pursuit of truth no matter who is hurt, is 'un-African'.

African traditional ethics, they suggest, would change the way certain stories and topics are covered. In South Africa, these arguments were raised when a newspaper ran a story on a cabinet minister revealing that she had convictions for theft, and a drinking problem. "We do not talk about our mothers like this", one politician said.

- Do you agree?
- Are there 'African ethics' and if so, what are they?
- Would the adoption of an 'African ethical code' change the practices of the press?
- Would this be a good thing? Who might benefit? Who might suffer?

The law and ethics  
of investigation:

## relationships with sources

### READ Threats of imprisonment

#### respond

You do an interview with the military commander of a big, popular regional separatist movement banned by your government. It's supported by huge numbers of peasants, many of whom are not fighters, but who do want independence for their region. You promise both the rebel general, and the community leader who set the interview up that you'll protect the circumstances of the interview and their names. The man says that his army will kill if necessary to achieve his aims. You personally find his views objectionable, but you feel that the public needs to hear them, and others, to understand the civil war.

Then you are called in by the security police. They don't care about the rebel commander; they know who he is. But they demand that you name the people who helped arrange the interview, the village where it took place, and many other details. "You know it's against the law to conceal these facts about a terrorist," they say. "And anyway, the man is a killer. We know you do not approve of his views. So come on, talk to us before we have to send you to jail..."

#### What should you do?

The normal principle here is well understood. If you promise sources confidentiality, you should be prepared to go to prison rather than break that promise. If you can't make the promise because you believe the person is dangerous or evil – don't make it in the first place, even if it means you lose the story. If you have made it – don't break it.

However, civil war is not a 'normal' situation, so you do need to weigh up the public interest – which may lie in ending the war – against the rights of your sources. There is no simple 'right' answer.

The best tool for resolving this dilemma is to think about **consequences**. What will happen next? Who will be hurt? Who will benefit? Will the war be ended by violent state retaliation? Which action of yours will produce **the least possible harm**? Your interrogation was not about the rebel leader. It was about those around his cause (not all of whom may support all of his methods; not all of whom may even be combatants), and your common sense must tell you that those people could be imprisoned, tortured or killed if you expose them. Are they more, less or equally important with other people, including soldiers, involved in the war?

There are some other principles too:

#### 1 Deal honestly with sources

Hopefully, you told the rebel leader: "I don't approve of your methods and I am not going to sugar-coat them when I write the story. But I will write accurately what you tell me."

Would you have told him you were writing a praise-song if that was the only way to get the interview? Only when there is overriding public interest is deception permissible – and you might feel that was the case in this situation.

#### 2 Undercover techniques

We have discussed covert interviewing before, in Chapters 5 and 6. Most ethical codes for journalists say that reporters should make their identities and intentions clear in interactions with sources. Why do they put such a heavy emphasis on this? Partly

because 'truth-telling' is what journalism is about, and truthfulness is a standard we apply to those we write about. We open our profession to the charge of double standards whenever we deceive, and it may work against us in terms of public reaction, trust from potential sources, or court decisions. We are also not dealing fairly with our sources, using the power of our access to covert technology gives us, to trick them out of information.

Deception takes many forms, from simply keeping quiet and not revealing you are a journalist, through pretending to be someone else in order to get answers or experience what an ordinary citizen would – for example, stowing away on a boat to Europe with trafficked immigrant workers – to using hidden microphones and cameras or actually entrapping someone, such as filming while you give a police officer a bribe. This last, entrapment, is illegal in most circumstances. Courts usually reject evidence obtained in this way. Judges argue that even if the person took the bribe on this occasion, it was a set-up situation and the person might not normally behave like that. Audiences likewise could accuse journalists of making, rather than reporting, the news.

Most books on journalism ethics say that the 'public interest' standard has to be even higher than usual to justify deception. Bob Steele of the US Poynter Institute says it must be "exceptionally important information ... of vital public interest."

### Using covert techniques

Steele suggests some other tests to apply before covert methods are used:

- Have all other methods been exhausted?
- Are you willing to disclose the methods you used and your motives?
- Does your news organisation set the highest standards in all aspects of its work?
- Will the reporting prevent a harm greater than that caused by the deception?
- Has there been careful, wide-ranging decision-making about the deception?

And he says these are NOT adequate justifications:

- "Winning a prize; beating the competition; getting the story more easily and cheaply; because everybody's doing it; because the sources themselves are unethical!"

There are dangers of misrepresentation with covert techniques. Your secretly-taken film may show someone looking nervous, and you may interpret this in your commentary as because he is guilty of something. But his nervousness may be because he has a dentist's appointment later that day.

And it is much easier to film people secretly on the 'front line' of an abuse than the decision-makers who created the faulty system: the medicines warehouse employee doing petty stealing rather than the employer who pays him starvation wages. This can cause your story to focus on small individual wrongdoers rather than seriously flawed processes.

