KONRAD ADENAUER STIFTUNG

Media Law Handbook for Southern Africa

Volume 1

Justine Limpitlaw

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KAS Media Programme Sub-Sahara Africa

The Konrad-Adenauer-Stiftung (KAS) is an independent, non-profit German political foundation that aims to strengthen democratic forces around the world. KAS runs media programmes in Africa, Asia and South East Europe.

KAS Media Africa believes that a free and independent media is crucial for democracy. As such, it is committed to the development and maintenance of a diverse media landscape on the continent, the monitoring role of journalism, as well as ethically based political communication.

Justine Limpitlaw

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by Justine Limpitlaw

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Cover photograph:	British soccer fan Pavlos Joseph hides from the press after appearing at Cape Town Magistrates' Court on June 20, 2010 in Cape Town, South Africa. Mr Joseph is appearing at court charged with two counts of trespassing after entering the England Football team's dressing room, following the England match with Algeria on Saturday June 18. (Foto24/Gallo Images/Getty Images)
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Acknowledgements

It has been nearly ten years since the first edition of the Media Law Handbook for Southern Africa was published by the Konrad-Adenauer-Stiftung Media Programme Sub-Sahara Africa (KAS). This second edition of the handbook is more extensive and runs to three volumes. The Tanzania chapter has been greatly enhanced by the inclusion of the media law landscape in Zanzibar. We also have three entirely new country chapters — Seychelles, Mauritius and Mozambique. I am particularly thrilled that we have, at last, been able to include a Lusophone country.

It has been inspiring and rewarding to meet so many people, students, journalists, editors, researchers, bloggers, academics and others who have found the first edition of the handbook a useful resource. Two such encounters stand out. One was an immigration official in Lusaka who studied my passport closely, causing some anxiety on my part. 'Justine Limpitlaw,' he said, 'are you here to talk about media law?' I was flummoxed. How could he know? 'I'm studying law part-time, and your book is a set work!'. Another was Swazi journalist, Bheki Makhubu. I attended court on one of his trial days (he was, of course, acquitted eventually as the charges were ridiculous and designed to stop his work). When I introduced myself as he sat in the dock, he said: 'This is all your fault. I read your book and thought 'publish and be damned', and here I am, damned!'

I am inspired by the courage and resilience of so many in the media who face grave risks in bringing important stories to light. They take their professional responsibilities of ensuring an informed citizenry, seriously.

Besides the journalists, it is important to remember that much-maligned profession, the lawyers. These handbooks could not have been written without the very generous assistance provided by lawyers, legal consultants and academics with better access to the laws of the countries under review than I have. As such, I am greatly indebted to Dr Tachilisa Balule (Botswana), Olivier Marc Mwamba Kabeya (Democratic Republic of Congo), Mabatsóeneng Hlaele (Lesotho), Kelvin Sentala (Malawi), Anushka Radhakissoon (Mauritius), Orquidea Palmira Massarongo (Mozambique), Adv Mohammed Tibanyendera (Tanzania) and Silas Dziike (Zimbabwe, Zambia, Namibia, Swaziland, and Seychelles).

Sadly, I am not multilingual, and so I relied heavily on my able French and Portuguese translators (all of whom are also excellent lawyers). Laurent Badibanga for the Democratic Republic of Congo chapter and Chantelle De Souza and Orquidea Palmira Massarongo for the Mozambique chapter. Again, I am greatly indebted to them.

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In writing these handbooks, I recognize that censorship and other legal restrictions are only part of the difficulties faced by journalists on the continent. Consequently, I would like to dedicate this edition of the Media Law Handbook for Southern Africa to the journalists of our region, in recognition of the vital work they do and the dangers of it. This is exemplified by the disappearance of Mozambican community radio journalist Ibraimo Mbaruco on 9th April 2020. In his last communication, he said he was 'surrounded by military'. He has not been seen since.[1]

Justine Limpitlaw

1 https://rsf.org/en/news/mozambique-case-missing-mozambican-journalist-referred-un#:~:text=Ibraimo%20Mbaruco%2C%20a%20reporter%20for,been%20raised%2C%20from%20the%20head [Last accessed 10 December 2020]

Foreword

Dear Readers,

KAS Media Africa, the Media Programme for Sub-Sahara Africa of the Konrad-Adenauer-Stiftung, brings together stakeholders in the media industry. We are working on business models for the media which the Covid-19 pandemic has made more necessary than ever. We discuss the credibility crisis of the media, and we work on strategies to counter fake news.

Media Laws on the African continent have been amended, revised and rewritten since the first edition of the SADC Media Law Handbook was first published nearly a decade ago. The reasons for new media laws range from the advent of social media to the realisation of the powers-that-be that, with new technologies, they cannot control the narrative and discussion in the way they used to do. How does one balance the need to prevent hate speech with the necessity to question and control those in power publicly as well as those opposing them?

Our legal expert, Justine Limpitlaw, has taken up the challenge of analysing and scrutinising the media laws of 13 southern African countries over the past four years. We present the results to you in this three-volume-edition. The work will, in the next few years, make its way into legal offices, newsrooms and courtrooms on the continent, just as the first edition did.

It may be the biggest compliment to the author and her many collaborators from as far afield as the Seychelles, Mozambique and Zimbabwe, that she has often been asked for legal advice from lawmakers, politicians and media experts when media laws are being redrafted in their respective countries.

KAS Media Africa would like to thank Justine Limpitlaw and her team of lawyers for their tireless work, including translations in English, French and Portuguese. An accurate and robust quality media strengthens democracy and, therefore, needs the commitment of experts. It also needs you, the readers, who are welcome to share these three volumes' digital versions on our website.

Christoph Plate
Director KAS Media Africa
Johannesburg , South Africa
January 2021

Abbreviations

General

ACHPR	African Commission on Human and Peoples' Rights
Aids	Acquired Immunodeficiency Syndrome
AU	African Union
CEO	chief executive officer
DTT	Digital Terrestrial Television
EU	European Union
GDP	gross domestic product
HIV	human immunodeficiency virus
HRC	Human Rights Commission
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICT	information and communication technology
IMF	International Monetary Fund
IP	Internet Protocol
JSC	Judicial Service Commission
MP	member of parliament
NGO	non-governmental organisation
OTT	Over the Top
SADC	Southern African Development Community
SMS	Short Message Service
SOE	state-owned enterprises
UHF	Ultra High Frequency
UN	United Nations

Unesco	United Nations Education, Scientific and Cultural Organisation
VHF	Very High Frequency
WSIS	World Summit on the Information Society

Botswana

ASO	analogue switch-off
Bocra	Botswana Communications Regulatory Authority
HC	High Court
MPA	Media Practitioners Act
NBB	National Broadcasting Board

Democratic Republic of Congo

CPA	Congolese Press Agency
DRC	Democratic Republic of the Congo
HBC	High Council of Broadcasting
HCBC	High Council of Broadcasting and Communication
NIEC	National Independent Electoral Commission
RTNC	Radio Télévision Nationale Congolaise [the Congolese National Radio and Television Broadcaster]

eSwatini

CAB	Communications Appeals Board
CHRPA	Commission on Human Rights and Public Administration
CST	Channel Swazi Television
PE	Public Enterprises
SCC	eSwatini Communications Commission
STA	eSwatini Television Authority

Lesotho

BDRP	Broadcasting Disputes Resolution Panel
LCA	Lesotho Communications Authority
LENA	Lesotho News Agency
LNBS	Lesotho National Broadcasting Service
USF	Universal Service Fund
USFC	Universal Service Fund Committee

Malawi

Macra	Malawi Communications Regulatory Authority
MBC	Malawi Broadcasting Corporation
MCM	Media Council of Malawi

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The role of the media and press freedom in society

In this chapter, you will learn:

- ▷ why freedom of expression is important
- ▷ why freedom of expression is a key building block of democracy
- ▷ what freedom of expression means
- ▷ the relationship between freedom of expression and freedom of the media
- ▷ the role of the media in society
- ▷ why broadcast and digital media are so important, particularly in southern Africa

1 Introduction

In the day-to-day life of a busy journalist, publisher, broadcaster, blogger, vlogger or media owner, it is easy to overlook the fundamental principles that are at stake when going about one's work. Newsroom constraints (whether print, broadcast or online), include deadlines, squeezed budgets, limited electronic and library resources, demanding managers, distribution difficulties (including internet shutdowns) and draconian media laws, to say nothing of news subjects who are often wary of journalists, if not overtly hostile. This makes for a challenging work environment, and it is easy for journalists, including so-called citizen-journalists, to lose sight of the big picture.

The big picture is that the work of journalists reflects how we, as humans, interact with each other and is a measure of how well our society is functioning. The principles of interaction that apply to us as individuals are carried through and apply to how broader social institutions, such as the media and government, interact with each other. You can tell a lot about the state of a country's governance, as well as its commitment to democracy and economic and social development, by looking at whether it respects its citizens and its media, print, broadcast and online.

This handbook unpacks the internationally developed standards and best practice models of democratic media regulation. It examines internationally agreed norms for best practice democratic media and democratic broadcasting regulations, as well as the standards for imposing restrictions upon, or otherwise regulating, media content. Thirteen southern African countries are examined in this work.

Each country's media laws are identified and analysed to assess their compliance with best-practice standards.

2 Why is freedom of expression important? Constitutive rationales

2.1 Overview

This handbook begins with a look at certain principles of basic human interaction, in particular, freedom of expression.

It is important to understand why freedom of expression has achieved global recognition as being foundational to human rights generally. There are several reasons why we protect the right to freedom of expression. These fall within two broad groupings:

- *Constitutive rationales:* These are based on the recognition that freedom of expression matters because human beings matter, irrespective of whether or not their views are correct, true or valuable.
- *Instrumental rationales:* These are based on the recognition that freedom of expression leads to something valuable — that having freedom of expression advances important goals.

2.2 Constitutive rationales for freedom of expression

Human beings matter; their exploits (mistakes or successes) and experiences have shaped and impacted on the world from time immemorial. However, only in fairly recent times has human society come to recognise the importance of the autonomy of every human being. The international community now acknowledges that humans matter intrinsically: who we are and what we think matters. From where does this recognition come? On what is it based? What are the hallmarks of that recognition?

2.2.1 Equality

The international community has grappled with the notion of equality since the mid-20th century. The previous century had seen the almost worldwide recognition that slavery — the notion that one human being could be owned by, and live in bondage to, another human — was barbaric and an affront to humanity as a whole. In the latter half of the 20th century, reflections upon colonialism, apartheid and the Holocaust and other genocides caused much of the community of nations to accept that every human being, irrespective of age, gender, sex, race, ethnicity, nationality, language, class, social origin, or religion, is inherently deserving of equality.

2.2.2 Dignity

The recognition of equality is intrinsically linked to the recognition of the inherent dignity of human beings. A key notion that underpins international recognition of human rights is that each person, regardless of the differences between that person and any other, is entitled to have his or her dignity respected. The recognition that a person is entitled to dignity, simply for being human, represents a profound change in human relations and is a recent and fundamental departure from historical practices and beliefs.

2.2.3 Autonomy and personality

Once there is widespread recognition of the equality and inherent dignity of each human being, there is recognition of the right of all individuals to be free to develop their personalities, and themselves, to their fullest potential. It is this recognition of the right to personal fulfilment and autonomy — the right to be who you are, based on inherent dignity and equality — that underscores so many of the internationally agreed-upon statements on fundamental basic human rights and freedoms.

2.3 Foundational international instruments and the constitutive rationales for freedom of expression

Below are excerpts from some of the foundational international human rights instruments that give recognition to the concepts of the inherent dignity and equality of human beings, as well as to our right to autonomy and self-fulfilment.

2.3.1 The Universal Declaration of Human Rights

The first sentence of the preamble to the Universal Declaration of Human Rights,[1] adopted by the United Nations (UN) General Assembly in 1948 as Resolution 217A, states: '*Whereas* recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.' The second sentence of the preamble states: '... the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.'

Article 1 of the Universal Declaration of Human Rights states: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' The first sentence of Article 2 states: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' The first sentence of Article 7 states: 'All are equal before the law and are entitled without any distinction to equal protection of the law.'

The Universal Declaration of Human Rights is one of a triumvirate of international instruments that make up what is called the International Bill of Rights.[2]

2.3.2 The International Covenant on Civil and Political Rights

The Preamble to the UN International Covenant on Civil and Political Rights[3] (ICCPR), which was adopted by the UN in 1966 and came into force in 1976, reaffirms that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' and, consequently, that rights 'derive from the inherent dignity of the human person'.

The ICCPR (together with its optional protocols) is the second of the triumvirate of international instruments that make up what is called the International Bill of Rights.

2.3.3 The International Covenant on Economic Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR)[4] which sets out several economic, social and cultural rights, was adopted by the United Nations in 1966 and came into force in 1976. It too reaffirms that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' and, consequently, that rights 'derive from the inherent dignity of the human person'. It goes on to recognise that 'the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights'.

The ICESCR is the third of the triumvirate of international instruments that make up what is called the International Bill of Rights.

2.3.4 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights,[5] known as the (Banjul Charter), adopted by the Organisation of African Unity and later by the African Union (AU), entered into force in 1986. Its protocol establishing an African Court on Human and Peoples' Rights came into force in 2005. The Banjul Charter contains several noteworthy statements that underpin the concept of human rights.

- The preamble to the Banjul Charter specifically considers that: 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples'.
- Article 2 of the Banjul Charter states that:

> ***Every individual shall be entitled to the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.***

The first clause in the first sentence in Article 5 states that 'Every individual shall have the right to the respect of the dignity inherent in a human being ... '

International recognition of the basic dignity, equality and autonomy of all people has impacted strongly on the formulation of fundamental rights, particularly concerning freedom of expression.

Freedom of expression is seen as a fundamental human right. It is internationally protected precisely because the notions of equality, dignity and individual development or fulfilment require that, when human beings talk or otherwise express themselves, what they are expressing or communicating is a reflection of who they are and, therefore, worthy of respect and protection.

3 Why is freedom of expression important? Instrumental rationales

3.1 Overview

The other broad set of rationales for freedom of expression is that free expression is a means to an end — it is necessary for achieving important social goals. There is no closed list of these goals, but there is consensus on at least two of the main ones:

- The search for truth in the marketplace of ideas
- That freedom of expression is essential for democracy

3.2 The search for truth in the marketplace of ideas

The argument behind this rationale is that it is only through the ongoing and open expression of different ideas that we can test the 'truth' of any single idea. This rationale is based on the recognition that freedom of expression is central to people's ability to:

- develop, hone and refine their ideas, opinions and views
- reject, discard or replace ideas, opinions and views
- convince others of their arguments, ideas, opinions and views
- consider and assess the arguments, ideas, opinions and views of others.

The process of sifting through the notional 'marketplace of ideas' is effectively a search for truth. This point is powerfully made concerning academic or scientific research, which relies heavily on frank peer review 'expression' to sift out erroneous conclusions. The same is also true for our general discourse.

Only through free expression can one ensure that there will be competing ideas or views which human beings can adopt or reject for themselves. The enterprise of

human development is based on ideas, viewpoints and arguments. For there to be progress, these need to be continually assessed, challenged, validated, refined or discarded. This cannot happen fully without free expression.

3.3 Freedom of expression is critical to democracy

This rationale is based on the notion that democracy — which recognises that people have the right to elect a government of their choosing — cannot exist in any meaningful way without the right to freedom of expression.

There are many aspects to this rationale, but the fundamental concept is that, for democracy to be effective, the citizenry that votes in elections and engages in public processes with the government must be informed and must have the right to participate freely in public discourse. The Southern African Development Community (SADC) has recognised, in the preamble to its Protocol on Culture, Information and Sport, 2001,[6] which came into force in 2006, that 'information is a prerequisite for political, economic, social and cultural development'.

If there is no freedom of expression — if people are not free to share information and express a range of ideas, opinions and political views; and, the corollary to that, if people are not free to receive information in the form of a range of ideas, opinions and political views — they will not be sufficiently well informed to make appropriate and meaningful political choices, whether at the ballot box or in their more general interactions with government.

4 Freedom of expression

4.1 Freedom of expression in various international human rights instruments

To understand what falls within the freedom and what does not, it is useful to look at how international human rights instruments define the scope of freedom of expression. This section examines the relevant provisions of certain universally accepted human rights instruments which set out the internationally agreed scope of the right to freedom of expression. Comment is made on certain aspects of the international human rights instruments.

4.1.1 The Universal Declaration of Human Rights

Article 19 of the Universal Declaration of Human Rights provides that: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'

Article 19 deserves some discussion as so many elements of the right to freedom

of expression are contained in these few lines. Importantly

- the right is granted to everyone; there are no qualifiers, such as citizenry or age.
- the right is to: 'freedom of opinion and expression'. In other words, not only is everyone entitled to hold their own opinions on any issue (encompassing thoughts, ideas and beliefs), they are also entitled to express these.
- the right is to freedom of 'expression'. This is broader than speech as it encompasses non-verbal or non-written expression, such as dance, mime, art, photography and other non-verbal action.
- the right specifically includes the right to: 'seek, receive and impart information and ideas'. This is a critical aspect of the right as it means that everyone has the right to obtain information. Thus, states that deny media freedom also trample on the rights of their citizens to freely receive information.
- the right includes the right to seek information and ideas: 'through any media'. This is a critically important statement for the press and media because it clarifies that newspapers, radio, television and the internet, for example, are all contained within the right.
- the right exists: 'regardless of frontiers'. In other words, this is internationally recognised as a universal right that is not dependent on or determined by, national borders.

4.1.2 The International Covenant on Civil and Political Rights

Article 19 of the ICCPR elaborates on several of the provisions of the Universal Declaration of Human Rights. It provides:

> *1. Everyone shall have the right to hold opinions without interference.*
>
> *2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or print, in the form of art, or through any other media of his choice.*
>
> *3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
>
> *(a) for the respect of the rights or reputations of others;*
>
> *(b) for the protection of national security or of public order, or public health or morals.*

Article 19 of the ICCPR needs some discussion as it reveals certain important differences between its provisions and those of article 19 of the Universal Declaration of Human Rights.

Some particularly noteworthy aspects are discussed below.

- Perhaps the most noteworthy aspect is that article 19 of the ICCPR, unlike the Universal Declaration of Human Rights, contains, in paragraph 3, a statement on how the right to freedom of expression may be restricted by states. We all know that rights may conflict with each other. Some examples of this are that the right to freedom of expression can be used unfairly to:
  - Ruin a person's reputation through the publication of untrue, defamatory statements and therefore infringe upon that person's right to dignity
  - Justify the taking of intimate photographs of a person and therefore violate his or her right to privacy
- The provisions of sub-article 3 in article 19 of the ICCPR acknowledge this clashing of rights and recognise the right of states to pass laws to restrict freedom of expression in certain limited circumstances — namely, where this is necessary to protect the rights or reputations of others, as well as to protect national security, public order, public health or morals.
- The use of the word 'necessary' is noteworthy. It means that unless freedom of expression is restricted, the protection of reputations, national security and public health will be endangered. This is a high standard to meet.

Continental and regional international human rights instruments contain similar protections of the right to freedom of expression and/or its corollary, access to information. Two examples are highlighted below, namely the African Charter of Human and People's Rights and the SADC Protocol on Culture, Information and Sport.

4.1.3 The African Charter on Human and Peoples' Rights

The provisions on the rights to freedom of expression in the African Charter on Human and Peoples' Rights' (known as the Banjul Charter) are weak. They do not provide anything like the protection of freedom of expression afforded by global instruments such as the ICCPR. Article 9 of the African Charter states:

> *1. Every individual shall have the right to receive information.*
>
> *2. Every individual shall have the right to express and disseminate his opinions within the law.*

There are two particular aspects to article 9 of the Banjul Charter that require further discussion:

- Unlike some other international human rights instruments, there is no express corresponding right to impart information in clause 1 of article 9.
- The right to express and disseminate opinions appears to be curtailed as this must be done 'within the law'. What is noteworthy about this restriction on the right to freedom of expression is not that there are legal restrictions upon the right (as can be seen from the instruments discussed above, this is common)

but that there are no requirements in article 9 that such laws be necessary to protect some other social good, such as the rights of others, public health or national security. At face value, the Banjul Charter elevates restrictions upon freedom of expression found in ordinary national laws — however, passed and no matter what their content — above the right to freedom of expression. This is extremely disappointing as it appears to provide no guarantee of freedom of expression. However, this is not, in fact, the case because the African Court of Human and Peoples' Rights has interpreted the words 'within the law' as being 'a reference to international norms which can provide grounds of limitation on freedom of expression'.[7] The court went on to make several important rulings regarding such grounds of limitation, namely:

- for a restriction to be acceptable, it must serve a legitimate purpose[8]
- reasons for limitations must be based on legitimate public interest and the disadvantages of the limitation must be strictly proportional to and absolutely necessary for the benefits to be gained[9]
- the only legitimate reasons to limit these rights and freedom are stipulated in Article 27(2) [of the Banjul Charter], namely that rights shall be exercised in respect of the rights of others, collective security, morality and common interest.[10]

This interpretation of the meaning of 'within the law' is extremely important, and brings the protections afforded by the expressive rights provided for in Article 9 of the Banjul Charter in line with international human rights standards.

4.1.4 The SADC Protocol on Culture, Information and Sport

Although the SADC Protocol[11] does not expressly deal with the right to freedom of expression, it does contain wording affirming SADC's commitment to the right of access to information.

4.2 Summary of key elements of the right to freedom of expression

It is clear from the international instruments that the scope of the right to freedom of expression is generally accepted to be as follows:

- The right is available to everyone — individuals as well as juristic persons, such as companies.
- The right to freedom of expression is broader than freedom of speech and includes non-verbal or non-written forms of expression.
- The right generally encompasses the right to receive as well as to impart information and ideas.
- The right includes the freedom of means of communication, demonstrating that there is no limitation on the medium that may be used to express ideas or opinions.

- Broadcasting licensing requirements do not constitute undue infringements on the right to freedom of expression.
- The right to freedom of expression is not absolute, and states are entitled to limit it. However, such limitations must be necessary for a democracy to protect the rights of others or important societal interests, such as national security or public health.

5 The relationship between freedom of expression and freedom of the media

It is clear from the international human rights instruments examined above that the right to freedom of expression requires, not only that everyone is free to express themselves, but that they are free to do so over a range of different types of media, including print, broadcast or online media, subject to licensing requirements in respect of the broadcast media. Indeed, one academic, Michael Bratton, has said:

> ***In order to be politically active, citizens require means to communicate with one another and to debate the type of government they desire for themselves. Civic discourse can take place in various forums, the most important of which are the public communications media, both print and electronic.***[12]

It is also clear from the international human rights instruments that freedom of expression includes the right to receive information and ideas. This is a critical component of the right. The effect of this is that, when a state acts to silence or curtail the operations of the media, whether print, broadcast or online, it is not only violating the expressive rights of the media and the journalists, editors and publishers thereof, but also violating the rights of its citizens to receive information and ideas freely.