DRC journalist Sage-Fidèle Gayala poses another question related to using your position and privileged access. Supposing you had been admitted to someone's office for an interview and, while waiting, saw a document you needed for your investigation lying on a desk. Would it be ethically acceptable to read the document, photograph or copy it, or take it away with you?

### 3 Deal considerately with sources

Theirs are not the only rights in any situation, but they often take risks to help the press, and deserve consideration for this. The community leader in our first example may have risked her life to bring you and the rebel general together, so that the public could be better informed about the war. Will any journalist be trusted to keep the information flowing in future if you betray her?

Being considerate also involves not naming as criminals in your stories people who have not yet been fairly tried and convicted. These people are only 'alleged' to have committed the crime, even after they have been charged, right up to the point where they are found guilty. And if someone has not been charged, but is merely the subject of rumours, it is very unfair to report those rumours without investigation. All these considerations also apply to the way you use photographs.

### 4 Keep a professional distance from sources

You do not have to approve of them, their views or their methods. You do not have to make them friends, and you certainly should not let your relationship with them affect what you write. If you have good relationships with police informants who bring you hot crime stories, this cannot stop you writing a story about police brutality, even if it puts that relationship at risk.

The law and ethics  
of investigation:**patronage, gifts and bribes****READ** Accepting favours?**respond**

You are reporting on a long-running investigation about corruption in the ruling party. One of your main sources is a wealthy businessman who supports the opposition party. You know this, but the facts and documents he brings you are good. He owns a restaurant, and as your investigation progresses, you find yourself eating there more and more often. Once or twice, he has said: "The meal's on me", and you have accepted. You don't want to offend him. But you have also occasionally bought him drinks or snacks when meeting at other places. One day, he says: "I know you're our good friend. From now on, you always eat at my place free. Bring your family too..."

**Should you accept?**

There is a difference between the occasional free meal and a meal-ticket. You already know this source is serving a political agenda by bringing you information, you are taking this into account, and you've tried to balance the favours he does you with small courtesies on your part. Now he's proposing a relationship of patronage with you – and for most commentators on media ethics that goes over the edge.

There are three problems with accepting favours from news sources.

- 1 The first is the **power-balance**. Once you are in any way in someone's debt, they are in a position to pressure you and weaken your independence.
- 2 The second is **conflict of interest**. If you are beholden to someone, you have something to lose (even if it's only friendship or good gossip) if you ever exercise your journalistic skills against them.
- 3 The third is **reputation**. Even if you think you would never bow to pressure or be swayed by gifts, once it is known you took the gifts, the public might believe you were influenced. And your source will undoubtedly develop all kinds of expectations about what his 'friend' the journalist will do for him – and may talk about these.

But it is not only news sources who may put us in this position. The owners or financiers of media organisations can put tremendous pressure on journalists to write or ignore certain stories. So can advertisers. So can donors who finance reporting projects. For example, Aids reporting projects funded under the US government's PEPFAR provisions were at one point obliged to emphasise abstinence in their stories. If the audience did not know this, they might believe that the predominance of abstinence reporting was because this was the only effective aspect of Aids campaigns – which it was not.

Before you enter into any professional relationships around reporting projects, find out where the money is coming from, and if possible get the rights and obligations of each party spelled out in a contract.

There are some situations where the patronage is far less subtle than the offer of a meal ticket. 'Brown envelope journalism' (accepting money from someone with an interest in a story to write it a certain way or drop it) is simply wrong.

**READ** Things are never that simple...**respond**

Right and wrong may appear straightforward on paper, but they are always more complex in real life. South-East Asian journalist Putsata Reang (who studied overseas and works with the international news and training body Internews) reports the following discussion with fellow journalists in her home country of Cambodia:

*"...In America, I never felt truly American. Now, in Cambodia, I was told I wasn't truly Cambodian.*

*I soon started to appreciate the distinction ... The assistant journalism adviser and I habitually urged good ethics. Cambodian journalists routinely practice 'reporting by envelope.' Where getting paid to attend press conferences by the people who hold them was not the exception but the rule. One afternoon, a few reporters from our group strolled into our office and joked loudly about a press conference they covered that morning where journalists jostled afterwards as government officials distributed envelopes stuffed with R10 000 (roughly \$5).*

*'Did you take one?' I asked [one journalist].*

## READ Things are never that simple...

### respond

*He paused, then said: 'Of course I did. What can I do? My children are hungry.'*

*'How can we write about corruption if we are corrupt?' I asked the other reporters during one training session on objectivity, balance and fairness.*

*Averted eyes. Silence. Then one weighed in. 'How much do you make on your NGO salary?' [one] asked.*

*My answer mimicked theirs. Averted eyes. Silence. We shared shame, but for different reasons.*

*That night, I cried. In a country where some journalists make in one month what I might spend on a good Cabernet, and where my international job paid international wages and extras like housing and health insurance, my condemnation of their bribe-taking felt disingenuous. In Cambodia, depending on who you were, professional ethics was either a sacrifice or a luxury.*

*... The journalists were operating in a country with no freedom of information law; a place where telling the truth meant risking their lives. The end result: stories populated by anonymous sources and rumours that reporters tried to pass off as fact. [One reporter] investigated generous tax breaks on farmland for wealthy and politically-connected businessmen. He refused to name names.*

*'It kills credibility,' I said.*

*"I don't want to get killed," he replied.*

*I dropped the matter.*

- Do you agree with Reang's reasoning in dropping these discussions?
- If you had been in her position, how would you have taken the debate further?
- Do poverty and danger justify accepting payments and concealing hard information?
- Is it better to get part of a story out than no story at all?
- How far is a story compromised by 'the envelope'?

## The law and ethics of investigation:

## loyalties, commitment and bias

## READ Dealing with bias

### respond

You work for a newspaper that supports and is funded by the Red party in your country. In the run-up to elections, there has been significant violence between supporters of Red and Green parties. You're sent to cover one such incident, where an important Red party activist and his family died in an arson attack in an informal settlement. "This is those Green so-and-sos," says your Editor. "We need a story that shows how violent and anti-democratic they are."

But when you get to the scene and begin talking to people, a different story emerges. The dead man, the local Red party organiser, seems to have been no better than a thug. He was demanding money from his neighbours for 'protection'; abused young girls and ran a drinking spot where gangsters gathered. People in the area say the attack on his home could have come from anywhere – but most likely from people he'd bullied and beaten, many of whom are actually Red party voters. You know this isn't the story your paper wants.

### What should you do?

There is nothing wrong with having views, and all journalists and news organisations have them. It would be hard, for example, to find a newspaper that was "pro-crime" or "anti-peace" in its mission statement. Many newspapers quite explicitly express support for a particular political party.

In addition, there are problems with the concept of complete 'objectivity'. Reporting is at every stage a human process. People with views, life experiences and outlooks define a story, decide what questions to ask and of whom, select material and string it together in a particular way using particular words. 'Objectivity' implies the sterile context of a laboratory process where exactly what happened is transferred to the screen or page without any human contamination. In fact, reporters' insights and judgments can actually help illuminate a story, where flat, purely factual reporting leaves it puzzling.

But this does create problems. The first is a problem of perception. Audiences may mistrust everything that appears in paper X, because they believe it takes its orders from the ruling party – even if paper X is a conscientious and largely honest periodical with good reporters.

The second, more serious problem, is that such loyalties can lead media houses or reporters to alter the truth, leaving out important aspects or even making up material to fit in with their views. Such papers may deal in stereotypes, spread stigma, and represent issues of gender, race or ethnicity in dishonest ways that serve a political agenda.

So, even if we have problems with the big, clumsy concept of objectivity, we still need some principles to help us report truthfully, even while we acknowledge that our stories will always carry some flavour of our lives, ideas and personalities. These principles are:

- Accuracy (which we've already discussed)
- Fairness (in the way we deal with people, quotes and ideas)
- Balance (in the range of people and ideas your coverage includes).

**Fairness** often involves eliminating stereotypes (where a person is reduced to an 'instance of a characteristic': the mercenary; miniskirted bar-girl; the backward rural grandfather; the money-grubbing businessman of a particular ethnicity). As well as leading to bad, dull writing, stereotypes build prejudice and stoke conflict. And they are never true. Talk to people for even five minutes and you'll realise that every individual has something that makes them unique: a person, not an instance.

**Balance** is not merely a crude representation of the 'two sides' of a story. Most stories have far more than two sides, and not all those involved represent a 'side' even though their input is relevant. Brainstorming a list of all the stakeholders and role players will give you some idea of all the facets the final story must reflect. In addition, think about those 'sides' that are rarely heard, because the consensus is that they are not important or worthy. Crime reporting rarely quotes criminals – yet any story seeking to investigate the causes of crime should be talking to them.

But balance also requires that you give appropriate weight to the different views you quote. Aids dissidents (those who do not believe that the HI virus leads to Aids, or that antiretroviral treatment works) complain that despite the demands of media balance, newspapers rarely quote them. But balance also demands that if you do quote them, you also have to quote the overwhelming weight of hard, peer-reviewed, scientific evidence against their views: we have pictures of the HI virus, we have evidence of how the virus and the drugs work, and we have millions of people worldwide able to live normal healthy lives while they continue the ARV treatment.

So, how could you apply accuracy, fairness and balance to writing your story of the killing of the Red party organiser? You'd need to quote what everybody was saying. You'd need to clarify what was known, and what was simply rumour or gossip. And you'd need to put your reporting in the context of bigger questions about the responsibilities of leaders to behave in accordance with party principles. That larger context might help you persuade your paper to carry a more truthful version. Ethically, you'd also have to argue the possible consequences of your story: reporting it falsely as a Green party killing could set off a spiral of revenge killings. Whether you'd succeed in getting your more balanced story printed, however, depends not on ethics but on office politics.