Consequently, the internationally recognised basic contours of the right to freedom of expression and inherently protect the right to freedom of expression of the media, too. The expressive and information rights of individuals and the media are thus inextricably linked.

6 The role of the media in society generally

6.1 Definition of the media

The media is not a monolithic entity but rather a broad term encompassing a

variety of content provided to the public, or sectors of the public, over a range of platforms. There is no closed list of content provided by the media: news, politics, business, current affairs, entertainment, motoring, gardening, religion, home decor, fashion, food, celebrity and lifestyle are some of the many topics covered by the media.

Furthermore, these topics are provided over a range of platforms. Traditionally, when thinking of the media one thinks of newspapers, magazines, radio and television. This is no longer the case. The so-called 'new' or 'digital' media encompasses a range of platforms, including web-based platforms, such as internet sites and apps. Internet-based media can be merely electronic versions of what is available in the print media (for example, a newspaper's website will carry an electronic version of the newspaper for that day), or such media can carry unique content not available in hard-copy form. New media is changing the way citizens and the media relate. Social networking sites such as Twitter and Facebook, for example, have played a significant role as sources of news and information in repressive countries.

Just as there is no monolithic 'media' entity, similarly, there is no single role that it plays. Indeed, the role of a particular part of the media is very much determined by a range of factors relating to the nature of the media itself, in particular, the content of the media (news or current affairs versus light entertainment) and the medium used (print, broadcasting or internet-based). Thus, the media plays several different roles in society, including being informative, educational or entertaining. Media can be narrowly focused by appealing to a particular interest (for example, a fishing magazine), religion (such as a Christian broadcaster) or area of specialisation (such as a trade publication). It can also appeal to a mass audience by being a full-service television station or a daily newspaper covering a variety of news and current affairs, whether local, national or international.

It is common to conflate the terms 'the media' with 'the press'. This is not necessarily a problem; however, when thinking about media and press freedom concerns, it is helpful to see the term 'the press' as a sub-set of 'the media'. The press has a connotation that is associated with the news media, whether provided in print or electronically. Within the term 'the press' (meaning the news media) there are various kinds of press outlets — state media, public media, commercial media and even certain forms of community media can be included in 'the press'. It is important to bear these distinctions in mind when considering the role of the press in particular and of the media more generally.

6.2 General role of the press

Academic commentators have often characterised the media or the press as being 'a separate player on behalf of the public against the agencies of power', and that media organisations: 'take a position between government agencies and the public'.[13] This is true only to a certain extent as several media outlets (print, broadcasting or otherwise) are fundamentally part and parcel of government and, therefore, cannot, and will not, play any role that is not supportive of the government. However, it is true that a strong and independent media, together with

other organs of civil society, can play mutually reinforcing roles to exert pressure on governments to support democracy and socio-economic development.[14] Media commentator and academic Masudul Biswas said that the major aim of the independent media is to make: 'political participation meaningful'.[15]

This leads to one of the instrumental rationales for freedom of expression — namely that the free flow of information and exchange of ideas is good for democracy because it makes for better democratic decision-making by government, improves transparency and accountability and gives citizens the ability to make informed political choices.

To achieve the important aim of assisting in giving democratic participation 'meaning', the press must fulfil several other roles. These are expanded on next.

6.3 The press as a public watchdog

6.3.1 Overview

The role of the press as a watchdog is a traditional characterisation of the role of the news media in particular. Biswas describes the media as 'a watchdog of the society [monitoring] the activities of public administrations and other institutions and practices that directly and indirectly affect the public'.[16]

This watchdog role can take many forms, depending on the nature of the medium concerned, as well as on the state of democracy and development in a particular country. Essentially, this role is to provide information — to be the 'eyes and ears' of the public in monitoring what is happening in public life by reporting on daily events as they unfold.

6.3.2 Reporting on government

When one thinks of the press as a watchdog, one thinks of the press as reporting on the happenings of government. In and of itself reporting on government

is a huge task. It involves reporting on the programmes and activities of the three branches of government:

- *The legislature:* Its activities include not only deliberating upon and passing legislation, but also important committee work, overseeing the executive's operations and being the body to which public authorities are generally accountable.
- *The executive:* Its activities include the day-to-day management of government and government policy development. The activities of all ministries and government departments fall under the auspices of the executive, which is essentially the 'engine room' of governance in a country. The media needs to be able to report on all these ministries — finance, health, trade, education, sports and more.

- *The judiciary:* These are the courts — that is, the administration of justice within a country. The media needs to be able to communicate judgments and court proceedings.

However, reporting on government also involves reporting on the activities of other related bodies, including:

- international bodies to which the country belongs, such as SADC, the AU, the UN and the Commonwealth
- public authorities, such as the central or reserve bank, the independent broadcasting authority, the public broadcaster, the independent electoral commission, the public protector or public Ombudsman (if any)
- parastatal companies, such as national airlines, electricity utilities, railways and telephony companies
- different spheres of government, such as provincial and local government, the latter being the most relevant tier of government to the daily lives of readers, viewers or listeners.

6.3.3 Reporting on economic development

Economic issues can be as important as political ones. Hence, a watchdog press also needs to report on economic developments and news. While these will often overlap with government-related reporting (for example, when covering issues such as interest rates, unemployment figures, gross domestic product figures, the budget, development projects or the use of international donor aid), this is not always necessarily the case.

Often economic issues involve the private sector, and a watchdog press will need to be able to report on the activities of major corporations and concerns in all spheres of the economy, including energy, mining, oil operations, agriculture, manufacturing and services. In doing so, the press needs to keep the public informed about the side-effects of economic activity, such as the actions of polluting companies.

6.3.4 Reporting on social issues

The press also needs to be able to report accurately on the social life of the nation. This means covering artistic and cultural happenings and sporting events, as well as social trends and developments that impact on the daily life of all, including children, the youth, the elderly and the disabled.

6.4 The press as detective

The role of detective is a critical adjunct to the role of the press as public watchdog; however, it is dealt with separately here to emphasise the difference between reporting on public affairs and journalistic investigations into wrongdoing in the administration of public affairs.

When journalists are well trained and have trusted sources of information, the press is able to investigate wrongdoing by public officials. Such wrongdoing would include perpetrating fraud or engaging in corruption to divert, and personally benefit from, public funds or other public resources.

This 'press as detective' role is demonstrated when the press can engage in fairly long-term, detailed, in-depth investigative journalism — the kind that can report to the public on large-scale systematic wrongdoing by public (or private) officials, which may include nepotism, corruption, fraud or other kinds of criminality. These exposés often rely on more than one journalist and require the backup of the media publication or outlet as a whole (be it broadcasting, or online) to provide the necessary resources for the investigative exercise. A good example of this was the investigation into so-called 'State Capture' in South Africa by the amaBhungane Centre for Investigative Journalism,[17] which resulted in the exposé known as the 'Gupta Leaks'.[18] The Gupta Leaks coverage, exposing high-level corruption, has resulted in the appointment of several commissions of enquiry whose work is ongoing.

In many countries, the ability and willingness of the press to engage in investigative journalism are crucial to encouraging the police and prosecuting authorities to act against corrupt public figures, even if this only occurs as a result of the immense pressure that the resulting publicity puts on the police and prosecuting authorities.

6.5 The press as a public educator

The press also plays a general educative role in society. This can be done at several levels. For example, in support of early childhood development, broadcasters can, and often do, air basic educational materials aimed at teaching children the alphabet, colours or animals.

In support of secondary education, print media outlets sometimes include supplementary educational materials for schoolgoers. Similarly, broadcasters can and do, air historical, scientific or even mathematical programmes also aimed at school-goers.

However, education is much broader than simply formal schooling, and the press can play a general educational role. For example, the media (print or electronic) can inform the adult population about a wide range of educational topics, including climate change, nutrition, health (especially concerning diseases such as HIV and Aids, malaria and diabetes) basic money management and budgeting, developments in agriculture, child care and the like.

6.6 The press as democracy and good governance advocate

Linked to its general educational role but, more controversially, the press can also play the role of democracy and good governance advocate. This role is controversial because it envisages the press as both advocate and impartial reporter. In this role, the press comments on issues of the day and advocates improved democratic practices and good governance.

In this advocacy role, the press sees itself firmly on the side of the ordinary citizen, whose life can be improved or worsened depending on how public authority is exercised. This advocacy role is also closely linked to the watchdog role of the press; however, it goes further. The press as an advocate will report not only on what is happening but on what *should* be happening.

The press in many developing countries is almost forced to play this role because improving basic human living conditions cannot happen without democratic practices and good governance.

An example of this democratic advocacy function is the role of the press during an election. As well as reporting on election issues (for example, the polls, party programmes and party tactics), the media can help to strengthen democratic processes by encouraging the public authorities to hold a free and fair election through educating the public about what this would entail. In this role, the press can, for example, inform the public about how democratic elections ought to be run. The press can provide information on, among others, the importance of having an up-to-date voters' roll, a secret ballot, election observers, multiparty officials at different ballot stations, the security of the ballot boxes, an independent electoral commission and the role of the media, particularly the public broadcaster. In other words, the press can demonstrate a democratic standard by which public authorities should be held to account for conduct during an election. In this way, the press educates the public about holding public officials accountable for their actions.

Other areas where the press can play a democracy advocacy role include:

- clean administration versus corruption and nepotism
- appropriate use of public resources versus mismanagement and waste
- proper policing and public safety versus public violence, particularly if meted out by the security or intelligence forces
- economic and social development versus growing poverty and unemployment
- generally increasing living standards versus glaring inequality and wealth disparities
- responsive and public-oriented public services versus bloated and self-serving bureaucracies
- transparency, openness and accountability versus secrecy, neglect and repression.

Importantly, a press that plays a democracy advocacy role will not target only government for coverage and comment. In many developing countries, companies (including subsidiaries of large multinational companies) and others in the private sector do not always adhere to basic standards concerning working conditions, occupational health and safety or environmental issues. The press needs to be able to point out actions by companies and other private sector entities that fall

short of national or international standards and which cause damage to individuals, communities or the environment. In a similar vein, policies of international bodies such as the International Monetary Fund, the World Bank, the International Telecommunications Union and the World Trade Organisation can, and often do, have a significant economic impact on developing countries. An advocacy press ought to be able to point out to citizens how, for example, a fair-trade regime concerning the country's exports and imports ought to look.

6.7 The press as a catalyst for democracy and development

Even if the press can perform only its most basic function — that is, reporting on matters of public interest — it nevertheless acts as a promoter of transparency, openness and accountability. Governments (even repressive ones) and the private sector dislike negative press coverage. Of course, a government may try to respond to negative press coverage by clamping down on press freedom through legal and illegal means, but this is not a sustainable long-term response and usually only serves to hasten the erosion of public confidence in, and support for, the government.

If the press can perform some, or all of the roles, set out above, it can act as a catalyst for democracy and development, helping to make public participation meaningful. The public supports a press that reports accurately and provides reliable news and information about matters of public concern. As this public support grows, governments come under public pressure to be more transparent and accountable and to work with, and not against, the press. As governments learn how to respond appropriately to press criticism, so the space for the media opens up and a positive cycle of more sophisticated government–press relations can ensue. In this way, the government sees the independent media as an important vehicle for communicating with the public about its programmes and actions and also as a gauge to measure its popular standing and support, as the press often (although not always) reflects public opinion.

In thinking about the press as a potential catalyst for democracy and development, it is crucial to bear in mind that several post-independence African governments have expressly used the mass media:

> ***as a tool for national consolidation, development, and authoritarian control … The reach of the mass media was extended to rural areas, supposedly to promote development and technical diffusion, but in actuality, the media was used as a tool of state control and propaganda.***[19]

This kind of government-controlled media is not the model of the 'press as democracy and development catalyst' that we are talking about here.

The stronger the media becomes in a particular country, the better it can fulfil its various roles as a watchdog, detective, educator, good governance advocate and even catalyst for democracy and development. The more the press can fulfil these roles, the more the public is informed about public interest issues. The more the

public is informed, the more it can hold public power accountable and relate to the government (through the ballot box, or in consultations or other interactions), the private sector and even civil society in an informed manner. The government of an informed citizenry is often able to engage in focused decision-making as there is a free flow of information and ideas that the government can access to improve its operations.

The former president of the World Bank, the late James Wolfensohn, has elaborated on this:

> ***A key ingredient of an effective development strategy is knowledge transmission and enhanced transparency. To reduce poverty, we must liberate access to information and improve the quality of information. People with more information are empowered to make better choices. For these reasons, I have long argued that a free press is not a luxury. It is at the core of equitable development. The media can expose corruption. They can keep a check on public policy by throwing a spotlight on government action. They let people voice diverse opinions on governance and reform and help build public consensus to bring about change.***[20]

7 Importance of the broadcast and online media

When thinking about the press and the media, people have traditionally focused on the print media — essentially, newspapers. In Africa, particularly southern Africa, this makes little sense for five important reasons:

- With few exceptions, newspapers are often only distributed in the larger cities and towns. In other words, they are not available in many rural areas.
- Relatively speaking, newspapers are expensive. Many countries in southern Africa have extremely high rates of poverty. The little money people have is far more likely to be spent on food and essentials rather than newspapers which are out of date within a day or so.
- In southern Africa, newspapers tend to be published in English, French or Portuguese — the languages of government. However, a country's broadcasting landscape can be characterised by several radio stations broadcasting in different local, indigenous languages, thereby enabling listeners to access news and information in their home languages.
- Adult literacy: if people cannot read, they obviously cannot access the content contained in the print media. While SADC has higher average adult literacy rates than other regions in sub-Saharan Africa,[21] there are still many adults who are unable to read and write.

- Internet Access:[22] More and more people have access to the internet, although internet penetration rates in SADC remain relatively low and uneven. The country with the highest internet penetration in the SADC region is Seychelles (72%) while the country with the lowest internet penetration rate is the Democratic Republic of the Congo (6%). Of the 16 member states in SADC, only seven have internet penetration rates above the African average of 35.9%, namely Botswana, Mauritius, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe. Only two have internet penetration rates above the world averages of 56.1% (including Africa) or 60.2% (excluding Africa), namely Mauritius and Seychelles.

Consequently, the broadcast media — which provides content visually, by the spoken word, or both — and online media which can provide content in a variety of ways are extremely important. Of the options provided by the broadcast media in SADC, most people access news and information via radio rather than television.[23] This is due to three main reasons:

- Terrestrial television transmission or signal distribution facilities and infrastructure are extremely expensive to roll out. Terrestrial television is therefore often limited to urban areas. Radio or sound transmission facilities are far less expensive, and so radio coverage is invariably greater than television coverage.

- In countries with erratic electricity supply or in areas where electricity is not available, watching television is simply not possible — although people sometimes make do by, for example, connecting television sets to car batteries or generators. As radio sets can be battery operated or even wind-up, the technology is far more suitable to conditions of no, limited or erratic electricity supply.

- The (relatively) prohibitive cost of television sets means that many households cannot afford them. Given the high levels of poverty in southern African countries, a television set is a luxury item. Radio sets are far less expensive.

Broadcasting, particularly radio, is the medium through which most people in southern Africa access news and information, although with internet penetration increasing rapidly, online resources are also becoming increasingly important. Historically, broadcasting has been a neglected area in the context of press freedom battles in Africa, particularly in southern Africa. It is only fairly recently (in the past 20–30 years) that state monopolies over the airwaves (both radio and television) have been abandoned and a more pluralistic broadcast media has begun to emerge.

This handbook contributes to that movement by setting out (in Chapter 2) what a democratic media regulatory environment looks like, as well as by analysing the print, broadcasting and online regulatory environments in each country chapter to test whether or not they meet international best practice standards.

Notes

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2

Hallmarks of a democratic media environment

In this chapter, you will learn about:

- eighteen instruments that contain key principles of democratic media regulation
- ten key principles of democratic media regulation:
  - freedom of the press and other media
  - independent media
  - diversity and pluralism in the media
  - professional and self-regulatory media
  - protecting journalists' sources
  - access to information
  - commitment to transparency and accountability
  - commitment to public debate and discussion
  - availability of local content
  - ensuring that states do not use their advertising power to influence content
- eight key principles of democratic broadcasting regulation:
  - national frameworks for the regulation of broadcasting must be set down in law
  - independent regulation of broadcasting
  - pluralistic broadcasting environment with a three-tier system for broadcasting: public, commercial and community
  - public as opposed to State broadcasting services
  - availability and nature of community broadcasting services
  - equitable, fair and transparent processes for licensing
  - universal access to broadcasting services and equitable access to broadcasting signal distribution and other infrastructure
  - regulating broadcasting content in the public interest

- seven key principles of democratic internet regulation:
  - internet access and affordability
  - freedom of expression and information online
  - freedom of assembly and association online
  - the right to privacy, anonymity, personal data protection and freedom from surveillance online
  - security, stability and resilience of the internet
  - democratic multi-stakeholder internet governance
  - equitable distribution of internet revenues

1 Introduction

Chapter 1 examined a number of international human rights instruments to gain a better understanding of the nature and extent of the right to freedom of expression and grounds for limiting expression, as well as its relationship to freedom of the press and other media. This chapter looks more specifically at the internationally accepted hallmarks of democratic media regulation — in other words, the legal regime that establishes a democratic media environment.

This chapter identifies 18 treaties, conventions, charters, protocols or declarations adopted, either by international bodies (such as the UN, the AU and SADC), or at significant conferences held under the auspices of international bodies (such as the United Nations Education, Scientific and Cultural Organisation (Unesco)) or civil society bodies focusing on the media (for example, Article 19, an international non-governmental organisation (NGO) focusing on press freedom issues).

It is important to note that some of these instruments may be legally binding upon certain countries but most are aspirational in the sense that they set out international best practice on a range of media-related regulatory issues without being legally enforceable.

The 18 instruments — many of which have a particular focus on Africa — deal with, among other things, various aspects of democratic media regulation. Ten key principles of general democratic media regulation, eight key principles of democratic broadcasting regulation and seven key principles of democratic internet regulation have been identified from these instruments.

The principles can be used as a yardstick to assess an individual country's commitment to democratic media, broadcasting and internet regulation and, more broadly, its commitment to the underlying principle of freedom of expression. Bear this in mind when reading the chapters that deal with the media laws of specific southern African countries and when evaluating their level of commitment to,

and compliance with, international best practice standards for democratic media, broadcasting and internet regulation.

2 Key instruments that establish democratic media, broadcasting and internet regulatory principles

This section examines eighteen treaties, conventions, charters, protocols or declarations to determine what are considered to be international best practice in respect of democratic media, broadcasting and internet regulatory environments.

As mentioned previously, some of these have been developed by international bodies established by treaty, such as the UN, the AU and SADC, and some have been established by NGOs with long-standing records of work in the areas of freedom of expression and freedom of the media.

Since this handbook is aimed at journalists and other media practitioners as opposed to lawyers, the instruments, charters, protocols or declarations are not set out in full, however, the key media-related provisions are detailed under the various principle headings.

It is also important to note that the instruments, charters, protocols, declarations and resolutions discussed are a selection of key documents relevant to democratic media, broadcasting and internet regulation made by bodies of international standing, with particular (but not exclusive) reference to Africa, including southern Africa.

The selected instruments, charters, protocols, declarations and resolutions are listed below in alphabetical order:

- **The Access to the Airwaves Principles:**[1] Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation is a set of standards on how to promote and protect independent broadcasting while ensuring that broadcasting serves the interests of the public. The principles were developed in 2002 by Article 19, an international NGO working on freedom of expression matters as part of its International Standards series.

- **The African Charter on Broadcasting:**[2] The African Charter on Broadcasting was adopted by participants at a 2001 Unesco conference to mark the 10th anniversary of the Windhoek Declaration. While the Windhoek Declaration focuses mainly on print media, the African Charter on Broadcasting focuses on broadcast media.

- **The African Declaration on Internet Rights and Freedoms:**[3] The African Declaration on Internet Rights and Freedoms was developed by members of the African Declaration group in 2015. This is a Pan-African NGO initiative to

promote human rights standards and principles of openness in internet policy formulation on the continent.

- **The African Democracy Charter:**[4] The African Charter on Democracy, Elections and Governance was adopted by the African Union (AU) in 2007 and came into force in 2012.

- **African Principles on Freedom of Expression and Access to Information Declaration:**[5] The original Declaration of Principles on Freedom of Expression in Africa was adopted in 2002 by the African Commission on Human and Peoples' Rights, a body established under the auspices of the AU. The ACHPR updated and replaced it in 2019 with the Declaration of Principles on Freedom of Expression and Access to Information in Africa.

- **The Agenda for Sustainable Development:**[6] The 2030 Agenda for Sustainable Development was adopted by heads of state at a UN summit in 2016 together with their corollary. It provides more information on the requirements of each of the UN's 17 Sustainable Development Goals.

- **AU Declaration on Internet Governance:**[7] The Declaration on Internet Governance and Development of Africa's Digital Economy was adopted by the Heads of State and Government of the African Union in 2018. It is not a treaty, capable of being signed or ratified and is, therefore, not legally binding on African states. Nevertheless, the Declaration on Internet Governance contains some important statements on internet governance, even if these are only aspirational.

- **The Dakar Declaration:**[8] The Dakar Declaration was adopted in Senegal in 2005 at a Unesco-sponsored World Press Freedom Day conference.

- **The Declaration of Table Mountain:**[9] The Declaration of Table Mountain was adopted in 2007 by the World Association of Newspapers and the World Editors Forum. It contains a number of important statements on African media issues made by a civil society forum of newspaper publishers and editors.

- **The Johannesburg Principles:**[10] The Johannesburg Principles on National Security, Freedom of Expression and Access to Information were adopted in October 1995 by a panel of experts in international law, national security and human rights. The panel was convened by Article 19, the International Centre against Censorship and the University of the Witwatersrand's Centre for Applied Legal Studies. The Johannesburg Principles have been endorsed by the UN Committee on Human Rights and the UN Special Rapporteur on Freedom of Opinion and Expression.

- **Malabo Convention:**[11] The AU Convention on Cyber Security and Personal Data Protection (known as the Malabo Convention) was adopted by the heads of state of the African Union in 2014. It comes into force when 15 countries have ratified it. At the time of writing this chapter, only four countries had done so. This means it is not yet legally binding and so its status is aspirational in nature.

- **Resolution 169:**[12] Resolution 169 on Repealing Criminal Defamation Laws in Africa was adopted by the African Commission on Human and Peoples' Rights (ACHPR) in 2010.
- **Resolution 362:**[13] Resolution 362 on the Right to Freedom of Information and Expression on the Internet in Africa was adopted by the African Commission on Human and Peoples' Rights (ACHPR) in 2016.
- **The SADC Protocol:**[14] The Southern African Development Community Protocol on Culture, Information and Sport was adopted in 2001 and came into force in 2006.
- **Unesco's Internet Universality Indicators:**[15] In 2019 Unesco published a document entitled 'Internet Universality Indicators: A Framework for Assessing Internet Development' which contains a set of 303 indicators divided into six categories: The ROAM-X Principles (Rights, Openness, Accessibility, Multi-stakeholder participation and Cross-cutting).
- **Unesco's Media Development Indicators:**[16] Unesco's International Programme for the Development of Communications in 2008 published a document entitled 'Media Development Indicators: A Framework for Assessing Media Development.'
- **The Windhoek Declaration:**[17] The Windhoek Declaration on Promoting an Independent and Pluralistic Press was adopted in 1991 by participants at a UN-Unesco seminar on promoting an independent and pluralistic African press. It was endorsed by Unesco's General Conference thereafter. The Windhoek Declaration is an important international statement of principle on press freedom and the day of its adoption, 3 May, is now Annual World Press Freedom Day.
- **The WSIS Geneva Principles:**[18] The WSIS Geneva Principles were adopted in Geneva in 2003 at the World Summit on the Information Society (WSIS), held by the UN in conjunction with the International Telecommunications Union. While the WSIS Geneva Principles cover mainly issues concerning universal access to information and communication technologies (ICTs), they also contain some important statements on the media more generally.

3 Ten key principles of democratic media regulation

3.1 Principle 1: Freedom of the press and other media

3.1.1 Relevant provisions in international instruments

- Article 2(10) of the African Democracy Charter states, in its relevant part, that

one of its objectives is to 'Promote the establishment of the necessary conditions to foster … freedom of the press.'

- Article 27(8) of the African Democracy Charter provides, in its relevant part, that 'In order to advance political, economic and social governance, states shall commit themselves to … Promoting freedom of expression, in particular freedom of the press.'
- Principle 1.2 of the African Principles of Freedom of Expression and Access to Information Declaration states that 'States … shall create an enabling environment for the exercise of freedom of expression and access to information.'
- Principle 5 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'The exercise of the rights to freedom of expression and access to information shall be protected from interference both online and off-line …'
- Principle 10 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'Freedom of expression, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art or through any other form of communication or medium, including across frontiers, is a fundamental and in a reasonable human right and an indispensable component of democracy.'
- Principle 12.2 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'Any registration system for media shall be for administrative purposes only, and shall not impose excessive fees or other restrictions on the media.'
- Principle 19.1 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'The right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions.'
- The preamble to the AU Declaration on Internet Governance recognises that the right 'to freedom of expression and access to information (one and offline), and human and peoples' rights … must be upheld online as well as offline.'
- The Declaration of Table Mountain declares, among other things, that 'African states must recognise the indivisibility of press freedom and their responsibility to respect their commitments to African and international protocols upholding the freedom … and safety of the press.'
- The Declaration of Table Mountain identifies 'as the greatest scourge of press freedom on the continent the continued implementation of 'insult laws', which outlaw criticism of politicians and those in authority and criminal defamation legislation, both of which are used indiscriminately in the vast majority of African states that maintain them and which have as their prime motive the 'locking up of information.'
- Resolution 169 calls on states parties to the AU 'to repeal criminal defamation

laws or insult laws which impede freedom of speech.'

- Clause 1 of Resolution 362 called on states parties to the AU to 'take legislative and other measures to guarantee, respect and protect citizen's right to freedom of … expression through access to internet services.'
- Article 20 of the SADC Protocol requires SADC states to 'take necessary measures to ensure the freedom … of the media.'
- Unesco's Internet Development Indicators at (RB.1) asks: 'Is freedom of expression guaranteed in law, respected in practice, and widely exercised?'
- The Unesco Media Development Indicators provide that states must guarantee freedom of expression in law and must respect it in practice. This requires, among other things:
  - national laws or constitutional guarantees on freedom of expression
  - bodies that guarantee the concrete application of the right to freedom of expression
- Article 1 of the Windhoek Declaration states that 'the establishment, maintenance and fostering of [a] … free press is essential to the development and maintenance of democracy in a nation, and for economic development.'
- Principle 55 of the WSIS Geneva Principles states, in its relevant part, that 'the principle … of freedom of the press … [is] essential to the Information Society.'

3.1.2 Summary

- A free press is essential for democracy.
- A free press is essential for economic and social development.
- A free press is essential to the information society.
- Freedom of expression and access to information must be upheld online as well as offline.
- Governments must uphold the freedom of the press and the safety of journalists.
- States must have national laws or constitutions guaranteeing the right to freedom of expression and must ensure that this is respected in practice.
- States cannot impose undue restrictions on the practice of journalism or on media operations, including through onerous registration processes.
- Criminal defamation, sedition, insult and false news laws impede freedom of speech and ought to be repealed.

3.1.3 Comment

- There is widespread international recognition that freedom of the press has tangible benefits for society and that real economic and social development, or democracy, is not possible without it.
- Also important is recognition of the need for legal, particularly constitutional, guarantees of freedom of expression (on and offline) and the need to repeal laws such as criminal defamation, sedition, insult, false news and media registration laws which impede media freedom.

3.2 Principle 2: An independent media

3.2.1 Relevant provisions in international instruments

- Article 1 of the Windhoek Declaration states that 'the establishment, maintenance and fostering of an independent … press is essential to the development and maintenance of democracy in a nation, and for economic development.'
- In article 2 of the Windhoek Declaration, an 'independent press' is defined as 'a press independent from governmental, political or economic control or from control of materials and infrastructure essential for the production and dissemination of newspapers, magazines and periodicals.'
- In article 17(a) of the SADC Protocol, SADC members agreed 'to cooperate in the area of information in order to attain … Cooperation and collaboration in the promotion, establishment and growth of independent media …'
- Article 20 of the SADC Protocol requires SADC states to 'take necessary measures to ensure the development of media that are editorially independent'.
- Article 7 of Part I of the African Charter on Broadcasting states that 'States should promote an economic environment that facilitates the development of independent production and diversity in broadcasting.'
- Principle 12.1 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall guarantee the right to establish various forms of independent media, including print, broadcast and online media.'
- Principle 12.3 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall develop regulatory environments that encourage media owners and media practitioners to reach agreements to guarantee editorial independence and prevent commercial and other considerations from influencing media content.'
- Principle 55 of the WSIS Geneva Principles states, in its relevant part, that 'the principle … of independence … of media … [is] essential to the Information Society.'

- The Dakar Declaration calls on member states of Unesco to 'create an enabling environment in which an independent … media sector can flourish.'
- The Declaration of Table Mountain declares, among other things, that 'African states must recognise the indivisibility of press freedom and their responsibility to respect their commitments to African and international protocols upholding the … independence … of the press.'

3.2.2 Summary

- Independence means being free from governmental, political and economic control or commercial interference. In other words, it means having editorial independence.
- An independent media is essential for democracy.
- An independent media is essential for economic development.
- An independent media is essential for the information society.
- Governments, media owners and publishers must act to secure the independence of the media.
- In respect of the broadcast media, independent production is an important aspect of independence.
- Media published by public authorities must be adequately protected against undue political interference.

3.2.3 Comment

- There is widespread international recognition that an independent media has tangible benefits for society and that real economic and social development, or democracy, is not possible without it.
- Another noteworthy aspect is that independence does not only mean independence from governmental or political interference, but also independence from commercial interference, such as pressure from advertisers or owners of media companies to report on an issue in a particular way. Commercial interference is a problem in developed countries and is likely to be even more of a problem in developing countries that have much smaller advertising pools.
- The international community has identified that media distributed by public authorities (for example, public broadcasters) needs particular protection against political interference.

3.3 Principle 3: Diversity and pluralism in the media

3.3.1 Relevant provisions in international instruments

- Article 1 of the Windhoek Declaration states that 'the establishment, maintenance and fostering of [a] … pluralistic … press is essential to the development and maintenance of democracy in a nation, and for economic development.'
- Article 2 of the Windhoek Declaration defines a 'pluralistic press' as 'the end of monopolies of any kind and the existence of the greatest possible number of newspapers, magazines and periodicals reflecting the widest possible range of opinion within the community.'
- Article 17(d) of the SADC Protocol requires member states to agree to cooperate in the area of information by 'taking positive measures to narrow the information gap between the rural and urban areas by increasing the coverage of the mass media, whether private, public or community-based.'
- In article 18(4) of the SADC Protocol, member states agree 'to create political and economic environments conducive to the growth of pluralistic media.'
- Principle 11.1 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'State or private media monopoly over print, broadcast and online media is not compatible with the right to freedom of expression.'
- Principle 11.3 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'States shall take positive measures to promote a diverse and pluralistic media …'
- Principle 55 of the WSIS Geneva Principles states, in its relevant part, that 'the principle … of pluralism and diversity of media … [is] essential to the Information Society … Diversity of media ownership should be encouraged, in conformity with national law …'
- The Dakar Declaration calls on member states of Unesco to 'create an enabling environment in which [a] … pluralistic … media sector can flourish.'

3.3.2 Summary

- A diverse and pluralistic media environment is one in which there are no monopolies and in which there is a variety of media (print and electronic) reflecting the widest possible range of opinions.
- A diverse and pluralistic media environment is essential for democracy.
- A diverse and pluralistic media environment is essential for economic development.
- A diverse and pluralistic media environment provides a range of media options to both urban and rural people.

- Governments must act to ensure pluralistic media environments and broadcasting regulatory regimes should provide for a diversity of broadcasting services.
- Governments must pass cross-ownership legislation to avoid market dominance by a single player across different media platforms.
- Avoid undue concentration of media ownership without damaging development of the media sector as a whole.

3.3.3 Comment

- There is widespread international recognition that a pluralistic media has tangible benefits for society and that real economic and social development — or democracy — is not possible without it.
- The international community recognises that diversity is not just a matter of having different types of media available in a country, but also about availability in both rural and urban areas. In addition, it stresses the need for diversity within broadcasting and different categories of broadcasting services (public, commercial and community).
- The international media recognises that diversity of media ownership is crucial to ensuring, not only diversity of services, but also diversity of viewpoints. Consequently, it is important that there are laws to regulate media ownership diversity — that is, laws to prohibit undue media ownership concentration, particularly in respect of cross-ownership (for example, of print and broadcast media). However, this regulation cannot be made in such a way that it damages the development of the media sector as a whole. For example, if a country limits a media company to holding only one or two small media outlets, it might be stifling investment in its media sector unwittingly. Governments need to perform a fine balancing act in this regard; ensuring that media companies can grow sufficiently to encourage investment and growth in the industry as a whole without stifling diversity through allowing the development of media monopolies.

3.4 Principle 4: Professional and self-regulatory media

3.4.1 Relevant provisions in international instruments

- Article 12 of the Windhoek Declaration describes the establishment of independent, representative associations, syndicates or trade unions of journalists and associations of editors and publishers as 'a matter of priority in all the countries in Africa where such bodies do not now exist.'
- Article 13 of the Windhoek Declaration states that national media and labour relations laws of African countries should be drafted so as 'to ensure that representative associations can exist and fulfil their important tasks in defence of press freedom.'

- Article 16(ii) of the Windhoek Declaration calls for detailed research to be done by the international community on 'the training of journalists and managers and the availability of professional training institutions and courses', clearly indicating a concern for the issue.
- Article 5(1) of the SADC Protocol, in its relevant part, requires states to 'cooperate in the research and training of … media practitioners.'
- In article 18(5) of the SADC Protocol member states agree 'to promote specialised training of journalists in the areas of culture and sports to improve the coverage of these.'
- Article 21 of the SADC Protocol provides that 'State Parties shall encourage the establishment or strengthening of codes of ethics to build public confidence and professionalism in the information sub-sector.'
- Principle 23.2 of the Access to the Airwaves Principles provides that 'where an effective self-regulatory system for addressing broadcasting content concerns is in place, an administrative system should not be imposed.'
- Principle 16.1 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'States shall encourage media self-regulation which shall be impartial, expeditious, cost-effective, and promote high standards in the media.'
- Principle 16.2 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'Codes of ethics and conduct shall be developed by the media through transparent and participatory processes and shall be effectively implemented to ensure the observance of the highest standards of professionalism by the media.'
- The Dakar Declaration calls on member states of Unesco to 'create an enabling environment in which [a] … professional media sector can flourish' and calls on media outlets and professional associations to 'commit themselves to fair and professional reporting as well as to put in place mechanisms to promote professional journalism … [and to] commit themselves to ongoing programmes for training for journalists to strengthen professional and ethical standards.'
- Article 27(8) of the African Democracy Charter provides, in its relevant part, that 'In order to advance political, economic and social governance, states shall commit themselves to … fostering a professional media.'

3.4.2 Summary

- A professional media is essential to political, economic and social good governance.
- A professional media is essential to the defence of press freedom.
- A professional media requires independent associations of media owners, publishers and journalists, including trade unions.

- A professional media requires institutions and courses aimed at specialised training for journalists and other media professionals.
- A professional media requires specialist journalists.
- A professional media requires self-regulation through the development and enforcement of codes of ethics and good practice for journalists.
- Administrative (by way of statutory or regulatory provisions enforced by a statutory body) systems of regulation in respect of broadcasting content ought to imposed only where there is no effective self-regulation.

3.4.3 Comment

- It is noteworthy that so many international statements deal with the question of the need for a professional media and state that a professional media is essential to good governance (political, social and economic) and for the defence of press freedom itself.
- Professionalism requires appropriate specialist training and expertise which, in turn, raises the issue of the need for training institutions and courses for journalists.
- Professionalism is also, crucially, an issue of self-identification with professionalisation by the media industry. This industry professionalisation requires two important areas of development:
  - the need for media workers, owners and publishers to form representative industry bodies
  - the need for these bodies to develop self-regulatory standards or codes of ethics and practice.

3.5 Principle 5: Protecting confidentiality of sources

3.5.1 Relevant provisions in international instruments

- Principle 18 of the Johannesburg Principles states that 'Protection of national security may not be used as a reason to compel a journalist to reveal a confidential source.'
- Principle 25.1 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'Journalists and other media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except where disclosure has been ordered by a court after a full and fair public hearing.'
- Principle 25.2 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'The disclosure of sources of information or journalistic material as ordered by a court shall only take place where:

(a) the identity of the source is necessary for the investigation or prosecution of a serious crime or the defence of a person accused of a criminal offence;

(b) the information or similar information leading to the same result cannot be obtained elsewhere;

(c) the public interest in disclosure outweighs the harm to freedom of expression.'

- Principle 25.3 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall not circumvent the protection of confidential sources of information or journalistic material through the conduct of communications surveillance except where such surveillance is ordered by an impartial and independent court and is subject to appropriate safeguards.'

- The Unesco Media Development Indicators provide that journalists must be able to 'protect the confidentiality of their sources without fear of prosecution or harassment.'

3.5.2 Summary

- A journalist should not be forced to reveal the identity of a confidential source or provide confidential journalistic material unless exceptional circumstances relating to public safety or criminal proceedings exist and such disclosure has been ordered by a court.

3.5.3 Comment

- It is extremely significant that international instruments have recognised the need to protect journalists' confidential sources of information. However, the international instruments do not clearly state why this protection is necessary.

- Sources of information are vital for journalists. Without these, journalists have little, if any, real role to play. Sometimes journalists receive sensitive, perhaps explosive, information on political issues of the day. Journalists have to be able to reassure a source that his or her identity will be kept confidential; otherwise people with information that ought to be reported in the media will not come forward and speak to journalists for fear of reprisals.

- The international principle is reasonable because it is not absolute. A court must be involved where the public interest requires a journalist's confidential source to be revealed. The revelation must be necessary in relation to matters of serious public concern, such as a criminal investigation.

- Importantly, international instruments now also recognize the potential of surveillance, including of communications, to undermine the right of journalists to protect confidential sources of information.

3.6 Principle 6: Access to information

3.6.1 Relevant provisions in international instruments

- Article 1 of Part I of the African Charter on Broadcasting states that the 'legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation including … the free flow of information and ideas …'
- Paragraph 2 of principle 3 of the African Declaration on Internet Rights and Freedoms provides that 'Everyone has a right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds through the internet and digital technologies and regardless of frontiers.'
- Principle 4 of the African Declaration on Internet Rights and Freedoms provides that 'Everyone has the right to access information on the internet. All information, including scientific and social research, produced with the support of public funds, should be freely available to all, including on the internet.'
- The preamble to the AU Declaration on Internet Governance recognises that the right 'to … access to information (on- and offline) and human and peoples' rights … must be upheld on- as well as offline.'
- Part of principle 11 of the Johannesburg Principles states that 'Everyone has the right to obtain information from public authorities, including information relating to national security.'
- Principle 13 of the Johannesburg Principles states that 'In all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.'
- Part of Principle 14 of the Johannesburg Principles states that 'The state is obliged to adopt appropriate measures to give effect to the right to obtain information.'
- Article (2)(d) of the SADC Protocol requires states to be guided by the general principle of commitment to the right of access to information.
- Principle 26.1 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'The right of access to information shall be guaranteed by law in accordance with the following principles:

  (a) Every person has the right to access information held by public bodies … expeditiously and inexpensively.

  (b) Every person has the right to access information of private bodies that may assist in exercise or protection of any right expeditiously and inexpensively.'

- Principle 27 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'Access to information laws shall take precedence over any other laws that prohibit or restrict the disclosure of information.'
- Principle 28 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'The the right of access to information shall be guided by the principle of maximum disclosure ... [and] may only be limited by narrowly defined exemptions, which shall be provided by law and shall comply strictly with international human rights law and standards.'
- Principle 35.1 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'No person shall be subject to civil, criminal, administrative or employment-related or other sanctions or harm, for releasing information on wrongdoing or which discloses a serious threat to health, safety or the environment, or whose disclosure is in the public interest, in honest belief that such information is substantially true.'
- Principle 55 of the WSIS Geneva Principles states, in its relevant part, that 'the principle ... of ... freedom of information ... [is] essential to the Information Society. Freedom to seek, receive, impart and use information for the creation, accumulation and dissemination of knowledge are important to the Information Society.'
- The Dakar Declaration calls on member states of Unesco to 'ensure that government bodies respect the principles of ... public access to information in their operations.'
- The Dakar Declaration calls on member states of Unesco 'to provide for comprehensive legal guarantees for the right to access information recognising the right to access information held by all public bodies, and requiring them to publish key categories of information and to introduce effective systems of record management ...'
- Article 2(10) of the African Democracy Charter sets out certain of the African Democracy Charter's objectives, the relevant part of which states that one of its objectives is to 'Promote the establishment of the necessary conditions to foster ... access to information ...'
- Clause 1 of Resolution 632 called on states parties to the AU to 'take legislative and other measures to guarantee, respect and protect citizen's right to freedom of information ... through access to internet services.'
- Unesco's Internet Development Indicators at (RC.1) asks: 'Is the right of access to information guaranteed in law and respected in practice?'

3.6.2 Summary

- Access to information (online and off-line) is essential to the free flow of information and ideas.

- Freedom to receive information (online and off-line) is essential to the information society.
- Public bodies hold information as custodians of the public good; therefore everyone has the right of access to information held by public bodies.
- Information produced with the support of public funds should be freely available to all, including on the internet.
- Information held by private bodies should be available where the information is required for the exercise or protection of any right.
- Governments must foster access to information by:
  - respecting the principle of public access to information
  - passing laws formally recognising the right to access information held by public and private bodies
  - publishing categories of information available
  - managing records effectively.
- National laws can impose limitations on the right to access information but these must be narrowly crafted in line with international human rights.
- No person can be subject to sanctions for disclosing information in the public interest.

3.6.3 Comment

The importance of the right of access to information is becoming widely recognized as being of vital importance in the information age. Many countries have elevated this to a constitutional right and many more have passed laws containing detailed provisions in support of the right of access to information held by the state and private bodies in certain circumstances, including in the public interest.

3.7 Principle 7: Commitment to transparency and accountability

3.7.1 Relevant provisions in international instruments

- The Dakar Declaration calls on member states of Unesco to 'ensure that government bodies respect the principles of transparency [and] accountability … in their operations'.
- The Dakar Declaration calls on member states of Unesco to 'respect the functioning of the news media as an essential factor in good governance, vital to increasing both transparency and accountability in decision-making processes and to communicating the principles of good governance to the citizenry'.

- Article 2(10) of the African Democracy Charter sets out certain objectives, the relevant part of which states that one of its objectives is to promote the establishment of the necessary conditions to foster transparency and accountability in the management of public affairs.
- Article 3(8) of the African Democracy Charter requires states to implement the charter in accordance with the principle of transparency and fairness in the management of public affairs.
- Article 12(1) of the African Democracy Charter requires states to promote good governance by ensuring transparent and accountable administration.
- Article 32(1) of the African Democracy Charter requires states to strive to institutionalise good political governance through accountable, efficient and effective public administration.
- Article 33(2) of the African Democracy Charter requires states to institutionalise good economic and corporate governance through promoting transparency in public finance management.
- The preamble to the African Principles on Freedom of Expression and Access to Information Declaration states, among other things, that it recognizes 'the role of open government data in fostering transparency, efficiency and innovation'.

3.7.2 Summary

- Transparency and accountability promote good governance, whether political, economic or corporate.
- The news media is essential for good governance.
- The news media is vital to increasing transparency and accountability in decision-making processes.
- The news media is vital to communicating the principles of good governance to the citizenry.
- Governments must respect the functioning of the news media in relation to transparency and accountability.
- Governments must foster the principles of transparency and accountability in their operations and in public affairs generally, including through open data.

3.7.3 Comment

- It is noteworthy that the international instruments, declarations and statements deal with the issue of transparency and accountability by linking the relationship between the role of the news media and the transparency and accountability of government.
- Governments are notorious for proclaiming a commitment to accountability

and transparency while denying the news media appropriate scope within which to operate. A democratic media regulatory environment is one which recognises that the news media is essential to a government's ability to communicate with the public. Unless the news media operates in an environment in which it (and the public's right to transparency) is respected, real accountability by government to the public for its actions is all but impossible. This is because being transparent means that the public is able to see what government is doing and know why it is doing it. The public is generally informed about government decisions, actions and programmes through the media. Thus, if the media is shunned and shut out by government or, worse, actively prevented from obtaining or publicising information about governmental activities, the public is similarly shunned, shut out and prevented from being informed. Once the public is unable to know what government is doing, it becomes difficult for the public to hold government to account for its actions.