These problems of loyalty to an employer (or simple need to keep a job) are toughest for the employees of state media. They face the public assumption that they must be lapdogs of the ruling party, even when they are actually trying to do a conscientious job. Yet at the same time they do risk losing their jobs if government does not like the news they report or the way they report it. And politicians are often very unsophisticated in their grasp of how the media operates. They believe that if a state newspaper tells readers that prosperity is booming, people will ignore their own empty bellies and believe it. In fact, telling such lies destroys the credibility of both newspaper and government; readers are not stupid.

## **READ** Helping the police?

### **respond**

You are investigating a series of kidnappings of women in your capital, believed to be linked to the sex trade. You know that your investigation is ahead of the police work: you have better sources and are building what looks like a dramatic exclusive story for your paper. But, just as you're about to break the story, the State Prosecutor rings you and says: "Please do not publish what you have. It will alert the criminals and stop us making arrests."

**What should you do? Is this a simple issue of press freedom versus obedience to government – or is it more complicated than that?**

Obviously as a citizen as well as a journalist, you want to do your part to fight crime. This is not a simple issue of being given a restrictive order by government – the consequences of publishing might be to allow the criminals to escape. Again, thinking about consequences can help with decision-making – so long as you are sure the State Prosecutor is telling the truth, rather than simply trying to cover up police incompetence. And what about the opposite situation, where following a story might involve you in **committing** a crime? If you are investigating drug trafficking undercover, and need to sell drugs in order to convince your informants you are 'one of them', is that acceptable – even if the exposure story that results will be for the greater good?

The key to resolving many of these dilemmas might lie in national media workers' organisations where all journalists in a country could be united by a shared code of ethics, irrespective of who they are employed by. It is quite reasonable for journalists with a

particular paymaster to concentrate on certain types of stories (to go out and look, for example, for government development success stories) in accordance with the policies of their employer. But the way in which those stories are reported must remain accurate, fair and balanced. And, in an ideal ethical climate – which we do not yet have – their editorial independence to report all sides of those stories would be protected. Where national journalists' organisations do not exist, transnational organisations such as FAIR can provide networking and ethical advice.

## The law and ethics of investigation: **general ethical principles**

Ethics is a personal and professional responsibility for all journalists, not simply a theoretical debate. And from these short discussions, we can see that ethical decision-making is undepinned by four broad principles:



### **Tell the truth**

Or, more accurately, truths, since situations are often complex and many-sided. This is our mission as journalists; when we stop doing it, we cease to deserve the name.



### **Minimise harm**

If we said "Do no harm" we might be advocating writing no stories, since all actions have consequences. But by balancing truth-telling and doing the least possible harm, we have constructed a framework that allows us to do our job while always being mindful of consequences.



### **Stay independent**

Don't be bullied, bought, or even muted by the weight of conventional opinion. It's legitimate to have views, and to write stories motivated by your convictions, but your views should never lead to your changing the truths you discover.



### **Stay accountable**

This means always thinking about how you would justify a story, or aspect of a story, if challenged. In many newsrooms, it means setting up a formal or informal process for ethical decision-making: having an ethics committee to debate tricky stories, or a 'press ombudsman' to arbitrate on complaints about stories.

## An 'Ethics roadmap'

Franz Krüger suggests the following 'Ethics roadmap' as a way of arriving at decisions on ethically challenging stories:

### **Define the issue**

- What are the facts of the case?
- What is the question?

### **Think through the issue**

- Why am I doing this story? What is the public interest?
- Who is affected and how? (sources, the subject of the story, people around them, the news organisation) What would they want? Are their wants legitimate?
- Which principles are involved?
  - Accuracy
  - Fairness
  - Independence
  - Duty to inform the public
  - Minimising harm
  - Avoiding unnecessary offence
  - Respecting privacy
  - Honesty in relations with the source
  - Honouring a promise
  - Avoiding deception
- Are race or gender factors? How?
- Do we have relevant guidelines or precedents? What are they?

## An 'Ethics roadmap' (cont.)

### Map out the options

- What are our alternative courses of action? What are the advantages or disadvantages of each?
- Are there ways of satisfying the various conflicting interests or principles?

### Decide

- The best option is... because...
- How will I defend my decision to colleagues, role players, stakeholders and to the audience?