- The relationship of trust, mandate, representation and responsibility that ought to exist between the government and the governed is mediated by the media. The media acts as a public information valve, reporting on government's activities and actions and reflecting public sentiments and opinions thereon back to government.

3.8 Principle 8: Commitment to public debate and discussion

3.8.1 Relevant provisions in international instruments

- Article 2(10) of the African Democracy Charter sets out certain of the African Democracy Charter's objectives, the relevant part of which states that one of its objectives is to 'Promote the establishment of the necessary conditions to foster citizen participation … in the management of public affairs.'

- Article 3(7) of the African Democracy Charter requires states to implement the charter in accordance with the principle of 'Effective participation of citizens in democratic and development processes and in governance of public affairs.'

- Article 13 of the African Democracy Charter provides, in its relevant part, that states 'shall take measures to ensure and maintain political and social dialogue, as well as public trust … between political leaders and the people, in order to consolidate democracy and peace.'

- Article 27(2) of the African Democracy Charter requires states to commit to, among other things, fostering popular participation.

- Article 28 of the African Democracy Charter requires states to ensure and promote 'dialogue between government, civil society and [the] private sector.'

- Article 30 of the African Democracy Charter requires states to 'promote citizen participation in the development process through appropriate structures.'

3.8.2 Summary

- Public trust requires public participation.
- Public participation is essential for democracy, governance, peace and development.
- Governments must foster public dialogue, including between government, civil society and the private sector on political and social issues.
- Governments must foster public participation in public affairs and administration, as well as in democratic and development processes.

3.8.3 Comment

- It is accepted that public debate and discussion are essential for public participation, which is itself essential to democracy and social and economic development. The media is the key vehicle through which society conducts its 'public discussions.'
- Another important way of fostering citizen participation in these public debates is to ensure that government is able to interact with the public electronically. The increasing availability of the internet and mobile technology allows for 'citizen-journalists' to play an increasingly important role in public debate and discussion.

3.9 Principle 9: Availability of local content

3.9.1 Relevant provisions in international instruments

- Principle 11.3 of African Principles on Freedom of Expression and Access to Information Declaration states that 'States shall take positive measures ... which shall facilitate: ... the promotion of local and African languages, content and voices.'
- Article 15 of the AU Declaration on Internet Governance requires member states to promote local content.
- Article 17(c) of the SADC Protocol requires member states to agree to cooperate in the area of information in order to ensure the development and promotion of local culture by increasing local content in the media such as magazines, radio, television, video, film and new information technologies.
- Article 17(e) of the SADC Protocol requires member states to agree to cooperate in the area of information in order to ensure the encouragement of the use of indigenous languages in the mass media as vehicles of promoting local, national and regional inter-communication.
- Principle 53 of the WSIS Geneva Principles states, in its relevant part, that 'The creation, dissemination and preservation of content in diverse languages and

formats must be accorded high priority in building an inclusive Information Society … the development of local content suited to domestic or regional needs will encourage social and economic development and will stimulate participation of all stakeholders, including people living in rural, remote and marginal areas.'

3.9.2 Summary

- Availability of content in a variety of African languages is essential for building an inclusive information society.
- Local content is essential to the development of local culture.
- Developing local content encourages social and economic development, including in rural areas.
- Local content should be available in all media: print, broadcasting and online.

3.9.3 Comment

- While Africa has many different languages and cultures, there is often insufficient reflection of this in the print and electronic media. All too often media is available largely (although not exclusively) in colonial languages, such as English, French, Portuguese or German. Encouraging the use of indigenous local languages is important to opening up conversations in societies and ensuring that marginalised people who can speak only these languages are included in public debate and discussion. The media must reflect a society back to itself, and it cannot do this effectively if large numbers of people are 'silenced' in the media because their languages are not used.
- Owing to widespread poverty and other developmental challenges, southern African governments often do not prioritise the development of local cultures.

3.10 Principle 10: Ensuring states do not use their advertising power to influence content

3.10.1 Relevant provisions in international instruments

- Principle 24.2 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall ensure that the allocation of funds for public advertising is transparent and subject to public accountability, and they shall not abuse their power over the placement of public advertising.'
- The Dakar Declaration provides that it 'condemns all forms of repression of African media that allows for … the use of … devices such as withholding advertising.'
- Principle 28.1 of the Access to the Airwaves Principles provides, in its relevant part, that 'Access to State resources, including the placement of State

advertisements, should always be provided in a fair and non-discriminatory manner …'

- The Declaration of Table Mountain recognises the 'deliberate exclusion of certain newspapers from State-advertising placement.'

3.10.2 Summary

State advertising is the lifeblood of many media outlets and this should not be abused by governments to skew editorial content.

3.10.3 Comment

- This principle is of critical practical importance to a range of fundamental principles, including freedom of the press and independence of the media.
- This principle recognises that in many poor and underdeveloped countries in Africa, particularly those with small or weak private sectors, states wield enormous influence due to their advertising spend capabilities.
- If a newspaper or broadcaster is dependent on state advertising to remain operational, it might do almost anything to secure the continuation of such revenue streams to ensure its economic survival.
- The media must be protected from undue content influence that may result from the State's advertising power.
- The state should not be entitled to use its advertising spend to reward compliant media or to punish what it sees as hostile media. If this happens, freedom of the press is undermined, the public's right to be informed is jeopardised and society as a whole risks moving away from democracy. Sadly, this is a frequent occurrence in a number of southern African countries.

4 Eight key principles of democratic broadcasting regulation

The previous section examined a range of international instruments in order to understand the ten key principles of democratic media regulation. These looked at the media generally: print, broadcast and online media. This section discusses certain of the international instruments, charters, protocols, declarations and resolutions that focus exclusively on the broadcast media in order to discern eight internationally-recognised hallmarks of democratic broadcasting regulation.

4.1 Principle 1: National frameworks for the regulation of broadcasting must be set down in law

4.1.1 Relevant provisions in international instruments

- Article 1 of the African Charter on Broadcasting provides, in its relevant part, that 'The legal framework for broadcasting must include a clear statement of the principles underpinning broadcast regulation, including promoting respect for freedom of expression … and the free flow of information and ideas.'
- Principle 14 of the Access to the Airwaves Principles provides, in its relevant part, that 'The powers and responsibilities of regulatory bodies, for example in relation to licensing or complaints, should be set out clearly in the legislation which establishes them … These powers and responsibilities should be framed in such a way that regulatory bodies have some scope to ensure that the broadcasting sector functions in a fair, pluralistic and smooth manner and to set standards and rules in their areas of competence …'
- Principle 17.1 of the Access to the Airwaves Principles provides, in its relevant part, that 'The framework for funding [of regulatory bodies] should be set out clearly in law …'

4.1.2 Summary

Broadcasting must be regulated in accordance with legislation that sets out:

- principles underpinning broadcasting regulation, including freedom of expression
- powers and duties of broadcasting regulatory bodies, which are necessary to ensure that the broadcasting sector is fair and pluralistic
- the funding framework for broadcasting regulatory bodies.

4.1.3 Comment

This principle is important as certain countries still do not have operational broadcasting laws and, instead, as a practical matter, allocate broadcasting as an area of responsibility to a particular ministry, such as internal affairs, communications or information. This means that the executive dominates broadcasting matters and 'regulates' broadcasting in accordance with the short-term interests of the government of the day, rather than in the long-term public interest.

4.2 Principle 2: Independent regulation of broadcasting

4.2.1 Relevant provisions in international instruments

- Article 2 of Part I of the African Charter on Broadcasting states that 'All formal powers in the areas of broadcast … regulation should be exercised by public

authorities which are protected against interference, particularly of a political or economic nature, by, among other things, an appointments process for members which is open, transparent, involves the participation of civil society and is not controlled by any political party.'

- Principle 14.3 of the African Principles on Freedom of Expression and Access to Information Declaration states 'States shall establish an independent regulatory body to issue broadcasting licences and to oversee the observance of licence conditions.'
- Principle 17.1 of the African Principles on Freedom of Expression and Access to Information Declaration states 'A public regulatory authority that exercises powers in the areas of broadcast... infrastructure shall be independent and adequately protected against interference of a political, commercial or other nature.'
- Principle 17.2 of the African Principles on Freedom of Expression and Access to Information Declaration states 'The appointment process the members of the public regulatory body overseeing broadcast... infrastructure shall be independent and adequately protected against interference. The process shall be open, transparent and involve the participation of relevant stakeholders.'
- Principle 17.3 of the African Principles on Freedom of Expression and Access to Information Declaration states 'Any public regulatory authority that exercises powers in broadcast... infrastructure shall be accountable to the public.'
- Principle 17.5 of the African Principles on Freedom of Expression and Access to Information Declaration states 'The powers of regulatory bodies shall be administrative in nature and shall not seek to usurp the role of the courts.'
- The Dakar Declaration calls on member states of Unesco to 'guarantee the independence of regulatory bodies for broadcasting.'
- Principle 11 of the Access to the Airwaves Principles provides, in its relevant part, that 'The independence of regulatory bodies ... should be specifically and explicitly provided for in the legislation which establishes them and, if possible, also in the constitution.'
- Principle 12 of the Access to the Airwaves Principles provides, in its relevant part, that 'Regulatory bodies should be required to ... act in the public interest at all times.'
- Principle 13.2 of the Access to the Airwaves Principles provides, in its relevant part, that 'Only individuals who have relevant expertise and/or experience should be eligible for appointment [to governing bodies of public entities which exercise powers in the areas of broadcast regulation]. Membership overall should be required to be reasonably representative of society as a whole.'
- Principle 17.2 of the Access to the Airwaves Principles provides, in its relevant

part, that 'Funding processes should never be used to influence decision-making by regulatory bodies.'

4.2.2 Summary

- Broadcasting must be regulated (including the granting and enforcement of broadcasting licences) by independent public authorities.
- The independence of the broadcasting regulator must be guaranteed in national legislation and, if possible, in the constitution.
- An independent public broadcasting authority is one which:
  - the members thereof are appointed in an open and transparent process characterised by public participation and which is not controlled by a single political party
  - is formally accountable to the public through a multiparty body such as a parliament
  - acts in the public interest
  - is not subject to any political or commercial interference
  - is not influenced by funding processes.
- Governments must protect the independence of broadcasting regulatory bodies.
- The members of an independent broadcasting authority must have relevant expertise and/or experience and must be reasonably representative of society as a whole.

4.2.3 Comment

- It is noteworthy that there are many African-focused international statements on the importance of the independent regulation of broadcasting. This is no doubt due to recognition of the role that broadcasting plays in poor, mainly rural, countries with high rates of illiteracy. Newspapers are often not available outside urban areas and, when they are available, they are often relatively expensive and not published in local languages. Furthermore, the availability and cost of print media is irrelevant if the audience cannot read. Broadcasting, particularly radio, is often the largest means of mass communication in Africa due to the problems of poverty, illiteracy and lack of print media distribution outside urban areas.
- Owing to the centrality of broadcasting in assisting African people to access news and current affairs, it is recognised that political control and manipulation of broadcasting services can severely limit citizens' rights, such as the rights to press freedom, an independent media and access to information.
- Independent broadcasting regulation is therefore in the public interest.

- It is noteworthy that an independent broadcasting authority is defined as one that is appointed by, and accountable to, a multiparty body such as a parliament, with public participation in the nominations process. This is important in guarding against the control (and abuse) of the broadcast media by a single (ruling) political party.

4.3 Principle 3: Pluralistic broadcasting environment that provides for a three-tier system for broadcasting: public, commercial and community services

4.3.1 Relevant provisions in international instruments

- Article1(1) of Part I of the African Charter on Broadcasting provides, in its relevant part, that 'The legal framework for broadcasting must include a clear statement of the principles underpinning broadcast regulation, including … diversity … as well as a three-tier system for broadcasting: public service, commercial and community.'

- Principle 14.1 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall promote a diverse private media as vehicles for the development and dissemination of a variety of content in the public interest.'

- Principle 14.2 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall encourage broadcast … media to publicly disclose all forms of media ownership and any subsequent acquisitions or change in ownership.'

- Principle 14.6 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall encourage private broadcasting services to promote interoperability of platforms and facilities.'

- Principle 20.1 of the Access to the Airwaves Principles provides in its relevant part that 'Restrictions may be imposed on the extent of foreign ownership and control over broadcasters but these restrictions should take into account the need for the broadcasting sector as a whole to develop and for broadcasting services to be economically viable.'

- The Unesco Media Development Indicators provide that states must take positive measures to promote a pluralistic media. States should pass 'specific legislation on cross-ownership within broadcasting and between broadcasting and other media sectors to prevent market dominance.'

4.3.2 Summary

- A diverse broadcasting environment is characterised by three tiers of broadcasters: public, private and community broadcasters.

- There must be an equitable allocation of frequencies between the different types of broadcasters.
- States must pass laws to prevent market dominance, particularly in the area of cross-media ownership. States may pass laws regulating the extent of foreign ownership, but these must take into account the developmental needs of the sector and the requirements of economic viability.

4.3.3 Comment

Regulating media ownership and control is a critical aspect of ensuring plurality of voices in the media. Too often a sector is judged by how many media outlets there are, rather than how many different voices or points of view are being put across. The aim of cross-media regulation is to prevent a particular media grouping from gaining market dominance over a range of media platforms (newspapers, radio and/or television) with a concomitant detrimental effect on the diversity of views and voices available to the public.

4.4 Principle 4: Public as opposed to state broadcasting services

4.4.1 Relevant provisions in international instruments

- Article 1 of Part I of the African Charter on Broadcasting states that the 'legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation including … a three-tier system for broadcasting: public service, commercial and community.'
- Article 1 of Part II of the African Charter on Broadcasting states that 'All state and government controlled broadcasters should be transformed into public service broadcasters, that are accountable to all strata of the people as represented by an independent board and that serve the overall public interest, avoiding one-sided reporting and programming in regard to religion, political belief, culture, race and gender.'
- Article 2 of Part II of the African Charter on Broadcasting states, in its relevant part, that 'Public service broadcasters should, like broadcasting … regulators, be governed by bodies which are protected from interference.'
- Article 3 of Part II of the African Charter on Broadcasting states, in its relevant part, that 'The public service mandate of public service broadcasters should be clearly defined.'
- Article 4 of Part II of the African Charter on Broadcasting states, in its relevant part, that 'The editorial independence of public service broadcasters should be guaranteed.'
- Article 5 of Part II of the African Charter on Broadcasting states, in its relevant

part, that 'Public service broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets.'

- Article 6 of Part II the African Charter on Broadcasting states, in its relevant part, that 'Without detracting from editorial control over news and current affairs content and in order to promote the development of independent productions and to enhance diversity in programming, public service broadcasters should be required to broadcast minimum quotas of material by independent producers.'
- Principle 13 of the African Principles on Freedom of Expression and Access to Information Declaration sets out, in its relevant part, principles governing public service broadcasters, which include:
  - Public broadcasters should be governed by a transparently constituted and diverse board which is protected from interference, particularly of a political or commercial nature.
  - The senior management of public service broadcasters shall be appointed by and accountable to the board.
  - Editorial independence of public service broadcasters shall be guaranteed.
  - Public broadcasters should be adequately funded in a manner that protects them from undue interference.
  - The public service mandate of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.
- The Dakar Declaration calls on member states of Unesco 'to transform State and government media into public service media and to guarantee their editorial and financial independence.'
- Principle 35.1 of the Access to the Airwaves Principles provides, in its relevant part, that 'Public broadcasters should be overseen by an independent body, such as a Board of Governors.' In particular, independence should be guaranteed and protected in law:
  - specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution
  - by clear legislative statement of goals, powers and responsibilities
  - through the rules relating to the appointment of members
  - through formal accountability to the public via a multiparty body
  - by respect for editorial independence
  - in funding arrangements.
- Principle 35.2 of the Access to the Airwaves Principles provides, in its relevant

part, that 'The governing body should be responsible for appointing senior management of public broadcasters and management should be accountable only to this body which, in turn, should be accountable to an elected multi-party body'.

- Principle 35.3 of the Access to the Airwaves Principles provides, in its relevant part, that 'The independent governing body should not interfere in day to day decision-making, particularly in relation to broadcast content, should respect the principle of editorial independence and should never impose censorship'.
- Principle 37 of the Access to the Airwaves Principles provides, in its relevant part, that 'Public broadcasters should be required to promote diversity in broadcasting in the overall public interest by providing a wide range of informational, educational, cultural and entertainment programming'. Their remit should include, among other things, a service that:
  - provides quality independent programming that contributes to a plurality of opinions and an informed public
  - includes comprehensive news and current affairs programming, which is impartial, accurate and balanced
  - provides a range of broadcast material that strikes a balance between programming of wide appeal and specialised programmes that serve the needs of different audiences
  - is universally accessible and serves all the people and regions of the country, including minority groups
  - provides educational programmes and programmes directed towards children
  - promotes local programme production, including through minimum quotas for original productions and material produced by independent producers.

4.4.2 Summary

- State broadcasters must be transformed into public broadcasters that serve the public.
- Public broadcasting is one of the three tiers of broadcasting services, the others being commercial and community broadcasting.
- A public broadcaster must have a clearly defined public service mandate including:
  - providing quality, independent programming that contributes to a plurality of opinions and an informed public
  - comprehensive news and current affairs programming which is impartial, accurate and balanced

- avoiding one-sided reporting and programming, particularly during election periods
- providing a range of broadcast material that strikes a balance between programming of wide appeal and specialised programmes that serve the needs of different audiences
- being universally accessible and serves all the people and regions of the country, including minority groups
- providing educational programmes and programmes directed towards children
- promoting local programme production, including through minimum quotas for original productions and material produced by independent producers.

- A public broadcaster must enjoy editorial independence.
- A public broadcaster must be run by an independent board as follows:
  - The board must operate in the public interest.
  - The board must appoint executive management who are accountable to it.
  - The board must not be subject to political or economic/commercial interference.
  - The board's independence must be protected in legislation and, if possible, in the constitution.
- A public broadcaster must be accountable to the legislature (a multiparty body), not to the executive.
- Public broadcasters must be adequately funded in a manner that protects their independence.

4.4.3 Comment

- Owing to the centrality of broadcasting in assisting African people to access news and current affairs, it is recognised that political control and manipulation of broadcasting services can severely limit citizens' rights, such as the rights to press freedom, independent media and access to information.
- Having public broadcasters as opposed to state broadcasters is therefore in the public interest.
- The essential aspects of public as opposed to state broadcasting include:
  - having an independent board, capable of appointing executive management
  - being accountable to a multiparty body such as a parliament, with public participation in the nominations process

- being editorially independent and avoiding one-sided reporting.

These aspects are important in guarding against the control (and abuse) of the public broadcaster by a single (ruling) political party.

4.5 Principle 5: Availability of community broadcasting

4.5.1 Relevant provisions in international instruments

- Article 1 of Part III of the African Charter on Broadcasting provides, in its relevant part, that 'Community broadcasting is broadcasting which is for, by and about the community, whose ownership and management is representative of the community, which pursues a social development agenda, and which is non-profit'.
- Principle 15 of the African Principles on Freedom of Expression and Access to Information Declaration deals with Community Media and its key provisions are as follows:
  - States shall facilitate the establishment of community media as independent nonprofit entities, with the objective of developing and disseminating content that is relevant to the interests of geographic communities or communities sharing common interests such as language and culture.
  - The regulation of community broadcasting shall be governed in accordance with the certain principles, including ownership, management and programming of community broadcasters shall be representative of the community.

4.5.2 Summary

Non-profit community broadcasting has the potential to broaden access to the airwaves by poor and rural communities as it pursues a social development agenda and is owned and managed by people who are representative of the community.

4.5.3 Comment

- Community broadcasting is generally based on two models:
  - geographic communities — that is, a community living in a particular area or location
  - community of interest — that is, a community bound by a common interest, such as a religious community broadcaster or a youth radio station.
- Community broadcasting provides an important platform for citizen empowerment given that it is not operated along commercial lines.
- It is, however, important to note that the community broadcasting stations are often beset with long-term viability concerns due to funding constraints.

4.6 Principle 6: Equitable, fair, transparent and participatory licensing processes, inclusive of frequencies

4.6.1 Relevant provisions in international instruments

- Principle 17 of the African Principles on Freedom of Expression and Access to Information Declaration deals with community media and in respect of licensing, it includes the following provisions:
  - Licensing processes shall be simple, quick, cost-effective and guarantee community participation.
  - Licensing requirements shall not be prohibitive.
  - States to allocate a fixed percentage of available radio frequency spectrum to community broadcasters to encourage diversity.
- Principle 14 of the African Principles on Freedom of Expression and Access to Information Declaration deals with private media and in respect of licensing, it provides that states shall ensure that licensing processes for private media of fair and transparent and promote diversity in broadcasting by:
  - mandating full public disclosure of all forms of media ownership and any subsequent acquisitions or change of ownership
  - taking preventive measures against the undue concentration of private broadcasting ownership, including through non-award of licences and non-approval of subsequent acquisitions or change of ownership
  - ensuring that the process of frequency allocation for private broadcasting use is fair and transparent
  - ensuring that the process for the acquisition of broadcasting rights imposes conditions as are necessary for ensuring diversity in the private broadcasting sector.
- Article 3 of Part I of the African Charter on Broadcasting provides that 'Decision-making processes about the overall allocation of the frequency spectrum should be open and participatory and ensure that a fair proportion of the spectrum is allocated to broadcasting uses'.
- Article 4 of Part I of the African Charter on Broadcasting provides that 'The frequencies allocated to broadcasting should be shared equitably among the three tiers of broadcasting'.
- Article 5 of Part I of the African Charter on Broadcasting provides that 'Licensing processes for the allocation of specific frequencies to individual broadcasters should be fair and transparent and based on clear criteria, which include promoting media diversity in ownership and content'.
- Principle 18 of the Access to the Airwaves Principles provides, in its relevant part, that 'Broadcasters should be required to obtain a licence to operate'.

- Principle 19.1 of the Access to the Airwaves Principles provides, in its relevant part, that 'All licensing processes and decisions should be overseen by an independent regulatory body'.
- Principle 20.1 of the Access to the Airwaves Principles provides, in its relevant part, that 'There should be no blanket prohibitions on awarding broadcasting licences to applicants, except in relation to political parties, where such a ban may be appropriate'.
- Principles 21.1 and 21.2 of the Access to the Airwaves Principles provide, in their relevant parts, that 'The process [for obtaining a broadcasting licence] should be fair and transparent, include clear time limits within which decisions must be made and allow for effective public input and an opportunity for the applicant to be heard … Licence applications should be assessed according to clear criteria set out in advance in … law or regulations … [which] criteria should … be objective and should include promoting a wide range of viewpoints which fairly reflect the diversity of the population and preventing undue concentration of ownership, as well as an assessment of the financial and technical capacity of the applicant'.

4.6.2 Summary

- Broadcasters must have a licence to operate.
- Licensing decisions must be made by independent broadcasting regulatory bodies.
- Licensing processes, including the licensing of radio frequency spectrum, must be:
  - fair, open, transparent and participatory, allowing for both the public and the applicant to be heard
  - based on clear criteria set down in law and which ought to include the technical and financial capabilities of the applicant
  - subject to time limits for decisions.
- The aim of licencing processes is to promote diversity of ownership and content in broadcasting.
- A fair proportion of the radio frequency spectrum must be allocated to broadcasting uses and these must be shared equitably among the three tiers of broadcasting services — public, commercial and community.
- The only appropriate blanket prohibition on awarding licences is in respect of political parties.

4.6.3 Comment

- As more and more countries pass broadcasting-specific legislation, these

internationally accepted standards relating to licencing processes are becoming increasingly common.

- There are still a number of countries where the actual decision to grant a licence is made by, or in conjunction with, the relevant minister, as opposed to being made entirely by an independent broadcasting regulatory authority.

4.7 Principle 7: Universal access to broadcasting services and equitable access to signal distribution and other infrastructure

4.7.1 Relevant provisions in international instruments

- Article 7 of Part II of the African Charter on Broadcasting provides, in its relevant part, that 'The transmissions infrastructure used by public service broadcasters should be made accessible to all broadcasters under reasonable and non-discriminatory terms.'
- Principle 11.3.d of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall ... facilitate: access to the media by poor and rural communities, including by subsidising household costs associated with digital migration.'
- Principle 13.5 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'Public service media shall ensure that their transmission systems cover the whole of the territory of the state.'
- Principle 7.1 of the Access to the Airwaves Principles provides, in its relevant part, that 'The State should promote the necessary infrastructure for broadcast development, such as sufficient and constant electricity supply and access to adequate telecommunications services.'

4.7.2 Summary

- The state must promote infrastructure for broadcast development including:
  - reliable electricity supply
  - telecommunications.
- Universal access must be promoted by ensuring that public broadcasting transmission or signal distribution systems cover the whole country and by subsidising household costs associated with digital migration.
- Public broadcasting transmission systems must be made available to all licensed broadcasters on reasonable and non-discriminatory terms.

4.7.3 Comment

- Broadcasting requires infrastructure: telecommunications facilities and links, signal reception and distribution facilities and, in particular, broadcasting transmitters, including digital facilities.
- The public broadcaster must guarantee universal access to its services owing to the importance of public broadcasting for ensuring access to news and information.
- Public broadcasting infrastructure can, and should, be used by other licenced broadcasters on reasonable and non-discriminatory terms so as to avoid unnecessary costs in duplicating infrastructure and to ensure diversity of available services.

4.8 Principle 8: Regulating broadcasting content in the public interest

4.8.1 Relevant provisions in international instruments

- Article 6 of Part 1 of the African Charter on Broadcasting states that 'Broadcasters should be required to promote and develop local content, which should be defined to include African content, including through the introduction of minimum quotas.'
- Principle 11.3.f of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall … facilitate: the promotion of local and African languages, content and voices.'
- Principle 13.6 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'The public service ambit of public broadcasters shall be clearly defined and include an obligation to ensure that the public receive adequate and politically balanced information, particularly during election periods.'
- Principle 16.3 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'Co-regulation may also be encouraged by states as a complement to self-regulation, founded on informed collaboration between stakeholders including the public regulatory authority, media and civil society.'
- Principle 18.2 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'Any regulatory body established to adjudicate complaints about media content shall be protected against political, commercial or any other undue interference.'
- Principle 2.1 of the Access to the Airwaves Principles provides, in its relevant part, that 'The principle of editorial independence, whereby programming decisions are made by broadcasters on the basis of professional criteria and the public's right to know, should be guaranteed by law …'

- Principle 23.2 of the Access to the Airwaves Principles provides that 'where an effective self-regulatory system for addressing broadcasting content concerns is in place, an administrative system should not be imposed.'
- Principle 23.3 of the Access to the Airwaves Principles provides, in its relevant part, that 'Any content rules should be developed in close consultation with broadcasters and other interested parties and should be finalised only after public consultation.'
- Principle 23.4 of the Access to the Airwaves Principles provides, in its relevant part, that 'Responsibility for oversight of any content rules should be by [an independent] regulatory body.'
- Principle 24.2 of the Access to the Airwaves Principles provides, in its relevant part, that 'positive content obligations may be placed on commercial and community broadcasters but only where their purpose and effect is to promote broadcast diversity by enhancing the range of material available to the public … Such obligations may be imposed, for example, in relation to local content and/or languages, minority and children's programming and news.'
- Principle 29.2 of the Access to the Airwaves Principles provides, in its relevant part, that 'Public broadcasters have a primary obligation [to ensure that the public receive adequate information during an election period] but obligations may also be placed on commercial and/or community broadcasters … provided … these obligations are not excessively onerous.'
- Principle 29.3 of the Access to the Airwaves Principles provides, in its relevant part, that 'broadcasters are required to ensure that all election coverage is fair, equitable and non-discriminatory.'
- Principle 29.4 of the Access to the Airwaves Principles provides, in its relevant part, that 'any obligations regarding election broadcasting should be overseen by an independent regulatory authority.'

4.8.2 Summary

General content regulation

- Editorial independence, whereby programming decisions are made by broadcasters on the basis of professional criteria and the public's right to know, must be guaranteed by law.
- Content rules must be developed in close consultation with broadcasters and other interested parties and must be finalised only after public consultation.
- It is preferable to have an effective self-regulatory system for addressing broadcasting content concerns although co-regulatory systems (with public regulatory authorities, civil society and broadcasters) is also encouraged.
- Positive content obligations may be placed on commercial and community

broadcasters, but only where their purpose and effect is to promote broadcast content diversity. Such obligations may be imposed, for example, in relation to local content and/or languages, minority and children's programming and news.

- Oversight of any content rules, including election broadcasting obligations, must be by an independent regulatory body.

Local content regulation

Governments should promote local content, including African content, by introducing minimum local content quotas for broadcasting services.

Election-related content regulation

- Public broadcasters have a primary obligation to provide adequate and balanced political reporting, particularly during election periods.
- Obligations to provide information during an election period may also be imposed upon commercial and/or community broadcasters, provided the obligations are not too onerous.
- All broadcasters are required to ensure that election coverage is fair, equitable and non-discriminatory.

4.8.3 Comment

- Owing to its 'push' nature, broadcasting has always been subject to far more stringent content restrictions than the print media, which has a 'pull' nature — requiring one to actually read it. This is not problematic, provided the safeguards set out above and in Chapter 3 on internationally accepted grounds for restricting the media, are adhered to.
- The problem of insufficient investment in local culture is particularly acute in respect of broadcasting due to high production costs. Nevertheless, ensuring that people have access to content in their home language and which is reflective of their community is important for preserving local cultures and identities, as well as for ensuring that people's information needs are met.
- Undoubtedly, the most serious challenge in respect of broadcasting content regulation is ensuring that broadcasters provide balanced, informative public interest information during election periods. All too often political parties (particularly ruling parties) try to ensure that broadcasters (particularly public broadcasters) play a partisan role in the government's interest rather than in the public's interest.

5 Seven key principles of democratic internet regulation

The previous two sections in this chapter examined a range of instruments in order to understand the ten key principles of democratic media regulation and the eight key principles of democratic broadcasting regulation. This section discusses certain of the international instruments, charters, protocols, declarations and resolutions that focus exclusively on the internet and online media in order to discern seven internationally-recognised hallmarks of democratic internet regulation.

5.1 Principle 1: Internet access and affordability

5.1.1 Relevant provisions in international instruments

- Principle 1 of the African Declaration on Internet Rights and Freedoms provides that 'The internet should have an open and distributed architecture, and should continue to be based on open standards and application interfaces and guarantee interoperability so as to enable a common exchange of information and knowledge. Opportunities to share ideas and information on the internet are integral to promoting freedom of expression, media pluralism and cultural diversity. Open standards support innovation and competition, and a commitment to network neutrality promotes equal and non-discriminatory access to and exchange of information on the internet.'

- Principle 2 of the African Declaration on Internet Rights and Freedoms provides that 'Access to the internet should be available and affordable to all persons in Africa without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, prosperity, birth or other status. Access to the internet plays a vital role in the full realisation of human development, and facilitates the exercise and enjoyment of a number of human rights and freedoms...'

- Principle 13 of the African Declaration on Internet Rights and Freedoms provides that 'To help ensure the elimination of all forms of discrimination on the basis of gender, women and men should have equal access to learn about, define, access, use and shape the internet. Efforts to increase access should therefore recognise and redress existing gender inequalities...'

- Principle 37.1 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall recognise that universal, equitable, affordable and meaningful access to the internet is necessary for the realisation of freedom of expression, access to information and the exercise of other human rights.'

- Goal 9(c) of the Agenda for Sustainable Development requires countries to 'Significantly increase access to information and communications technology

and strive to provide universal and affordable access to the internet in least developed countries by 2020.'

- The preamble to the AU Declaration on Internet Governance acknowledges that 'the internet is an essential tool and a dynamic force for economic, social and cultural development.'
- Article 4 of the AU Declaration on Internet Governance reaffirms that the states parties remain 'committed to facilitating a resilient, unique, universal and interoperable internet that is accessible to all and will strive to ensure universal and affordable internet access for all African citizens, including people with specific needs.'
- Unesco's Internet Development Indicators at (AA.4) asks: 'Does the government have a policy and programme to implement universal access to reliable, affordable broadband, and is thus effectively implemented?
- Unesco's Internet Development Indicators at (AB.2) asks: 'Are broadband networks available in all districts of the country?'
- Unesco's Internet Development Indicators at (AD.1) asks: 'Are there significant differences in broadband access and use between regions and between urban and rural areas?'
- Principle 21 of the WSIS Geneva principles provides, in its relevant part, 'Universal, ubiquitous, equitable and affordable access to ICT infrastructure … should be an objective of all stakeholders involved in building it.'

5.1.2 Summary

- The internet plays a vital role in the full realisation of human development, including economic, social and cultural development.
- The internet facilitates the exercise and enjoyment of a number of human rights and freedoms.
- Access to broadband internet must be universal and affordable for all African citizens without discrimination, including for rural populations, women and people with specific needs.
- The internet should have an open and distributed architecture.
- The internet should be based on open standards and application interfaces and network neutrality.
- The internet should be interoperable.

5.1.3 Comment

- It is clear that, in the information age, the internet is an essential component of the realisation of human development and that it facilitates the exercise and enjoyment of a number of human rights and freedoms.

- New concepts in media regulation such as 'open and distributed architecture', 'open standards and application interfaces', 'network neutrality' and 'interoperability' come to the fore with regards to the internet. Essentially what this is dealing with is requiring the structure of, standards and applications used on the internet to be and remain open, accessible, widespread, neutral (that is, not favouring any particular platform or content)[19] and interoperable (the ability of two or more components or systems to exchange and/or use information).[20]
- The international instruments clearly recognise that affordability and non-discrimination are key elements of ensuring universal access to the internet.

5.2 Principle 2: Freedom of expression and information online

5.2.1 Relevant provisions in international instruments

- Paragraph 2 of principle 3 of the African Declaration on Internet Rights and Freedoms provides that 'Everyone has the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds through the internet and digital technologies and regardless of frontiers.'
- Paragraph 3 of principle 3 of the African Declaration on Internet Rights and Freedoms provides that 'The exercise of this right should not be subject to any restrictions, except those which are provided by law, pursue a legitimate aim is expressly listed under international rights law (the rights or reputation of the others, the protection of national security, or of public order, public health or morals) and are necessary and proportionate in pursuance of a legitimate aim.'
- Principle 24 of the WSIS Geneva Principles provides that the 'ability for all to access and contribute information, ideas and knowledge is essential in an inclusive Information Society.'

5.2.2 Summary

- Everyone has the right to freedom of expression, which includes the freedom to seek, receive and impart information, ideas and knowledge through the internet.
- Limitations on these rights can be imposed only to the extent that they are:
    - prescribed by law
    - pursue a legitimate aim recognised under international human rights law (the rights or reputation of the others, the protection of national security, or of public order, public health or morals)
    - necessary in pursuance of a legitimate aim

- proportionate in pursuance of a legitimate aim.

5.2.3 Comment

It is clear that the general protections granted to freedom of expression and information offline are required to apply online too.

5.3 Principle 2: Freedom of assembly and association online

5.3.1 Relevant provisions in international instruments

- Paragraph 1 of principle 5 of the African Declaration on Internet Rights and Freedoms provides that 'Everyone has the right to use the internet and digital technologies in relation to freedom of assembly and association, including through social networks and platforms.'
- Paragraph 2 of principle 5 of the African Declaration on Internet Rights and Freedoms provides that 'No restrictions on usage of and access to the internet and digital technologies in relation to the right to freedom of assembly and association may be imposed unless that restriction as prescribed by law, pursues a legitimate aim is expressly listed under international rights law [the rights or reputation of the others, the protection of national security, or of public order, public health or morals] ... And is necessary and proportionate in pursuance of a legitimate aim.'
- Unesco's Internet Development Indicators at (RD.2) asks: 'Can non-governmental organisations organise freely online?'

5.3.2 Summary

- The right to assemble and associate is recognised in respect of the internet, including in respect of social networks and platforms.
- Limitations on these rights can be imposed only to the extent that they are:
  - prescribed by law
  - pursues a legitimate aim recognised under international human rights law (the rights or reputation of the others, the protection of national security, or of public order, public health or morals)
  - necessary in pursuance of a legitimate aim
  - proportionate in pursuance of a legitimate aim.

5.3.3 Comment

It is clear that the general protections applicable to the rights to freedom of assembly and association offline are required to apply online as well.

5.4 The right to privacy, anonymity, personal data protection and freedom from surveillance online

5.4.1 Relevant provisions in international instruments

- Paragraph 1 of principle 8 of the African Declaration on Internet Rights and Freedoms provides that 'Everyone has the right to privacy online, including the right to the protection of personal data concerning him or her. Everyone has the right to communicate anonymously on the internet, and to use appropriate technology to ensure a secure, private and anonymous communication.'

- Paragraph 2 of principle 8 of the African Declaration on Internet Rights and Freedoms provides that 'The right to privacy on the internet should not be subject to any restrictions, except those that are provided by law, pursue a legitimate aim as expressly listed under international human rights law [the rights or reputation of the others, the protection of national security, or of public order, public health or morals] ... and are necessary and proportionate in pursuance of a legitimate aim.'

- Paragraph 2 of principle 9 of the African Declaration on Internet Rights and Freedoms provides that 'Unlawful surveillance, monitoring and interception of users' online communications by state or non-state actors fundamentally undermine the security and trustworthiness of the internet.'

- Principle 40.2 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'Everyone has the right to communicate anonymously or use pseudonyms on the internet and to secure the confidentiality of the communications and personal information from access by third parties through the aid of digital technologies.'

- Principle 41.1 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall not engage in or condone acts of indiscriminate and untargeted collection, storage, analysis or sharing of a person's communications.'

- The preamble to the AU Declaration on Internet Governance provides that the Heads of State and Government of the AU reaffirmed their commitments to 'protect the right to privacy, including in the context of digital communication';

- Article 17 of the AU Declaration on Internet Governance provides that the Heads of State and Government of the AU undertake to promote 'personal data protection.'

- Article 8.1 of the Malabo Convention requires a states party to 'commit itself to establish a legal framework aimed at strengthening fundamental rights and public freedoms, particularly the protection of physical data, and punish any violation of privacy without prejudice to the principle of free flow of personal data.'

- Article 25.3 of the Malabo Convention requires states parties to ensure that 'In adopting legal measures in the area of cyber security … the measures so adopted will not infringe on the rights of citizens … such as … the right to privacy …'
- Unesco's Internet Development Indicators at (RE.5) ask: 'Are data encryption and online privacy protected in law and practice …?'
- Unesco's Internet Development Indicators at (RE.6) ask: 'Do individuals have legal rights to protect their online identity …?'

5.4.2 Summary

- The right to privacy, anonymity and to the protection of personal data online is recognised.
- Limitations on these rights can be imposed only to the extent that they are:
  - prescribed by law
  - pursue a legitimate aim recognised under international human rights law (the rights or reputation of the others, the protection of national security, or of public order, public health or morals)
  - necessary in pursuance of a legitimate aim
  - proportionate in pursuance of a legitimate aim.
- Unlawful surveillance, monitoring and interception of online communications fundamentally undermine the security and trustworthiness of the internet.

5.4.3 Comment

- The general protections applicable to the right to privacy offline are required to apply online too.
- Unlawful monitoring and interception of online communications is a recognised problem internationally and is rife in Africa,[21] including in southern Africa.

5.5 Security, stability and resilience of the internet

5.5.1 Relevant provisions in international instruments

- Paragraph 1 of principle 9 of the African Declaration on Internet Rights and Freedoms provides, in its relevant part, that 'Everyone has the right to benefit from security, stability and resilience of the internet. As a universal global public resource, the internet should be a secure, stable, resilient, reliable and trustworthy network …'
- Principle 38.2 of the African Principles on Freedom of Expression and Access

to Information Declaration provides that 'States shall not engage in or condone any disruption of access to the internet and other digital technologies for segments of the public or an entire population.'

- Principle 37 of the WSIS Geneva Principles provides that 'cyber security should be dealt with at appropriate national and international levels.'

5.5.2 Summary

- The internet should be a secure, stable, resilient, reliable and trustworthy and cyber security must be dealt with both nationally and internationally.
- States must not engage in preventing access to internet through blackouts such as switching off the internet as a whole or particular social media platforms.

5.5.3 Comment

Many countries' experience of the internet is that it is not reliable, stable, or resilient. This can be caused by a number of factors including electricity outages, mobile network or fixed line grid failures and, in a number of instances, internet shut downs or throttling, for example when certain internet-based social-media applications such as WhatsApp, Twitter or Facebook are unavailable but, in other respects, the internet is available.

5.6 Democratic multi-stakeholder internet governance

5.6.1 Relevant provisions in international instruments

- Article 1 of the AU Declaration on Internet Governance reaffirms that 'Internet Governance should be inclusive, transparent and accessible to all.'
- Principle 13 of the African Declaration on Internet Rights and Freedoms provides that 'To help ensure the elimination of all forms of discrimination on the basis of gender, women and men should have equal access to learn about, define, access, use and shape the internet. Efforts to increase access should therefore recognise and redress existing gender inequalities, including the under-representation of women in decision-making roles, especially in internet governance.'
- Unesco's Internet Development Indicators at (MB.2) asks: 'Does the government actively involve other stakeholder groups in developing national internet policies and legislation?'
- Unesco's Internet Development Indicators at (MB.3) asks: 'Is there a national Internet Governance Forum and/or other multi-stakeholder forum open to all stakeholders, with active participation from diverse stakeholder groups?'
- Principle 49 of the WSIS Geneva Principles provides that the 'management of the internet encompasses both technical and public policy issues and should

involve all stakeholders [at national level these would include the state, the private sector and civil society] and relevant intergovernmental and international organisations.'

5.6.2 Summary

- Internet governance ought to be inclusive, transparent and accessible to all and women ought to be equitably represented in decision-making roles in internet governance.
- Management of the internet should involve all stakeholders at the national level (state, private and civil society), as well as intergovernmental and international organisations.

5.6.3 Comment

Multi-stakeholder internet governance is critical to freedom of expression online. However, the reality is that multi-stakeholder governance of the media as a whole is not practised and so most African countries have a long way to go until this becomes a norm.

5.7 Equitable distribution of internet revenues

5.7.1 Relevant provisions in international instruments

Principle 15 of the AU Declaration on Internet Governance requests heads of states and governments to 'put in place necessary mechanisms to ensure equitable distribution of internet revenues.'

5.7.2 Summary

There ought to be equitable distribution of internet revenues.

5.7.3 Comment

- The distribution of internet revenues is a problematic issue.
- It is clear that large internet-based companies, including social media platforms, generate enormous profits from the sale of advertising and goods and services, including in southern African countries, and yet many of these countries derive no benefit other than, at best, the levying of Value-Added Tax on the sale of goods and services provided to customers in those countries.[22]
- The disruptive impact of, for example, Over the Top (OTT) services such as Netflix, on African broadcasting companies has already begun to be considered, including by the South African communications regulator.[23]

Notes

1 http://www.article19.org/data/files/pdfs/standards/accessairwaves.pdf [accessed 28 April 2019]

2 http://archive.niza.nl/docs/200207191410309398.pdf [accessed 28 April 2019]

3 https://africaninternetrights.org/articles/#download-lang [accessed 28 April 2019]

4 http://www.achpr.org/files/instruments/charter-democracy/aumincom_instr_charter_democracy_2007_eng.pdf [accessed 28 April 2019]

5 https://www.achpr.org/legalinstruments/detail?id=69#:~:text=The%20Declaration%20of%20Principles%20of,2019%20in%20Banjul%2C%20The%20Gambia. [accessed 16 June April 2020]

6 https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf [accessed 28 April 2019]

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9 http://www.wan-ifra.org/sites/default/files/field_article_file/Declaration%20of%20Table%20Mountain%20Eng%20text.pdf [accessed 28 April 2019]

10 http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf [accessed 28 April 2019]

11 https://au.int/en/treaties/african-union-convention-cyber-security-and-personal-data-protection [accessed 29 April 2019]

12 http://www.achpr.org/sessions/48th/resolutions/169/ [accessed 28 April 2019]

13 http://www.achpr.org/sessions/59th/resolutions/362/ [accessed 30 April 2019]

14 https://www.sadc.int/files/3213/5292/8362/Protocol_on_Culture_Information_and_Sport2001.pdf [accessed 28 April 2019]

15 https://unesdoc.unesco.org/ark:/48223/pf0000367617?posInSet=1&queryId=a46642b0-1893-4f04-9bfb-b832b0851652 [accessed 1 December 2020]

16 https://unesdoc.unesco.org/ark:/48223/pf0000163102 [accessed 28 April 2019]

17 http://www.europarl.europa.eu/document/activities/cont/201104/20110429ATT18422/20110429ATT18422EN.pdf [accessed 28 April 2019]

18 http://www.itu.int/wsis/docs/geneva/official/dop.html [accessed 28 April 2019]

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22 https://www.businesslive.co.za/bd/opinion/2018-07-02-the-pros-and-cons-of-the-digital-revolution/ [accessed 29 April 2019]

23 https://www.icasa.org.za/legislation-and-regulations/discussion-document-on-the-inquiry-into-subscription-television-services-gazette-41070 [accessed 29 April 2019]

Media law: Pitfalls and protections for the media

In this chapter, you will learn about:

- ▷ the internationally accepted grounds for regulating certain forms of expression by the media
- ▷ the internationally accepted grounds for prohibiting the publication of certain forms of expression by the media
- ▷ laws that hinder the media in performing its various roles
- ▷ laws that assist the media in performing its various roles

1 Introduction

It is clear that freedom of the press is not absolute. This chapter looks in some detail at the internationally accepted standards for restricting the media. It outlines the legitimate grounds on which the media can be restricted and how such restrictions are implemented.