# Case studies

## Case study #1

## Failed SRC top brass 'passed': Privacy vs public interest by Sello Selebi and Phakamisa Ndzamela

Sello Selebi's and Phakamisa Ndzamela's investigative story exposed two Wits SRC (Student Representative Council) members as academic failures. The story, which revealed that Mbali Hlophe and Selaelo Modiba had been excluded from the 2007 academic year due to their poor academic record, was published in the Wits student newspaper *Vuvuzela* and caused a storm. The article, entitled "Failed SRC top brass 'passed'", uncovered that SRC president Mbali Hlophe, currently in her third year of study (architecture), failed all her courses for 2006 while SRC member Selaelo Modiba passed only one course. Dr. Faroon Goolam, the Deputy Registrar, was quoted as having confirmed that Hlophe had been excluded and then re-admitted. This resulted in the student body, The Progressive Youth Alliance (PYA), calling for Goolam's immediate resignation and proclaiming that he had violated the particular student's privacy. After the story was published, the SRC threatened to seek a legal interdict to stop the newspaper from going to print. The SRC complained that the story was a vicious violation of the named students' right. Professor Anton Harber, head of the Journalism School, consulted legal advisors and established that there was no appropriate reason for the department to stop the distribution of the newspaper. The two journalists, both Wits Journalism grad students, discovered that:

- the SRC member Mbali Hlophe had been academically excluded and then re-admitted on a conditional basis;
- a member of the SRC allegedly approached the Dean of Students, Prem Coopoo, to seek the student's re-admission, however she denies having done so;
- the university will not exclude people from standing for SRC based on their academic performance;
- Hlophe was re-admitted at the discretion of the Engineering Dean.



### What led to this story?

A source leaked the story to Phakamisa about four SRC members who had been academically excluded.



### Why did you think this story was of importance to your readers?

We felt the story was important to Wits readers because the issue of academic performance is often taken for granted when it comes to student leadership. We felt it was ironic that Wits is an academic institution yet this is overlooked when it comes to issues of student leadership. We also felt compelled to report on it because SRC leaders are elected representatives who are accountable to the rest of the student body and had to set a good example, especially academically.



### How did you go about gathering the necessary information? Please explain the methods you used in your research and process of investigation.

Once the story was leaked to us we felt it was important to verify this so we used the information provided by our source to get verification from the university management. When we got to management we asked some pretty tough questions, most of which we already had answers to. Once we got confirmation we confronted the parties concerned and gave them an opportunity to respond.



### What were the challenges and obstacles you faced and how did you work around those?

The biggest challenge we faced was about ensuring that we covered the story in a responsible manner so that we do not necessarily infringe on anyone's rights. We had to make a calculated decision on whether there indeed was an overwhelming public

interest in the story that far outweighed the right to the privacy of the two student leaders concerned. In the end we debated the issue and looked carefully at legal issues around the story.

**? The story triggered a vigorous debate at Wits. You have been accused of invading the named and shamed students' privacy and of having ruined their lives. How do you respond to these accusations?**

We are glad that these issues are now debated and hope that the debate leads to positive change at Wits. Our position is that a person who assumes public office gives away a portion of their privacy rights and we feel that since Wits is an academic institution, student leaders have to demonstrate some level of academic competence. We think that if the minimum level of competence was not achieved by student leaders then we might as well change Wits into a leadership training academy. Great leaders should be able to juggle many balls and we feel that this is the very essence of a truly great leader. Great leaders lead by example. And no, we have not ruined the two (eventually three) student leaders' lives, but have made them stronger and prepared them for leadership positions externally. We have also made the next generation of Wits leaders think hard because leaders have to be accountable.

**? As a result you have been denounced as a "vehicle of management" out to discredit the SRC. What do you say to this?**

We think that is absolute hogwash. *Vuvuzela* is probably one of the few independent publications on any campus. It is put together by professional future journalists who come from diverse backgrounds and follow a professional ethic. It is not as if we will turn a blind eye. If, for example, a member of management was corrupt, we would gladly expose a story like that because we are a watchdog that serves the Wits public.

**? Has your campus life changed after the publication of the story?**

Not really for me (Sello) as I am new on campus but Phakamisa was freaking out a bit as prior to joining *Vuvuzela* he was heavily involved in student leadership and the article did not sit well with his former 'comrades'.

**? Did the story have any impact and if so what was the impact?**

It did. The story probably generated the biggest debate at Wits in a while and debate is good, because change is always a by-product of a relevant, albeit often heated, debate.

**? What advice would you give to journalists who wish to pursue a similar story?**

Winston Churchill once remarked: "Never, never, in nothing great or small, large or petty, never give in except to convictions of honour and good sense". Journalism is not a beauty contest: you have a transformational job to do, so just go ahead and do it!