This chapter identifies fifteen instruments, charters or declarations adopted by international bodies such as the UN, the EU and the AU, or adopted at significant conferences held under the auspices of international bodies such as Unesco. Others have been established by NGOs with long-standing records of work in the area of freedom of expression and freedom of the press, such as the international NGO, Article 19. These instruments, many of which have a particular focus on Africa, deal with, among other things, legitimate grounds for regulating certain forms of expression.

Since this handbook is aimed at journalists and other media practitioners as opposed to lawyers, the content of the instruments, charters and declarations is not set out as a whole, as these typically deal with a wide range of topics other than the media. Instead, detail is given on the key grounds upon which expression, including by the media, may be regulated or restricted, as found in the media-related provisions thereof under the different headings for the grounds.

It is also important to note that the list of instruments referred to does not purport to contain every instrument, charter or declaration relevant to democratic media restriction. Rather it is a selection of the key instruments, charters or declarations made by bodies of international standing, some of which have particular (but not exclusive) relevance to Africa.

The selected instruments, charters, protocols and declarations to be discussed are listed below in alphabetical order:

- **The Access to the Airwaves Principles:**[1] Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation is a set of standards on how to promote and protect independent broadcasting while ensuring that broadcasting serves the interests of the public. The principles were developed in 2002 by Article 19, an international NGO working on freedom of expression issues as part of its International Standards series.

- **The African Declaration on Internet Rights and Freedoms:**[2] The African Declaration on Internet Rights and Freedoms was developed by members of the African Declaration group, a Pan-African NGO initiative to promote human rights, standards and principles of openness in internet policy formulation on the continent, in 2015.

- **The African Principles on Freedom of Expression and Access to Information Declaration:**[3] The Declaration of Principles on Freedom of Expression in Africa was adopted in 2002 by the African Commission on Human and Peoples' Rights (the ACHPR), a body established under the auspices of the AU. The ACHPR updated and replaced the Declaration in 2019 with the Declaration of Principles on Freedom of Expression and Access to Information in Africa.

- **The Camden Principles on Freedom of Expression and Equality:**[4] The Camden Principles on Freedom of Expression and Equality were prepared by Article 19 on the basis of an international conference held in 2009 to discuss freedom of expression and equality issues. They aim to promote greater consensus about the proper relationship between freedom of expression and the promotion of equality.

- **The Dakar Declaration:**[5] The Dakar Declaration was adopted in Senegal in 2005 by a Unesco-sponsored World Press Freedom Day conference.

- **The Declaration of Table Mountain:**[6] The Declaration of Table Mountain was adopted in 2007 by the World Association of Newspapers and the World Editors Forum. It contains a number of important statements on African media issues made by a civil society forum of newspaper publishers and editors.

- **The European Convention for the Protection of Human Rights and Fundamental Freedoms:**[7] The European Convention for the Protection of Human Rights and Fundamental Freedom was adopted in 1950 under the auspices of the Council of Europe and came into force in 1953. Although the European Convention has no direct application to any African country, it has significant precedent value because of the depth of human rights-related jurisprudence developed by the European Court of Human Rights. Consequently, its provisions and jurisprudence are often referred to by national and regional courts in Africa and by the African Court of Human and Peoples' Rights.

- **The International Convention on the Elimination of All Forms of Racial Discrimination:**[8] The International Convention on the Elimination of All Forms of Racial Discrimination was adopted by the UN General Assembly in 1965 and came into force in 1969.

- **The International Covenant on Civil and Political Rights:**[9] The ICCPR was adopted by the UN General Assembly in 1966 and came into force in 1976.

- **The Johannesburg Principles:**[10] The Johannesburg Principles on National Security, Freedom of Expression and Access to Information were adopted in October 1995 by a panel of experts in international law, national security and human rights. The panel was convened by Article 19, the International Centre against Censorship and the University of the Witwatersrand Centre for Applied Legal Studies. The Johannesburg Principles have been endorsed by the UN Committee on Human Rights and the UN Special Rapporteur on Freedom of Opinion and Expression.

- **Malabo Convention:**[11] The AU Convention on Cyber Security and Personal Data Protection (known as the Malabo Convention) was adopted by the heads of State of the African Union in 2014. It comes into force when 15 countries have ratified it. At the time of writing this chapter, only eight countries had done so. This means it is not yet legally binding and so its status is aspirational in nature.

- **Resolution 169:**[12] Resolution 169 on Repealing Criminal Defamation Laws in Africa was adopted by the African Commission on Human and Peoples' Rights (ACHPR) in 2010.

- **Unesco's Internet Universality Indicators:**[13] In 2019 Unesco published a document entitled 'Internet Universality Indicators: A Framework for Assessing Internet Development' which contains a set of 303 indicators divided into six categories: The ROAM-X Principles (Rights, Openness, Accessibility, Multi-stakeholder participation and Cross-cutting).

- **Unesco's Media Development Indicators:**[14] Unesco's International Programme for the Development of Communications in 2008 published a document entitled 'Media Development Indicators: A Framework for Assessing Media Development'.

- **The WSIS Geneva Principles:**[15] The WSIS Geneva Principles were adopted in Geneva in 2003 at the World Summit on the Information Society (WSIS), held by the UN in conjunction with the International Telecommunications Union. While the WSIS Geneva Principles mainly covers issues concerning universal access to information and communication technologies (ICTs), they also contain some important statements on the media more generally.

After reviewing the relevant instruments, charters, protocols and declarations, the chapter takes a closer look at media law itself and examines the kinds of laws that hinder the media when reporting on news and current affairs, as well as the kinds of laws that assist the media in performing its functions. This lays the basis for the chapters that follow, which deal with the media laws applicable to specific southern African countries.

2 Restricting freedom of expression

This section looks at the international standards for restricting freedom of expression generally. It does not identify specific types of expression that are legitimate to regulate or restrict; instead, it focuses on the manner in which expression may be legitimately regulated or restricted and what kinds of interference or restrictions are illegitimate, or not, according to internationally accepted standards. The specific grounds for restriction are examined in the next section.

2.1 Relevant provisions in international instruments

- Principle 23.1 of the Access to the Airwaves Principles provides that broadcasting laws 'should not impose content restrictions of a civil or criminal nature on broadcasters, over and above, or duplicating, those that apply to all forms of expression.'
- Paragraph 3 of principle 3 of the African Declaration on Internet Rights and Freedoms essentially provides that the right to freedom of expression on the internet should not be subject to any restrictions, except those which are:
  - provided by law
  - pursue a legitimate aim as expressly listed under international human rights law
  - necessary in pursuance of a legitimate aim
  - proportionate in pursuance of a legitimate aim.
- Principle 9.1 of the African Principles on Freedom of Expression and Access to Information Declaration essentially repeats what is in the bullet point immediate above and then Principle 9.3 goes on to state 'A limitation shall serve a legitimate aim where the objective of the limitation is:
  - to preserve respect for the rights or reputations of others; or
  - to protect national security, public order or public health.
- Principle 9.4 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'To to be necessary and proportionate, the limitation shall:
  - originate from a pressing and substantial need that is relevant and sufficient;
  - have a direct and immediate connection to the expression and disclosure of information, and be the least restrictive means of achieving the stated aim; and
  - be such that the benefit of protecting the stated interest outweighs the

harm to the expression and disclosure of information, including with respect to the sanctions authorised.'

- Principle 11 of the Camden Principles provides that states should not impose any restrictions on freedom of expression '... [unless these are] provided by law' and '[are] necessary in a democratic society to protect [legitimate] interests. This implies ... that restrictions [must be]':
  - clearly and narrowly defined and respond to a pressing social need
  - the least intrusive measure available in the sense that there is no other measure which would be effective and yet less restrictive of freedom of expression
  - not too broad, in the sense that they must not restrict speech in a wide or untargeted way or beyond the scope of harmful speech and rule out legitimate speech
  - proportionate, in the sense that the benefit to the protected interest outweighs the harm to freedom of expression, including in respect to the sanctions they authorise.
- The Dakar Declaration calls upon member states to 'repeal criminal defamation laws and laws that give special protections to officials and institutions.'
- The Dakar Declaration 'condemns all forms of repression of African media that allows for banning of newspapers and the use of other devices such as levying of import duties on newsprint and printing materials ...'
- In Resolution 169, the ACHPR called on states parties to 'refrain from imposing general restrictions that are in violation of the right to freedom of expression.'
- Unesco's Internet Development Indicators at (RB.2) asks: 'Are any restrictions on freedom of expression narrowly defined, transparent and implemented in accordance with international rights agreements, laws and standards?'
- The Unesco Media Development Indicators provide that 'restrictions upon freedom of expression ... should be clear and narrowly defined in law and justifiable as necessary in a democratic society in accordance with international law and that such laws should be subject to a public interest override where appropriate.'
- The Unesco Media Development Indicators provide that the state 'may not place unwarranted legal restrictions on the media such as legal provisions dictating who may practice journalism or requiring the licensing or registration of journalists.'
- The Unesco Media Development Indicators provide that neither broadcasting nor print content may be 'subject to prior censorship, either by government or by regulatory bodies', and require that 'sanctions for breaches of regulatory rules relating to content are applied only after the material has been broadcast or published.'

- The Unesco Media Development Indicators provide that there can be no 'explicit or concealed restrictions upon access to newsprint, to distribution networks or printing houses.'

2.2 Summary

- Broadcasting laws should not impose content restrictions of a civil or criminal nature which are in addition to, or duplicate, those that apply to all forms of expression.
- The right to freedom of expression may not be restricted by indirect methods, in particular by:
  - the abuse of control over access to media-related materials such as newsprint, printing materials, printing facilities, distribution networks, radio broadcasting frequencies and equipment, including through the imposition of import duties and other means
  - requiring the licensing or registration of journalists.
- Legitimate restrictions on freedom of expression must be clearly set down in law and must:
  - be narrowly defined and targeted
  - serve a legitimate interest. In other words, serve a pressing social need (these legitimate interests or social needs are dealt with in the next section)
  - be necessary in a democratic society
  - be the least intrusive measure available
  - be proportionate
  - be in accordance with international law
  - be subject to a public interest override where appropriate.
- Illegitimate legal restrictions on freedom of expression include those that:
  - require prior censorship. In other words, a process of approval of content by a government or regulatory body prior to publication. Although, as will be dealt with in more detail in the next section, there are certain limited circumstances when prior censorship would be acceptable, for example, during a state of emergency
  - give special protections to officials and institutions.

2.3 Comment

- One of the most important aspects to bear in mind is that the tests for determining whether or not a media restriction is legitimate are objective. This

means that a court can enquire as to whether or not there is or was, in reality, a genuine pressing social need for the restriction of the publication of information by the media. Consequently, laws that allow for officials to restrict the publication of information by the media based on their 'opinion' as to, for example, whether or not there is a pressing social need for such restrictions, would not be legitimate. This is important as many national laws allow for officials (particularly in the security forces or elsewhere in the executive) to restrict the publication of information by the media on the mere say so of these officials without there being any requirement of an objective pressing social need. Needless to say, such national laws are not in accordance with internationally accepted standards for restricting the media.

- Sadly, many African countries, including in southern Africa, do have provisions that provide for the registration of journalists and for the licensing of media houses. These are often extremely onerous and, essentially, act as barriers to entry to the journalism profession and to the operation of the media.

- The abuse of control over access to media-related materials must also be considered with regard to the abuse of control over the internet. There are a number of ways in which this is being done in southern Africa:

  - First, there are general internet-blackouts — where the internet is simply 'turned off' by government so that it is unavailable to citizens. This has happened recently in both Zimbabwe[16] and the Democratic Republic of Congo (DRC).[17]

  - Second, there are specific internet site- or social media platform-blackouts — where particular websites or applications (such as Twitter, Facebook, WhatsApp and Instagram) are disabled and become unavailable to citizens. This has happened in a number of countries.[18]

  - Third, there is so-called internet throttling or brownouts. This is when government forces telecommunications or internet service providers 'to lower the quality of their cell signals or internet speed'. This makes the internet too slow to use. Throttling can also target particular online destinations such as social media sites'.[19]

  - Fourth, there is the imposition of taxes, licence fees or excise duties by governments which are imposed in such a way as to make using the internet unaffordable for ordinary people. This is a recent trend in a number of African countries, including in Tanzania.[20]

- It is important to bear in mind that the cumulative tests for a legitimate restriction on the media's right to publish or broadcast information are that the restriction must be clearly set down in law and must:

  - be narrowly defined and targeted

  - serve a legitimate interest, that is, serve a pressing social need

  - be necessary in a democratic society

- be the least intrusive measure available
- be proportionate
- be in accordance with international law
- be subject to a public interest override, where appropriate.

These tests apply in relation to every instance of such a restriction. Consequently, when reading the next section setting out pressing social concerns constituting legitimate grounds for such restrictions, one needs to bear in mind that this is just one of the tests and that all the others must be present at all times for such restrictions to be legitimate.

3 Regulating and prohibiting the dissemination of certain forms of expression by the media

It was noted in the previous section that states must have legitimate grounds for regulating and restricting freedom of expression, including by the media. This section looks at the 14 internationally accepted specific grounds for such regulations or restrictions. These are the 14 grounds upon which there is broad international agreement on the legitimacy of restricting the media's publication of such content or otherwise regulating the media. Each one is dealt with, setting out the relevant provisions of the applicable international instruments, statements and declarations. A summary and/or comment are provided where necessary.

The 14 legitimate grounds for regulating, including prohibiting, the dissemination of certain forms of expression by the media, are:

- licensing and regulation of broadcasting and cinema
- protection of reputations
- protection of rights of others generally
- protection of privacy
- obscenity and the protection of children and morals, particularly child abuse images
- propaganda for war
- hate or discriminatory speech, including xenophobic expression, hate crime incitement and genocide denialism
- national security or territorial integrity
- war or state of emergency

- protection of public order or safety
- protection of public health
- maintaining the authority and impartiality of the judiciary
- for the prevention of crime
- preventing the disclosure of information received in confidence.

3.1 Legitimate licensing and regulation of broadcasting and cinema

3.1.1 Relevant provisions in international instruments

Article 10(1) of the European Convention on Human Rights specifically provides that the article, which protects the right to freedom of expression, 'shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.'

3.1.2 Comment

Although this restriction is mentioned in only one international instrument, it is important to note that a licensing requirement in respect of broadcasting (television or radio) or cinema enterprises is not, without more, an abuse of the media's right to disseminate information to the public. Indeed, as broadcast media in Africa generally makes use of a scarce and finite natural resource, namely the radio frequency spectrum (as cable broadcasting is not widely used in Africa), licensing is essential to avoid inevitable interference, which would result in no broadcast media being available to the public. Without licensing, it would be impossible to regulate the use of the radio frequency spectrum effectively and the level of radio interference would be so great that no one would be able see or hear any broadcasting service at all.

3.2 Protecting reputations

3.2.1 Relevant provisions in international instruments

- In its relevant part, paragraph 3 of principle 3 of the African Declaration on Internet Rights and Freedoms provides that the right to freedom of expression on the internet 'should not be subject to any restrictions, except those which … pursue a legitimate aim as expressly listed under international human rights law (namely the … reputations of others …) …'
- Principle 21.1 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall ensure that laws relating to defamation conform with the following standards':
    - No one shall be found liable for true statements, expressions of opinions

or statements which are reasonable to make in the circumstances.

- Public figures shall be required to tolerate a greater degree of criticism.
- Sanctions shall never be so severe as to inhibit the right to freedom of expression.

- Principle 22.3 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall amend criminal laws on defamation and libel in favour of civil sanctions which must themselves be necessary and proportionate.'
- Principle 22.4 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'The imposition of custodial sentences for the offences of defamation and libel is a violation of the right to freedom of expression.'
- The Dakar Declaration provides, in its relevant part, that it calls on member states to 'repeal criminal defamation laws and laws that give special protections to officials and institutions.'
- Article 10(2) of the European Convention on Human Rights specifically provides, in its relevant part, that freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society … for the protection of the reputation … of others …'
- Article 19(3)(a) of the ICCPR specifically provides, in its relevant part, that the exercise of the right to freedom of expression 'may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of the … reputations of others.'
- In Resolution 169, the ACHPR called on states parties to 'repeal criminal defamation laws or insult laws which impede freedom of speech and to adhere to the provisions of freedom of expression.'
- The Table Mountain Declaration provides that African states must abolish 'insult and criminal defamation laws.'
- Unesco's Media Development Indicators provide that defamation laws must 'impose the narrowest restrictions necessary to protect the reputation of individuals'. In this regard, Unesco's Media Development Indicators set out the characteristics of appropriate defamation laws, including that:
  - they do not inhibit public debate about the conduct of officials or official entities
  - they provide for sufficient legal defences such as:
    - the statement was an opinion not an allegation of fact
    - the publication/broadcast was reasonable or in the public interest

- that it occurred during a live transmission
- that it occurred before a court or elected body

- they provide for a regime of remedies that allow for proportionate responses to the publication or broadcasting of defamatory statements
- the scope of defamation laws is defined as narrowly as possible, including as to who may sue
- defamation law suits cannot be brought by public bodies, whether legislative, executive or judicial
- the burden of proof falls upon the plaintiff in cases involving the conduct of public officials and other matters of public interest
- there is a reasonable cut-off date, after which plaintiffs can no longer sue for an alleged defamation.

3.2.2 Summary

- While protecting the reputations of others is a legitimate ground for regulating, or even prohibiting, expression by the media (print, broadcasting or online), laws relating to defamation:
  - must not:
    - criminalise defamation but ought instead to impose post-publication civil sanctions, such as damages awards
    - inhibit public debate about the conduct of officials or official entities who are required to tolerate a greater degree of criticism than ordinary members of the public
    - allow defamation law suits to be brought by public bodies, whether legislative, executive or judicial
  - must:
    - provide for legal defences to a defamation suit including that:
      - the statement was true and was made in the public interest
      - the statement was an opinion not an allegation of fact
      - publication/broadcasting was reasonable or in the public interest
      - it occurred during a live transmission
      - it occurred before a court or elected body
    - provide for a range of appropriate and proportionate remedies for the publication of defamatory material
    - ensure the burden of proof falls upon the plaintiff in cases involving the conduct of public officials and other matters of public interest
    - ensure there is a reasonable cut-off period, after which plaintiffs can no longer sue for an alleged defamation.

3.2.3 Comment

- A summary of the contours of internationally accepted standards for defamation law clearly lays out a progressive vision which puts the public interest ahead of the reputations of, particularly, public figures. The reality, however, is that most southern African countries' defamation laws fall far short of these standards, as will be seen in the country chapters.

- One of the most important developments since the publication of the first edition of this handbook has been the judgment of the African Court of Human and Peoples' Rights in the case of *Konate v Burkina Faso*.[21] In this critically important case for the development of African defamation law, the Court held that 'apart from serious and very exceptional circumstances … violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences …'.[22] The effect of this is that, in most cases, a jail sentence would be an inappropriate sentence for a violation of a law limiting freedom of expression. Further, the court noted that 'other criminal sanctions, be they fines, civil or administrative, are subject to the criteria of necessity and proportionality; which therefore implies that if such sanctions are disproportionate, or excessive, they are incompatible with … relevant human rights instruments.' [23]

3.3 Protecting the rights of others generally

3.3.1 Relevant provisions in international instruments

- Principle 23.3 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall not prohibit speech that merely lacks civility or which offends or disturbs.'

- Article 10(2) of the European Convention on Human Rights specifically provides, in its relevant part, that freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society … for the protection of the … rights of others …'

- Article 19(3)(a) of the ICCPR specifically provides, in its relevant part, that the exercise of the right to freedom of expression 'may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of the rights … of others.'

- Article 58 of the WSIS Geneva Principles provides that 'The use of ICTs and content creation should respect human rights and fundamental freedoms of others, including … the right to freedom of thought, conscience and religion in conformity with relevant international instruments.'

3.3.2 Summary

Protecting the rights of others does not mean outlawing offensive or disturbing expression.

3.3.3 Comment

- The wording of this ground is extremely vague and will usually be subsumed under other more specific grounds, such as reputation, privacy or morality. It is included here because it features in at least three international instruments.
- However, it is important to note that no one has the right not to be offended or disturbed by expression — that is recognized as going to far in protecting the rights of others.

3.4 Protecting privacy

3.4.1 Relevant provisions in international instruments

- Principle 22.3 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'Privacy … laws 'shall not inhibit the dissemination of information of public interest.'
- The Unesco Media Development Indicators provide that 'restrictions upon freedom of expression … based on … privacy … should be clear and narrowly defined in law and justifiable as necessary in a democratic society in accordance with international law and that such laws should be subject to a public interest override where appropriate.'
- Article 58 of the WSIS Geneva Principles provides that 'the use of ICTs and content creation should respect human rights and fundamental freedoms of others, including personal privacy … in conformity with relevant international instruments.'

3.4.2 Summary

The right to privacy must be capable of being overridden in the public interest.

3.4.3 Comment

Public figures, particularly in government, have less reason for claiming a right to privacy due to the public nature of their chosen positions.

3.5 Regulating obscenity and protecting children and morals

3.5.1 Relevant provisions in international instruments

- In its relevant part, paragraph 3 of principle 3 of the African Declaration on Internet Rights and Freedoms essentially provides that 'the right to freedom of expression on the internet should not be subject to any restrictions, except those which … pursue a legitimate aim as expressly listed under international human rights law (namely … the protection of … public … morals) …'
- Article 10(2) of the European Convention on Human Rights specifically

provides, in its relevant part, that freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society … for the protection of … morals …'

- Article 19(3)(b) of the ICCPR specifically provides, in its relevant part, that the exercise of the right to freedom of expression 'may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for the protection of … morals …'

- Article 29(3)(a) of the Malobo Convention deals with 'content related offences' specific to Information and Communication Technologies and it requires states parties to 'take the necessary legislative and/or regulatory measures to make it a criminal offence to: … disseminate … an image or a representation of child pornography through a computer system.'

- The Unesco Media Development Indicators provide that 'restrictions upon freedom of expression … based on … obscenity should be clear and narrowly defined in law and justifiable as necessary in a democratic society in accordance with international law and that such laws should be subject to a public interest override, where appropriate.'

- Article 59 of the WSIS Geneva Principles provides that 'All actors in the Information Society should take appropriate actions and preventive measures as determined by law, against abusive uses of ICTs such as … all forms of child abuse, including paedophilia and child pornography and trafficking in, and exploitation of, human beings.'

3.5.2 Summary

- While protecting children and morality are both legitimate grounds for regulating or even prohibiting expression, particularly of obscene materials, by the media, this cannot prevent the publication of information in the public interest.

- Regulating access to public entertainments (such as films, whether to be shown in cinemas or broadcast) to prevent access for the moral protection of children and adolescents, is a legitimate ground for prior censorship. In other words, a government or regulatory body can rule on whether or not and, if so, how, the publication or exhibition of public entertainments is to take place — for example, by imposing age restrictions on films.

3.5.3 Comment

- Some of the international instruments are contradictory on the issue of prior censorship of materials — that is, approval of content prior to publication by a governmental official or regulatory agency. However, most countries have national laws that regulate obscene materials or materials aimed at children through some system of prior censorship.

- Many countries are moving away from regulating the publication or

broadcasting of materials based on the ground of 'morality' due to the difficulty of setting a national standard for morality. This is often a highly subjective matter, particularly in multicultural societies.

3.6 Propaganda for war

3.6.1 Relevant provisions in international instruments

Article 20(1) of the ICCPR provides that 'Any propaganda for war shall be prohibited by law.'

3.6.2 Summary

Propaganda for war is prohibited and engaging in it is an offence.

3.6.3 Comment

It is interesting to note that the international instruments use exceptionally strong language in relation to propaganda for war. This is not just content which governments may legitimately restrict; indeed, governments are required to prohibit such content and to make the publication thereof an offence.

3.7 Hate speech or discriminatory speech

3.7.1 Relevant provisions in international instruments

- Principle 23.1 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'States shall prohibit any speech that advocates from national, racial, religious or other forms of discriminatory hatred which constitutes incitement to discrimination, hostility or violence.
- Principle 12 of the Camden Principles provides that states 'should adopt legislation prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.'
- Article 4(a) of the Convention on the Elimination of Racial Discrimination provides, in its relevant part, 'states parties condemn all propaganda … which … [is] based on ideas or theories of superiority of one race or group of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to … such discrimination and to this end … Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin …'
- Article 20(2) of the ICCPR provides that 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'

- Article 29(3) of the Malobo Convention deals with 'content related offences' specific to Information and Communication Technologies:
  - Sub-article (e) requires states parties to 'take the necessary legislative and/or regulatory measures to make it a criminal offence to … disseminate … ideas or theories of [a] racist or xenophobic nature through a computer system.'
  - Sub-article (g) requires states parties to 'take the necessary legislative and/or regulatory measures to make it a criminal offence to: assault, through a computer system, persons for the reason that they belong to a group distinguished by race, colour, descent, national or ethnic origin, or religion or political opinion … or against a group of persons distinguished by any of these characteristics.'
  - Sub-article (h) requires states parties to 'take the necessary legislative and/or regulatory measures to make it a criminal offence to: 'deliberately deny, approve or justify acts constituting genocide or crimes against humanity through a computer system.'
- The Unesco Media Development Indicators provide that 'restrictions upon freedom of expression … based on … hate speech … should be clear and narrowly defined in law and justifiable as necessary in a democratic society in accordance with international law and that such laws should be subject to a public interest override, where appropriate.'
- Article 59 of the WSIS Geneva Principles provides that 'All actors in the Information Society should take appropriate actions and preventive measures, as determined by law, against abusive uses of ICTs, such as illegal and other acts motivated by racism, racial discrimination, xenophobia and related intolerance, hatred, violence …'

3.7.2 Summary

- Hate speech is the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.
- Discriminatory speech is propagating the idea of the superiority of one race or group or one colour or ethnic or national origin.
- Dissemination of hate or discriminatory speech or of the denial or justification of genocidal crimes against humanity should be an offence.
- Preventing hate or discriminatory speech are both legitimate grounds for regulating, or even prohibiting, expression by the media.

3.7.3 Comment

- As was the case for propaganda for war, the international community uses particularly strong language in relation to hate or discriminatory speech, or speech which denies or justifies genocide or crimes against humanity, and it

requires that the dissemination of these be made an offence under national law.

- When considering how a particular country deals with hate speech restrictions, it is important to be aware that, while hate speech can be, and often is, regulated in ordinary laws, it is also sometimes included in constitutions as an exception to the right to freedom of expression itself. Note, however, that this is not required by the international instruments that deal with this issue.

3.8 Protection of national security or territorial integrity

3.8.1 Relevant provisions in international instruments

- In its relevant part, paragraph 3 of principle 3 of the African Declaration on Internet Rights and Freedoms provides that the right to freedom of expression on the internet 'should not be subject to any restrictions, except those which … pursue a legitimate aim as expressly listed under international human rights law (namely … the protection of national security …) …'

- Principle 22.4 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'Freedom of expression shall not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.'

- Article 10(2) of the European Convention on Human Rights specifically provides, in its relevant part, that freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security [and] territorial integrity …'

- Article 19(3)(b) of the ICCPR specifically provides, in its relevant part, that the exercise of the right to freedom of expression 'may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for the protection of national security …'

- Principles 1(c) and (d), read together with principles 2(a) and (b) and principle 6 of the Johannesburg Principles, provide that the exercise of the right to freedom of expression 'may be subject to restrictions … for the protection of national security. No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restrictions rests with the government … A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use, or threat, of force or its capacity to respond to the use, or threat, of force, whether from an external source, such as a military threat, or an internal

source, such as incitement to violent overthrow of the government. In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security. For example, this could include protecting a government from embarrassment or exposure of wrongdoing, concealing information about the functioning of its public institutions, entrenching a particular ideology or suppressing industrial unrest.'

- Principle 23 of the Johannesburg Principles provides that 'Expression shall not be subject to prior censorship in the interest of protecting national security, except in a time of public emergency which threatens the life of the country …'
- The Unesco Media Development Indicators provide that 'restrictions upon freedom of expression … based on … national security … should be clear and narrowly defined in law and justifiable as necessary in a democratic society in accordance with international law and that such laws should be subject to a public interest override where appropriate.'
- The Unesco Media Development Indicators provide that 'national security restrictions must not inhibit public debate about issues of public concern.'

3.8.2 Summary

- Protecting national security or territorial integrity are both legitimate grounds for regulating, or even prohibiting, expression by the media. This cannot inhibit public debate on matters of public concern.
- Restricting the media's right to freedom of expression on the basis of a national security interest is not legitimate:
  - unless it can be shown that:
    - the restriction will protect a country's existence or its territorial integrity against the threat of force, whether external or internal
    - there is a causal link between the expression and the risk of the threat of force
  - if it protects interests unrelated to national security, including, for example:
    - protecting a government from embarrassment or exposure of wrongdoing
    - concealing information about the functioning of its public institutions
    - entrenching a particular ideology
    - suppressing industrial unrest.

3.8.3 Comment

- It is interesting to note that the international instruments go into a great deal of detail as to when resorting to a 'national interest' restriction would not be

legitimate. This is undoubtedly due to the history of the near-systematic abuse of this otherwise legitimate ground for media restriction by many government officials, particularly in the security forces.

- It is noteworthy that the international instruments detail the nature of the threat to national security and its relationship to the proposed restricted expression that must exist before such a ground will be legitimate.
- Very few national laws, particularly in southern African countries, comply with these requirements.

3.9 War or state of emergency

3.9.1 Relevant provisions in international instruments

- Article 15(1) of the European Convention on Human Rights provides that 'In a time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'
- Principle 3 of the Johannesburg Principles provides that 'In a time of public emergency which threatens the life of the country and the existence of which is officially and lawfully proclaimed in accordance with both national and international law, a state may impose restrictions on freedom of expression and information but only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government's other obligations under international law.'
- Principle 23 of the Johannesburg Principles provides that 'Expression shall not be subject to prior censorship in the interest of protecting national security, except in a time of public emergency which threatens the life of the country …'
- The Unesco Media Development Indicators expressly provide that laws must 'not allow state actors to seize control of broadcasters during an emergency.'

3.9.2 Summary

- War or a state of emergency are both legitimate grounds for regulating, or even prohibiting, expression by the media, including by means of prior censorship, provided that this is done only for the period of time strictly necessary in the circumstances.
- Emergency laws must not allow states to seize control of broadcasters during an emergency.

3.9.3 Comment

- Comments are confined only to issues on states of emergency.

- Many governments abuse emergency powers and use them to stifle dissent rather than to protect the population. One of the most important aspects of the internationally articulated standards for emergency restrictions is the requirement that these last for a limited period only. Consequently, states of emergency that are said to be 'indefinite', or which, in practice, last for years or decades, do not meet international standards of legitimacy.

- Another noteworthy aspect is the requirement that emergency laws do not allow state organs to seize control of broadcasters during an emergency. Many national broadcasting laws allow for broadcasters to be required to broadcast public service announcements by government during public emergencies. This is obviously very different from governments taking over a broadcaster altogether.

3.10 Protection of public order or safety

3.10.1 Relevant provisions in international instruments

- In its relevant part, paragraph 3 of principle 3 of the African Declaration on Internet Rights and Freedoms provides that the right to freedom of expression on the internet 'should not be subject to any restrictions, except those which ..., pursue a legitimate aim as expressly listed under international human rights law (namely ... the protection of ... public order...) ...'

- Principle 9.3.b of the Principles of African Freedom of Expression and Access to Information Declaration provides that 'A limitation shall serve a legitimate aim where the objective of the limitation is ... to protect ... public order ...'

- Article 10(2) of the European Convention on Human Rights specifically provides, in its relevant part, that freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of ... public safety ... [and] for the prevention of disorder ...'

- Article 19(3)(b) of the ICCPR specifically provides, in its relevant part, that the exercise of the right to freedom of expression 'may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for the protection of ... public order ...'

3.10.2 Summary

Protecting public order or public safety are both legitimate grounds for regulating, or even prohibiting, expression by the media, provided there is a real risk to public order or public safety and there is a close causal link between the risk of harm and the expression.

3.10.3 Comment

- As is the case with emergency provisions, governments often abuse the

grounds of public order or public safety to restrict the publication of legitimate expressions of dissent. National laws often do not comply with internationally articulated standards in regard to these grounds.

3.11 Protection of public health

3.11.1 Relevant provisions in international instruments

- In its relevant part, paragraph 3 of principle 3 of the African Declaration on Internet Rights and Freedoms essentially provides that the right to freedom of expression on the internet 'should not be subject to any restrictions, except those which … pursue a legitimate aim as expressly listed under international human rights law (namely … the protection of … public health …) …'
- Principle 9.3.b of the Principles of African Freedom of Expression and Access to Information Declaration provides that 'A limitation shall serve a legitimate aim where the objective of the limitation is … to protect … public health.'
- Article 10(2) of the European Convention on Human Rights specifically provides, in its relevant part, that freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society … for the protection of health …'
- Article 19(3)(b) of the ICCPR specifically provides, in its relevant part, that the exercise of the right to freedom of expression 'may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for the protection of … public health …'

3.11.2 Summary

Protecting public health is a legitimate ground for regulating or even prohibiting expression by the media.

3.11.3 Comment

A number of countries have introduced prohibitions on disinformation regarding Covid-19 as part of emergency provisions to deal with the pandemic. However, there have been a number of instances where disinformation provisions have been abused by governments to stifle legitimate criticism of official action in response to the pandemic.

3.12 Maintaining the authority and impartiality of the judiciary

3.12.1 Relevant provisions in international instruments

- Article 10(2) of the European Convention on Human Rights specifically provides, in its relevant part, that freedom of expression 'may be subject to such

formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society … for maintaining the authority and impartiality of the judiciary …'

- The Unesco Media Development Indicators provide that 'restrictions upon freedom of expression … based on … contempt of court laws … should be clear and narrowly defined in law and justifiable as necessary in a democratic society in accordance with international law', and that such laws should be subject to a public interest override where appropriate.

3.12.2 Summary

Maintaining the authority and impartiality of the judiciary is a legitimate ground for regulating or even prohibiting expression by the media.

3.12.3 Comment

Generally, the authority and impartiality of the judiciary is maintained legally through contempt of court laws, which are made up of two aspects:

- the rule against scandalising the court: This is where attacks on the judiciary are such that they undermine the administration of justice. This obviously goes far beyond fair and reasonable comment and criticism of judgments and judges which does not undermine the administration of justice.
- the *sub judice* rule: This is where the outcome of a judicial proceeding is effectively preempted or prejudiced through the publication of information which also undermines the administration of justice.

3.13 For the prevention of crime

Article 10(2) of the European Convention on Human Rights specifically provides, in its relevant part, that freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society … for the prevention of … crime …'

3.14 Prevent the disclosure of information received in confidence

3.14.1 Relevant provisions in international instruments

Article 10(2) of the European Convention on Human Rights specifically provides, in its relevant part, that freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society … for preventing the disclosure of information received in confidence …'

3.14.2 Comment

This provision can operate in at least two ways:

- to protect the government's ability to secure the free flow of confidential information to itself
- to protect the media's ability to guarantee confidential sources of information.

Many countries secure the former without sufficiently protecting the latter.

4 Laws that hinder the media in performing its role

The kinds of laws that hinder the media are those that do not comply with internationally accepted standards for:

- democratic media regulation
- democratic broadcasting regulation
- democratic internet regulation
- restricting publication or broadcasting by the media.

Consequently, it is difficult to give a definitive or even comprehensive list of the kinds of laws that hinder the media. Nevertheless, ten examples are given of laws that are commonly seen as hindering the media's role of providing news and information in the public interest. These are laws that:

- unreasonably restrict market entry — that is, which act as a barrier to establishing independent media sources
- provide for prior censorship
- favour individual rights, particularly of public officials, over the public's right to know
- do not comply with internationally accepted restrictions on the publication of obscene materials
- do not comply with internationally accepted restrictions on the publication of propaganda for war or hate speech
- do not comply with internationally accepted restrictions on the publication of information which threatens national security, territorial integrity and public order

- do not comply with internationally accepted restrictions on the publication of information which threatens law enforcement
- provide for indefinite states of emergency
- do not comply with internationally accepted restrictions on the publication of information which undermines the judiciary
- criminalise defamation.

4.1 Laws that unreasonably restrict market entry

Governments that are not media friendly often enact (or deliberately fail to repeal) laws which require journalists or newspapers to be registered, d or accredited prior to operation. Often such laws directly or indirectly, require government approval of the journalist or media house in question before such licences or registration will be granted. This acts as a barrier to establishing independent media sources and a professional cadre of journalists in a country.

Note that licensing is, in fact, required in respect of broadcasting due to the need to regulate frequency spectrum use effectively. However, there is no requirement to license a person to provide content online (outside of some very specific exceptions for scheduled programming streamed online). Recently Tanzania re-enacted regulations to license (at an exorbitant fee) online content providers such as bloggers[24] but it remains to be seen if these will go unchallenged.

4.2 Laws that provide for prior censorship

Any law that provides for a government or regulatory body to determine, prior to publication, whether or not information ought to be published by the media is obviously an enormous threat to the media and hinders the performance of its roles. Prior censorship laws should be very carefully drafted to ensure that they meet internationally accepted standards.

It is clear from the plethora of prohibitions against the publication of different types of information that censorship is a feature of African media law. Surprisingly many prohibitions remain in place from the colonial era, cementing censorship and denying people their rights to receive information and ideas. This issue is one of the most pressing areas for law reform in southern Africa to secure press freedom in the region.

4.3 Laws that favour individual rights, particularly of public officials, over the public's right to be informed

In an effort to guard against embarrassing public revelations in the media, governments sometimes enact (or deliberately fail to repeal) laws which provide a great deal of protection for private and even public figures at the expense of the media's right to publish or broadcast and the public's right to know.

Thus, criminal defamation laws, insult laws or civil defamation laws — whether provided for in a statute or in the common law, as determined by the judiciary — that do not comply with internationally accepted standards for laws protecting privacy, reputations, or the rights of others, greatly hinder the media in its operations.

Not only is the media threatened with damages awards but these laws often make publication an offence, with a potential prison sentence or heavy fine as a sanction. Even if such 'punishment' does not occur, these kinds of laws have a distressing effect on newsrooms as journalists, editors, owners and publishers try to avoid falling foul of the law. This can lead to self-censorship — where the media fails to report the full story in order to guard against potential liability.

Although many southern African countries continue to have criminal defamation laws on their statute books, it is important to note that international best practice standards indicate that the appropriate way of protecting against defamation is through civil sanctions such as damages awards, and not through criminal sanctions such as fines and/or periods of imprisonment.

4.4 Laws that do not comply with internationally accepted restrictions upon the publication of obscene materials

Generally, the mainstream media does not often fall foul of laws that regulate obscenity, morality or which aim to protect children. However, in the recent past, there have been a number of examples in Africa where obscenity laws have been invoked by officials to try to prevent the publication of news and information that is in the public interest.

In one instance, an editor of a publication running a story about the state of public health care in Zambia faced obscenity charges for circulating to public officials (not even publishing) photographs of a woman giving birth on the pavement outside a hospital.[25]

Obscenity laws that are drafted loosely and not in accordance with universally accepted standards can be abused to prevent the publication of material that is in the public interest.

Prohibitions on the ground of 'morality' or 'obscenity' are increasingly outdated; with many developed-country jurisdictions recognizing the rights and the freedoms of adults to make their own moral judgements on expression-related issues.

4.5 Laws that do not comply with internationally accepted restrictions upon the publication of propaganda for war or hate speech

Although one generally associates the passage of hate speech legislation with progressive governments anxious to protect citizens from racism or other

discrimination, governments sometimes make use of such legislation to stifle dissent and prevent the publication of material in the public interest. Further, a perennial problem with hate speech and anti-discrimination restrictions is that they are often too broadly framed, capturing legitimate content within the net of prohibitions on hate or discriminatory speech.

4.6 Laws that do not comply with internationally accepted restrictions on the publication of information which threatens national security, territorial integrity and public order

Unfortunately, governments often confuse national security with government popularity. Thus, a threat to a government's standing or popularity among citizens is seen as a threat to 'national security' or 'public order'. This means that governments often abuse legitimate grounds for limiting media expression of national security or territorial integrity for their own, as opposed to the public, interests.

Unfortunately, a large number of national laws relating to security issues — such as defence, intelligence, classified information, terrorism and the like — often do not comply with internationally accepted standards for such legislation. These standards have been set out chapters 1 and 2.

Security laws prohibiting the publication of information on these grounds, and which do not comply with such standards, hinder the media's work enormously as they:

- prohibit the publication of information that the public ought to know
- often provide for stiff penalties, including criminal sanctions such as fines or jail sentences.

4.7 Laws that do not comply with internationally accepted restrictions on the publication of information which threatens law enforcement

As is the case with laws relating to national security, laws that restrict media publication in order to prevent crime, but which do not comply with internationally accepted standards for these kinds of laws, can harm the media. Sometimes laws relating to policing, prosecutorial bodies, criminal procedure and other administration of justice matters, contain unreasonable restrictions on the publication of information. Furthermore, they sometimes contain provisions that require journalists to divulge confidential sources of information without any of the internationally accepted safeguards. Clearly, these kinds of laws hinder the media.

4.8 Laws that provide for indefinite states of emergency

Internationally, the ability of governments to restrict the media during a time of national crisis, such as a state of emergency, is widely recognised. However, this is subject to a set of clearly specified internationally agreed requirements. Unfortunately, many governments abuse so-called emergency powers. Perhaps the worst such abuse is the indefinite state of emergency that lasts for years, sometimes even decades. States of emergency and freedom of the press are largely incompatible. The media therefore has very little space within which to operate in countries with ongoing states of emergency. Needless to say, enormous damage is done to the independent media, with dangerous consequences for democracy and social development.

4.9 Laws that do not comply with internationally accepted restrictions on the publication of information which undermines the judiciary

As a general rule it is rare that the judiciary acts in such a way as to unreasonably prevent the media from publishing information in the public interest. However, laws such as the *sub judice* rule in common law can be abused in ways that harm the media and prevent it from carrying out its functions.

For example, sometimes public officials involved in court proceedings cite the *sub judice* rule as a reason for providing no information to the media, even if the case is on a matter of public importance and the publication of information would not prejudice the outcome of the case.

5 Laws that assist the media to perform its various roles

The kinds of laws that assist the media are those that comply with internationally accepted standards for:

- democratic media regulation
- democratic broadcasting regulation
- democratic internet regulation
- restricting publication or broadcasting by the media.

There are also other kinds of laws that greatly assist the media, if only indirectly, in its day to day operations, as well as in terms of building long-term support for media freedom.

While it is difficult to give a definitive or even comprehensive list of the kinds of laws that assist the media, seven types of laws have been selected, which are commonly seen as supporting the functioning of the media, namely:

- constitutions
- laws that comply with internationally accepted standards for democratic media regulation
- laws that comply with internationally accepted standards for democratic broadcasting regulation
- laws that comply with internationally accepted standards for democratic media regulation
- laws that comply with internationally accepted standards for restricting publication or broadcasting by the media
- access to information legislation
- whistleblower protection or anti-corruption laws
- laws that establish independent bodies to act in the public interest.

5.1 Constitutions

One of the most important laws in relation to the media is, of course, a constitution. A constitution that contains a number of provisions and is the supreme law (that is, it takes precedence over national laws) provides a level of institutional protection and safety for the media, which greatly increases the media's ability to perform its roles effectively. These provisions include the following:

- the right to freedom of expression, including freedom of the press and other media, should be enshrined in a bill of rights. In addition, this right ought not to be subject to specific internal limitations on the right itself, but should rather be subject to a general limitations clause that allows for rights to be limited, provided this is necessary and justifiable in an open and democratic society.
- the right of access to information, whether held by the State or by private bodies, should be enshrined in a bill of rights.
- the right to administrative justice, including the right to procedurally fair administrative action and to written reasons for administrative action should be enshrined in a bill of rights.
- the independence of the broadcasting or electronic communications regulatory authority and the need for it to act in the public interest ought to be specifically guaranteed in constitutional provisions.
- the independence of the public broadcaster, and the fact that it is to act in the public interest, should be specifically guaranteed in constitutional provisions.

- an independent judiciary that has the final say over the legal interpretation of the provisions of the constitution should be provided for in the constitution.
- general public watchdog bodies to protect the public from abuses of power and to preserve constitutional values should be established by the constitution. Bodies that can perform these roles include human rights commissions, public protectors or a public ombudsman.