**Do you agree with the way the two student journalists weighed up public interest against the student leaders' right to privacy and the decision they reached?**

**Case study #2**

**"Housing scam hits Bulawayo" by Charles Rukuni  
(A story where the main subject never speaks)**

The first story in this series of investigations was published in Zimbabwe's *Financial Gazette* on 14 October 2004

**Brief outline**

This is a story about Bulawayo businessman, Jonathan Gapare. His company Alpha Construction signed an agreement with the Bulawayo City Council in 1996 to develop virgin land and build about 530 houses for low-paid people in Bulawayo. This was a way of trying to speed up housing delivery to the poor since local government could not cope with demand. Under the agreement, private developers were supposed to construct roads and provide water and sewer systems, and then build basic houses which they could then sell to people on the council's housing waiting list.

Gapare, however, started selling undeveloped stands to people and asked them to pay for the construction of their houses. But he did not build some of the houses. In some cases he sold stands or houses to more than one person. He did not complete the infrastructure required and built shoddy houses which were condemned by the council.

A number of people ended up having title to stands that were already owned by someone else. Alpha was supposed to complete the project in two years but had not done so by 2004 when I broke my story. It has not completed the project up to now.

**? What questions was your story trying to answer?**

The questions that I sought to answer, but still haven't answered up to now because the story is still running, were how Gapare had been able to dupe so many people over so many years. Was he working with council officials, building society workers, officers of the revenue authority and those from the Deeds Office? He could not have done all that he did without the collaboration of officials from one or more of these departments. Council building inspectors should have stopped him from building houses that were

later condemned if they had been doing their job. Police should have arrested him for conning people out of their money. Building societies should not have allowed titles to be issued when they had sold the house or stand to someone else. The revenue authority should not have cleared the transfer of properties if they kept proper records. The same applied to the Deeds Office, it should have realised that it had issued title to two people for the same property.

### **How did the story get started?**

I had always been sceptical about the success story of Gapare and his Alpha Construction, but for 12 years I had not been working for any mainline media. I was involved in training. When I joined the *Financial Gazette* in May 2004, a friend who had been sub-contracted by Gapare to do some jobs in Lupane about 170 km north of Bulawayo and in Bulawayo itself started telling me how corrupt Gapare was and how easily he was getting away with his scam. I told him I could only do a story if there was concrete proof.

### **What research did you do and what sources did you consult?**

He told me, and showed me proof, that he had to resort to legal action to get paid, yet Gapare was claiming in the media to be doing very well. For example he claimed to have built 70 000 houses in Bulawayo which would make up seven to 10 townships. But the media had swallowed that. He claimed to have won a contract to build 10 000 houses in Angola and the media published that without questioning the details about how this could be possible.

In September, the sub-contractor tipped me that Gapare could be in trouble because he had ripped off scores of people in Cowdray Park, including *Injiva* (Zimbabweans who work in South Africa). That got my interest but I demanded proof. He introduced me to one of Gapare's employees who in turn introduced me to leaders of the Cowdray Park Residents Association who were now spearheading the fight against Gapare.

Association chairman Abednico Ncube and the secretary Fidelis Ndebele were more than willing to talk because their story had been ignored by most of the media houses. They claimed that they had failed to get their story in the local papers because Gapare had connections everywhere and bribed some of the reporters and editors. They had loads of information. They gave me all the documents I required for the story and also introduced me to some of the people that had been conned. I also relied on council minutes and correspondence between Gapare and the council that I got from his employee.

### **What difficulties did you encounter and how did you deal with them?**

The biggest difficulty was to verify the information. I was facing a dilemma on whether to confront Gapare and get his comment or use third parties to confirm what I had. I was quite certain Gapare would deny the allegations, so I cross checked all the allegations with correspondence from the council or from Gapare's lawyers. With hindsight I feel I should have confronted Gapare all the same and write what he had to say.

### **How long did it take to complete the first story? What were the most time-consuming/expensive aspects of the investigation?**

The story was published on 14 October 2004 after more than three weeks of going to and from the sources to get information. This was very frustrating for the people I was talking to because they thought I was not likely to publish the story.

The initial investigation took about three weeks. The most time-consuming aspect was the research about who Gapare was, what he had been doing, how he got into construction, how many houses he had built and gathering documents that I could use to prove that he had been cheating some of his clients. The leaders of the residents association were well organised and helped me get all the documents I needed to beef up my story.

There were no financial expenses involved at all except copying the documents that I was given but this was not expensive as I was able to use our petty cash without having to request more money from head office. I also have a company car so I did not have to seek money for my travel expenses. There was a lot of going up and down to meet leaders of the association at their workplaces and going to Cowdray Park itself to talk to witnesses and attend residents' meetings, but my fuel allocation was enough.

### **What was the response to the story?**

The response was overwhelming. Gapare phoned and shouted at me and threatened to sue me and the paper but I stood my ground. I was tipped that the matter had been brought before the council and the council had decided to cancel its agreement with Gapare, but this was contained in confidential minutes that were not available to the media. I, however, got the confidential minutes after our company lawyers were slapped with summons by Gapare's lawyers. I used that letter to get the confidential minutes from the council to defend ourselves and to do a follow-up story. My editor, who was very co-operative, said we should continue to publish the story despite the legal threat.

More people began to come forward with documentary evidence of how they had been cheated and agreed to talk on the record.

### **Have there been any follow-up stories?**

I have so far done 12 follow-up stories but the story is still running.

- The first follow-up story was published on 21 October 2004. The council had decided to cancel Alpha Construction's contract and announced that it would be taking corrective measures to ensure that those who had bought stands from the company would not be prejudiced.

- The second follow-up story was published on 11 November 2004. It was about the possibility that financial institutions that had financed Alpha could lose their money because the city council was planning to revoke all title deeds obtained by Alpha leaving the financial institutions without collateral.
- The third follow-up story was published on 2 December 2004. The Bulawayo City Council was demanding Z\$1.1 billion from Alpha Construction to correct the shoddy job the company had done.
- The fourth story was published on 9 December. It was on how police officers had protected Alpha Construction by turning down complaints from house seekers.
- The fifth story was on Beit Bridge Council cancelling part of its contract with Alpha. It was published on 13 January 2005.
- The sixth story was on two other private contractors who had done shoddy jobs in Cowdray Park being given six months to put things right. This story was published on 10 February 2005.
- The seventh story covered all private developers. The council had prepared a report that almost all private developers, not just Alpha, had breached their agreements with the council in one way or the other. This story was published on 22 April 2005.
- The eighth story published on 6 January 2006 was about residents from Cowdray Park complaining that the council was taking too long to get Alpha to finish its job.
- The ninth story was about residents being worried that the houses they had bought might have been sold to others. This story was published on 16 November 2006.
- The tenth story was published on 25 January 2007. The council had now finally decided to cancel its contract with Alpha and was now suing the company for breach of contract.
- The eleventh story was about Alpha tendering for other council jobs but the council ruled it had struck the company off those that could be offered jobs. The story was published on 26 April 2007.
- The twelfth story was on the council issuing summons to Alpha to pay the council \$883 billion with the figure to be adjusted for inflation when the suit is settled. The story was published on 12 July 2007.



#### **What lessons did you learn from this investigation and what advice would you give to other journalists?**

The case is still pending. It has not been brought to court yet. My biggest mistake was not to confront Gapare to give him a say in the story, though I used documents he had written to give his side of the story. All the same I believe I should have talked to him.

I also learnt that the wheels of justice are very slow. Gapare took advantage of this. He appealed against the council's decision to cancel his contract and it took the council more than two years to finally do so. Everything was at a standstill during those two years. Those who were conned had to wait and it might take them years before their cases can come up. They have to wait for the outcome of the council lawsuit against Alpha.

The legal wrangle between the council and Gapare has also restricted further investigations into how corrupt our system has become. I could not investigate how the revenue authority and the Deeds Office cleared people to get title to property. This is a story that can have several spin-offs. I intend to pursue them once the wrangle between the council and Gapare is over.

I believe that anyone involved in a similar investigation must cultivate enough contacts to be able to get documents to back up his story. Unlike me he or she must confront the principal person involved.

The most important thing I learnt from this story is that while investigative reporting is usually expensive and time-consuming, there are some stories one can do without paying a lot. In this case, none of my sources ever demanded payment to give me vital documents. I even used these sources to get more documents which I would not have been able to get as a journalist as this would have raised suspicion.

- **Do you feel that Rukuni's failure to confront Gapare damages the final story?**
- **How effectively does his other research make up for this absence?**

# Key points from this chapter

## So, what were the ethical dimensions of Maria Gonzales's story?

Clearly, if family links are affecting the disposal of large state contracts, the story is of public interest. But as well as the rights of tendering companies disadvantaged by this corruption, there are other rights affected by the story.

The President's new wife has been defamed. Her angry ex-husband is quoted calling her "callous and cruel" – but we don't know what kind of a spouse he was, or what her real motives might have been for the divorce. We are assuming this was a mercenary alliance, but it might have been real love for the President. We have not heard her side.

And, of course, Maria and her publication have rights that are being attacked by the use of the insult laws.

The defence here will have to rest on 'public interest', but the extensive use of the ex-husband's anger and criticism, which are comment, may weaken it. Let's hope the publication's evidence about the links between the marriage and the building contract is extensive and strong.

- ✓ Journalists' freedom to operate is governed by an international legal framework that guarantees significant rights, as well as by national legal codes that are sometimes more restrictive.
- ✓ The 'public interest' is a key concept in defence against legal attacks and in making decisions. It refers to information which the public will be better-off knowing or worse-off not knowing – not simply what interests the public.
- ✓ Defamation laws exist to protect individuals' reputation and dignity.
- ✓ Defamation is the crime of publishing something that could tend to lower a person's reputation. Publication includes re-publication from another medium, a quote, or Internet publication. The key defence is that what was published was "true and in the public interest", but to succeed this must be provable in terms of your country's legal code.
- ✓ Keep all materials relevant to a potentially defamatory story until the statute of limitations runs out, and keep track of witnesses, too.
- ✓ Everybody – including public figures – has the right to privacy. You have to be able to demonstrate the relevance of their private to their public life to justify breaching privacy.
- ✓ Official secrets laws exist nominally to protect national security, but can be and are used to restrict press freedom. The climate of official secrecy has in many cases been made tighter by anti-terrorism legislation.
- ✓ You need to know the press laws of your country thoroughly, and seek detailed advice for specific problems. Don't rely on generic tips and hints.
- ✓ All reporting requires ethical decision-making at every stage.
- ✓ The guiding principles are: tell the truth; minimise harm; stay independent and be accountable.
- ✓ Use a consistent process (such as the 'ethics roadmap' given here) for reaching ethical decisions.

## Glossary

- **Balance** – giving fair treatment to all (not just two) sides of a story and all role players, and giving appropriate weight to the various aspects of the story
- **Civil law** – law dealing with offences and grievances between persons
- **Civil society** – the various non-state groups, interests and organisations in society
- **Conspiracy** – offence of a group of people getting together to plot something illegal, rather than an individual simply acting on their own
- **Constitution** – national code defining the principles of a state and the rights and responsibilities of its citizens and institutions
- **Criminal law** – law dealing with offences and grievances against the state
- **Defamation** – published statements likely to lower a person's reputation in the eyes of others. In some countries, split between **libel** (published) and **slander** (spoken)
- **Ethics** – system of moral behaviour; acting in accordance with such a system
- **Freedom of expression** – the right to publish and express information and opinions
- **Freedom of information** – the right to access information
- **Innuendo** – a hint or implication that does not state matters directly
- **Juristic person** – in some legal codes, organisations are defined as 'persons' for the purpose of law
- **National security** – matters related to the defence of a state and its institutions, both military and non-military
- **Natural person** – legal term for an individual
- **Official secrets** – information defined by the state as confidential to the state
- **Patronage** – non-employment relationship between two persons, one of whom provides resources, access or support for the other to do their work
- **Publication** – making information public to one or more other people
- **Public interest** – where the public is advantaged by something being known or done, or would be worse off if it were not known or done
- **'Reasonable'** (in law) – a view or action that would be supported by an average, law-abiding citizen
- **Sedition** – stirring up discontent against the state
- **State of Emergency** – legally defined situation in a state where conditions have become so bad or dangerous that normal laws may be suspended

## Further reading

- Read the full story of the Wits University investigation at [www.journalism.co.za](http://www.journalism.co.za)
- Read Charles Rukuni's housing scam stories at:
  - <http://www.fingaz.co.zw/fingaz/2004/October/October14/6763.shtml>
  - <http://www.fingaz.co.zw/fingaz/2004/October/October21/6832.shtml>
  - <http://www.fingaz.co.zw/fingaz/2004/November/November11/7040.shtml>
  - <http://www.fingaz.co.zw/fingaz/2004/December/December2/7211.shtml>
  - <http://www.fingaz.co.zw/fingaz/2004/December/December9/7274.shtml>
  - <http://www.fingaz.co.zw/fingaz/2005/January/January13/7494.shtml>
  - <http://www.fingaz.co.zw/fingaz/2005/February/February10/7747.shtml>
  - <http://www.fingaz.co.zw/fingaz/2005/April/April22/8287.shtml>
  - <http://www.fingaz.co.zw/story.aspx?stid=-452>
  - <http://www.fingaz.co.zw/story.aspx?stid=-1921>
  - <http://www.fingaz.co.zw/story.aspx?stid=-2314>
  - <http://www.fingaz.co.zw/story.aspx?stid=-2951>
  - <http://www.fingaz.co.zw/story.aspx?stid=750>
- For a detailed account of media law in SADC countries as at 2003, see the two-volume *SADC Media Law Handbook for Media Practitioners* published by the Konrad-Adenauer Foundation and available as PDF downloads online from [www.kas.de/mediaafrica](http://www.kas.de/mediaafrica)

### Further reading (cont.)

- For a summary of the KAS material that specifically relates to investigative journalism, see Chapter 9 of *A Watchdog's Guide to Investigative Reporting* by Derek Forbes (Johannesburg: KAS, 2005)
- For a fuller discussion of the international human rights information and media framework, see the *Human Rights Handbook for Southern African Journalists* by Gwen Ansell and Ahmed Veriava (Johannesburg: IAJ, 2000)
- For a comprehensive Southern African perspective on media ethics, see *Black, White and Grey* by Franz Krüger (Johannesburg: Double Storey, 2004)
- Read Putsana Reang's full article at: [http://www.internews.org/articles/2007/2071000\\_ajr\\_reang.shtm](http://www.internews.org/articles/2007/2071000_ajr_reang.shtm)