5.2 Laws that comply with internationally accepted standards for democratic media regulation

If all laws that regulate the media generally comply with internationally accepted standards for democratic media regulation (set out in Chapter 2), this will assist the media to perform its roles effectively by:

- ensuring that regulation does not result in the public being unreasonably denied access to news and information in the public interest
- ensuring a media environment that supports values such as diversity, independence, freedom of expression and of the press and professionalism in the media.

5.3 Laws that comply with internationally accepted standards for democratic broadcasting regulation

If all laws that regulate broadcasting comply with internationally accepted standards for democratic broadcasting regulation (set out in Chapter 2), this will assist the broadcast media to perform its roles effectively, including through guaranteeing:

- a public as opposed to a state broadcaster
- an independent broadcasting regulator
- a diverse range of broadcasting services: public, commercial and community.

5.4 Laws that comply with internationally accepted standards for democratic internet regulation

If all laws that regulate the internet comply with internationally accepted standards for democratic internet regulation (set out in Chapter 2), this will assist the online media to perform its roles effectively, including through:

- ensuring that regulation does not result in the public being unreasonably denied access to news and information online in the public interest, including through guarding against government interference with the internet such as internet or social media blackouts, and internet throttling

- ensuring a media environment that supports values such as diversity, independence, freedom of expression and of the press and professionalism in the media.

5.5 Laws that comply with internationally accepted standards for restricting publication (including online) or broadcasting by the media

If all laws that restrict what the media may publish (whether in print or online) or broadcast were to comply with internationally accepted standards for restricting publication or broadcasting by the media (set out previously in this chapter), this will assist the media to perform its roles effectively by ensuring that regulation does not result in the public being unreasonably denied access to news and information in the public interest.

5.6 Access to information legislation

One of the most useful pieces of legislation for any journalist or media institution is access to information legislation. Typically, an access to information law grants any person (including the media) the right to access information held by public authorities. Where the information is needed to exercise or protect a right, access to information laws may also provide for this right of access to information to be extended to information held by private bodies or persons. This kind of law is particularly useful for investigative journalists.

Access to information statutes almost always provide for grounds upon which disclosure of the information or access to the records requested can be denied. Generally, these grounds are there to protect important societal interests, such as crime prevention, national security, privacy or information provided in confidence.

Progressive access to information laws will contain a public interest override clause, allowing for the information to be disclosed if there is an overwhelming public interest in the information being made public (for example, if this will provide evidence of a crime or public wrongdoing), even if the information falls within one of the grounds for non-disclosure.

Furthermore, such laws usually allow for internal appeals against refusals to provide the information requested, as well as for access to a regulatory oversight body and, ultimately, the courts, to challenge a refusal to disclose information.

5.7 Whistleblower protection and anti-corruption laws

Other laws that are often particularly useful for journalists are statutes designed to promote good governance by supporting anti-corruption measures. Thus, anti-corruption statutes or statutes that provide 'whistleblower' protection for those who alert the authorities (or the media) to public wrongdoing, particularly criminal

activities by public officials, help to provide an environment in which the media is able to access sources of public interest information without those sources suffering abuse or retaliation as a result.

5.8 Laws that establish independent bodies to act in the public interest

Sometimes laws are passed to establish bodies that are aimed at supporting constitutional democracy and the public interest more generally, such as a public protector, public ombudsman, human rights commission and an independent electoral authority. While not directly established to assist the media, these bodies can, and often do, play important roles in protecting the media from governmental harassment, or in supporting the media generally by encouraging access to information or freedom of expression. These bodies can play particularly crucial roles during election periods.

Notes

1 http://www.article19.org/data/files/pdfs/standards/accessairwaves.pdf [accessed 28 April 2019]

2 https://africaninternetrights.org/articles/#download-lang [accessed 28 April 2019]

3 https://www.achpr.org/legalinstruments/detail?id=69#:~:text=The%20Declaration%20of%20Principles%20of,2019%20in%20Banjul%2C%20The%20Gambia. [accessed 16 June April 2020]

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7 https://www.echr.coe.int/Documents/Convention_ENG.pdf%23page=9 [accessed 30 April 2019

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16 https://www.iol.co.za/news/africa/zimbabwe-internet-blackout-slammed-for-enabling-crimes-against-humanity-18867243 [accessed 1 May 2019]

17 https://qz.com/africa/1513023/drc-shuts-down-internet-sms-ahead-of-election-results/ [accessed 1 May 2019]

18 For example, Zambia, https://advox.globalvoices.org/2016/10/11/the-plight-of-the-zambian-watchdog-embattled-opposition-news-site-goes-down/ [accessed 1 May 2019].

19 https://www.fin24.com/Opinion/shutting-down-the-internet-doesnt-work-but-governments-keep-doing-it-20190222-2 [accessed 1 May 2019].

20 Justine Limpitlaw Human Rights Impacts of Taxing Popular Internet Services: the Cases of Kenya, Tanzania and Uganda 2019 https://www.apc.org/en/pubs/human-rights-impacts-taxing-popular-internet-services-cases-kenya-tanzania-and-uganda [accessed 1 May 2019].

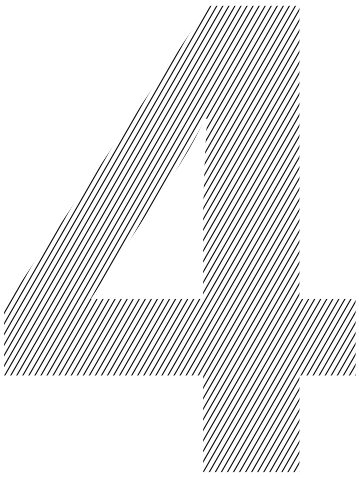
21 Konate v Burkina Faso Application No. 004/2013. http://en.african-court.org/images/Cases/Judgment/Judgment%20Appl.0042013%20Lohe%20Issa%20Konate%20v%20Burkina%20Faso%20-English.pdf [accessed 1 May 2019]

22 Ibid. At paragraph 165 of the judgment.

23 Ibid. At paragraph 166 of the judgment.

24 Justine Limpitlaw Human Rights Impacts of Taxing Popular Internet Services: the Cases of Kenya, Tanzania and Uganda 2019 https://www.apc.org/en/pubs/human-rights-impacts-taxing-popular-internet-services-cases-kenya-tanzania-and-uganda [accessed 1 May 2019]. The regulations which were the subject of this article were repealed and replace with new ones in 2020 but these have not addressed the problem. See the chapter on Tanzania for more details.

25 https://www.iol.co.za/news/africa/editor-held-over-obscene-picture-of-woman-449535 [accessed 1 May 2019].



Botswana

1 Introduction

The Republic of Botswana is a large country with a small population of approximately 2.3 million people.[1] The country was a British protectorate from 1885–1966 when it gained full independence from the United Kingdom. Botswana has maintained a multiparty democracy since independence and is generally considered a model of peace and democracy in southern Africa.

Despite its strong democratic credentials when it comes to political stability, there is little doubt that the media environment in Botswana is not in accordance with international standards for democratic media regulation. An old-style state broadcaster operates out of the president's office, and it is yet to be transformed into a public broadcaster. Legislation requires the registration of all media practitioners. The broadcasting regulator, Botswana Communications Regulatory Authority (Bocra) is not an independent body. Nevertheless, there is a level of media diversity in both the broadcasting and print media as well as online media.

Botswana, although sparsely populated, is one of the better-developed countries in the Southern African Development Community (SADC) with only 16.3% of the population living below the poverty line.[2] Nationally, 60% of the population has access to electricity; however, it is divided unequally between 77% of the population in urban and 37% in rural areas.[3] Internet penetration in Botswana is currently recorded at 47.5% of the population with 35.3% having access to Facebook.[4] Botswana has yet to finalise the switchover from analogue television transmission to digital terrestrial transmission (DTT), the analogue switch-off date (ASO date) has been projected for 2020 but is still to be confirmed.[5] Interestingly, unlike the rest of the SADC region that selected DVB-T2 as the standard for DTT, Botswana has chosen to make use of the Japanese alternative, ISDB-T, as their standard for DTT.[6] This chapter introduces working journalists and other media practitioners to the legal environment governing media operations in Botswana. The chapter is divided into five sections:

- Media and the constitution
- Media-related legislation
- Media-related regulations
- Media self-regulation
- Media-related case law

This chapter aims to equip the reader with an understanding of the main laws governing the media in Botswana. Critical weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Botswana, to enable the media to fulfil its role of providing the public with relevant news and information better, and to serve as a vehicle for government-citizen debate and discussion.

2 The media and the constitution

In this section, you will learn:

- the definition of a constitution
- what is meant by constitutional supremacy
- how a limitations clause operates
- which constitutional provisions protect the media
- which constitutional provisions might require caution from the media or might conflict with media interests
- what key institutions relevant to the media are established under the Botswana Constitution
- how rights are enforced under the constitution
- what is meant by the 'three branches of government' and 'separation of powers'
- whether there are any obvious weaknesses in the Botswana Constitution that ought to be strengthened to protect the media

2.1 Definition of a constitution

A constitution is a set of rules that are fundamental to the country, institution or organisation to which they relate. For example, you can have a constitution for a soccer club or a professional association, such as a press council. Such constitutions set out the rules by which members of the organisation agree to operate. However, constitutions can also govern much larger entities and entire nations.

The Botswana Constitution is notable because it has been in place since Botswana achieved independence in 1966. The constitutions of some other southern African countries were enacted much more recently as these countries embarked on democratic constitutional reforms only in the 1990s. The Botswana Constitution sets out the foundational rules of Botswana. These are the rules upon which the entire country operates.

2.2 Definition of constitutional supremacy

Constitutional supremacy means that the constitution takes precedence over all other law in a country, for example, legislation or case law. It is important to ensure that a constitution has legal supremacy. If a government passed a law that violated the constitution — was not in accordance with or conflicted with a constitutional provision — such law could be challenged in a court of law and could be overturned on the ground that it is unconstitutional.

The Constitution of Botswana does not make specific provision for constitutional supremacy; however, constitutional supremacy is implied in two important ways:

- In Chapter II, Protection of Fundamental Rights and Freedoms of the Individual, section 3 specifically provides that 'the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms [listed in Chapter II] subject to such limitation of that protection as *are contained in those provisions*' (emphasis added). The effect of this is that fundamental rights can only be limited to the extent that is allowed by the limitations contained in that chapter. This indicates that the constitution is the supreme law and that, with regard to fundamental rights and freedoms, no other law can limit rights beyond the limitations set out in the constitutional rights themselves.
- The Constitution of Botswana contains specific provisions regarding altering the constitution, which requires voting majorities and various other procedures (including a national plebiscite in respect of certain types of amendments) that are far more onerous than is required for the passage of mere legislation. Again, this points to the supremacy of the constitution.

2.3 Definition of a limitations clause

It is evident that rights are not absolute, as society would not be able to function. For example, if the right to freedom of movement were absolute, society would not be able to imprison convicted criminals. Similarly, if the right to freedom of expression were absolute, the state would not be able to protect its citizens from hate speech or false, defamatory statements made with reckless disregard for the truth. Governments require the ability to limit rights to serve important societal interests; however, owing to the supremacy of the constitution, this can be done only in accordance with the constitution.

The Constitution of Botswana makes provision for legal limitations on the exercise and protection of rights that are contained in Chapter II of the Constitution of Botswana, Protection of Fundamental Human Rights and Freedoms of the Individual. Section 3(1) specifically provides that the various rights provided for in Chapter II are subject to:

> ***respect for the rights and freedoms of others and for the public interest, in each and all of the following, namely:***

> *(a) life, liberty, the security of the person and the protection of the law*
>
> *(b) freedom of conscience, of expression and of assembly and association*
>
> *(c) protection for the privacy of his or her home and other property, and from deprivation of property without compensation.*
>
> *The provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.*

This is an interesting provision that requires some explanation.

- It is clear that the limitations of rights can be done on two main bases:
  - to protect the rights and freedoms of other individuals;
  - to protect the public interest.
- While limitations to protect the rights and freedoms of others are worded broadly, the following are critical justifications for limiting rights, life, liberty, the security of the person, freedom of conscience, expression, assembly and association and protection of privacy and property, including not being deprived of property without compensation.
- Limitations to protect the public interest are also worded broadly, but the following are, again, key justifications for limiting rights on the basis of public interest: life, liberty, the security of the person and protection of the law, freedom of conscience, expression, assembly and association and protection of privacy and property, including not being deprived of property without compensation.
- Section 3 of the Constitution of Botswana contains the general criteria for constitutional limitations, but it is not in itself a generally applicable limitations provision because it states that rights are: 'subject to such limitations of that protection as are contained in those provisions.' Thus, the actual limitations of rights and fundamental freedoms are set out in the provisions of the relevant right or fundamental freedom itself.

Consequently, it is apparent that the rights contained in Chapter II of the Constitution of Botswana are subject to the limitations that are contained within the provisions of the right itself. The limitations in respect of each right are dealt with below.

2.4 Constitutional provisions that protect the media

The Constitution of Botswana contains several important provisions in Chapter II, Protection of Fundamental Human Rights and Freedoms of the Individual, which directly protect the media, including publishers, broadcasters, journalists, editors and producers.

2.4.1 Freedom of expression

The most important provision that protects the media is section 12(1), Protection of Freedom of Expression, which states:

> ***Except with his or her consent, no person shall be hindered in the enjoyment of his or her freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his or her correspondence.***

This provision needs some explanation.

- The freedom applies to all persons, not just certain people, for example, citizens. Hence everybody (including both natural persons and juristic persons, such as companies) enjoys this fundamental right.
- The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many examples of this, including physical expression (such as mime or dance), photography or art.
- Section 12(1) specifies that the right to freedom of expression includes 'freedom to hold opinions without interference,' thereby protecting the right of the media to produce opinion pieces and commentary on important issues of the day.
- Section 12(1) specifies that the right to freedom of expression includes 'freedom to receive ideas and information without interference'. This freedom of everyone to receive information is a fundamental aspect of freedom of expression, and this subsection effectively enshrines the right to the free flow of information. Thus, the information rights of audiences, for example, as well as the expression rights of the media are protected. This right is important because it also protects organisations that foster media development. These organisations facilitate public access to different sources and types of information, particularly in rural areas which traditionally have limited access to the media.
- Section 12(1) specifies that the right to freedom of expression includes 'freedom to communicate ideas and information without interference (whether the communication is to the public generally or to any person or class of persons).' This is a central provision because it protects the right to communicate

information and ideas to the public, a critically important role of the press, and the media more generally. Therefore, although the Constitution of Botswana does not specifically mention the press or the media, the freedom to perform that role, namely to communicate information to the public, is protected.

- Section 12(1) specifies that the right to freedom of expression includes 'freedom from interference with his or her correspondence'. This protection of correspondence (which would presumably include letters, emails and WhatsApp messages or SMSes) is an important right for working journalists.

As discussed, constitutional rights are never absolute. Section 12(2) sets out the basis on which the right to freedom of expression detailed in section 12(1) may be limited.

Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits the right to freedom of expression will not violate section 12(1) of the constitution provided that it:

- is reasonably required in the interests of defence, public safety, public order, public morality, or public health;
- is reasonably required for:
  - the purposes of protecting:
    - the reputations, rights and freedoms of other persons
    - the private lives of persons concerned in legal proceedings
  - protecting information received in confidence
  - maintaining the authority and independence of the courts
  - regulating educational institutions in the interests of persons receiving instruction therein
  - regulating the technical administration or operation of telephony, telegraphy, posts, wireless, broadcasting or television
- imposes restrictions on public officers, employees of local government bodies or teachers
- is reasonably justifiable in a democratic society.

Although the limitation provisions in section 12(2) are lengthy (the provision is much longer than the right itself), it is generally (see exceptions immediately below) in accordance with internationally accepted standards. In this regard, it is important to note that the requirement that the limitation be 'reasonably justifiable in a democratic society' qualifies each of the separate grounds for limiting a right. Thus, any law that intends to limit a right on one of the stipulated grounds must also be reasonably justifiable in a democratic society. This is an objective test that a court can apply and is not dependent on a governmental official's view on whether or not the limitation is justifiable.

Notwithstanding this, there are at least two provisions in the limitations set out in section 12(2) that stand out as not being internationally acceptable grounds for limiting expression, namely:

- the restriction imposed on public officers: Obviously, many public officials do have secrecy obligations, particularly in defence, intelligence and police posts. Nevertheless, the general ability of whistleblowers in the public service to bring illegal conduct, including corruption, to the attention of the media in the public interest is a critical part of a functioning democracy. Consequently, such limitations provisions could well have a chilling effect on public servants, unduly preventing the disclosure of official misconduct.
- the restrictions on educational institutions: The rationale behind this limitation is unclear. Academic freedom is often mentioned explicitly as a subset of the right to freedom of expression precisely due to the essential role that freedom of expression plays in the search for truth, one of the key rationales for protecting freedom of expression.

It should be noted that even though Botswana has introduced the Whistleblowing Act, Act 9 of 2016, many of these restrictions still apply. This is dealt with later in this chapter.

2.4.2 Privacy of home and other property

A second right that protects the media is contained in section 9(1) of the Constitution of Botswana. This right provides that 'Except with his or her own consent, no person shall be subjected to the search of his or her person or his or her property or the entry by others on his or her premises.' Being free from searches of notebooks, computer flash sticks, cameras and other tools of a journalist's trade, as well as the offices of media houses, is an important right, but it can be limited.

As discussed, constitutional rights are never absolute. Section 9(2) sets out the basis on which the right to protection for the privacy of home and other property set out in section 9(1) may be limited.

Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits the protection of privacy will not violate section 9(1) of the constitution, provided that it:

- is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources, for the purposes of any census or to secure the development or utilisation of any property for a purpose beneficial to the community
- is reasonably required to protect the rights or freedoms of others
- authorises a government (or parastatal company) officer to access the property and inspect premises or anything on the property for tax purposes, or to carry out work connected with any governmental (or parastatal) property on the premises

- authorises compliance with a court order
- is reasonably justifiable in a democratic society.

2.4.3 Deprivation of property

This right is linked to the right to protection of property and deals with property seizures. It is wordy and very legalistic, but section 8(1) of the Constitution of Botswana provides in its relevant part that:

> *No property of any description shall be compulsorily acquired, except where:*
>
> *(a) the taking of possession is necessary or expedient —*
>
> *(i) in the interests of defence, public safety, public order, public morality, public health, town and country planning or land settlement; and*
>
> *(b) provision is made in the law —*
>
> *(i) for the prompt payment of adequate compensation; and*
>
> *(ii) securing to any person having an interest in … the property a right of access to the High Court … for … a determination of … the legality of the taking of possession … of the property*

It is evident from the provisions of section 8 that it is generally intended to allow for expropriation of land for purposes such as the exploitation of mineral rights, conservation, development and the like. However, strictly speaking, section 8(1) could be used by a journalist or media house to prevent the confiscation of media-related property, such as computers, cameras, notebooks and phones.

Note that sections 8(4)–(6) contain a range of limitations on the right. These are not particularly relevant to the media and are, therefore, not included here.

2.4.4 Freedom of conscience

Section 11(1) of the Constitution of Botswana provides in its relevant part that 'Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought'. Freedom of thought is important for the media as it provides additional protection for commentary on issues of public importance.

As discussed previously, constitutional rights are never absolute. Section 11(2) sets out the basis on which the right to freedom of conscience detailed in section 11(1) may be limited. Although the wording is complicated and legalistic, the essence of these provisions is that a law which limits freedom of conscience will not violate section 11(1) of the constitution, provided that it:

- is in the interests of defence, public safety, public order, public morality or public health

- protects the rights of others
- is reasonably justifiable in a democratic society.

Freedom of assembly and association

A fifth protection is provided for in section 13(1) of the Constitution of Botswana, which provides that:

> *Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of assembly and association, that is to say, his or her right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his or her interests.*

This right not only guarantees the rights of journalists to join trade unions, but also the rights of the press to form press associations and of entrepreneurs to form media houses and conduct media operations.

As discussed previously, constitutional rights are never absolute. Section 13(2) sets out the basis on which the right to freedom of association contained in section 13(1) may be limited. Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits freedom of assembly and association will not violate section 13(1) of the constitution, provided that it:

- is in the interests of defence, public safety, public order, public morality or public health
- protects the rights of others
- imposes restrictions on public officers
- makes provision for the registration of trade unions (including various conditions relating to issues such as membership and representation)
- is reasonably justifiable in a democratic society.

2.4.5 Protection of law

A sixth protection is provided in section 10(10) of the Constitution of Botswana, which provides that:

> *Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public.*

The formulation of this right to 'open justice' in the Constitution of Botswana is interesting because it effectively allows the parties to a case to agree to the proceedings not being public. This is an unusual formulation and detracts from the

openness of the proceedings because the right to a public trial is not just crucial for the protection of litigant, but also to secure public faith in the judiciary. In other words, the public (and, as part of that, the media) generally ought to have a right to attend judicial proceedings.

As discussed previously, constitutional rights are never absolute. Besides the limitation already contained in section 10(10) allowing the exclusion of the public by the parties involved in the litigation, section 10(11) provides that the above general right to open court hearings shall not prevent a court (or similar body) from limiting public access:

- to the extent that the court considers this necessary or expedient in circumstances where publicity would prejudice the interests of justice
- where this is empowered by the law in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of 18 years, or the protection of the private lives of persons involved in the proceedings.

2.5 Constitutional provisions that might require caution from the media or might conflict with media interests

Just as there are certain rights or freedoms that protect the media, other rights or freedoms can protect individuals and institutions from the media. It is important for journalists to understand which provisions in the constitution can be used against the media. The Constitution of Botswana does not, in fact, contain many provisions that are used against the media ordinarily, such as a right to dignity or privacy. However, there are provisions that allow for the derogation from fundamental rights and freedoms, as well as declarations relating to emergencies, which may affect the media.

It is important to note the provisions of sections 16 and 17 of Chapter II in the Constitution of Botswana, which deal respectively with derogations from fundamental rights and freedoms, and declarations relating to emergencies. In terms of section 17, the president may by proclamation published in the Gazette declare that a 'state of public emergency exists,' which declaration shall cease to have effect after:

- seven days (if parliament is sitting or has been summoned to meet within seven days); or
- twenty-one days in all other circumstances.

If the National Assembly approves the declaration, it will remain in force for six months (although this can be extended for up to six months at a time).

It is important to note that the emergency provisions in the Constitution of Botswana are not in accordance with international best practice standards. This is because there are no objective preconditions to such a declaration. In other words, there is nothing in the constitution which requires that a real threat to the public

must exist before the president can make a declaration of public emergency.

Importantly, section 16 of the Botswana Constitution specifically allows laws passed when Botswana is at war or under a state of emergency to derogate from the rights to personal liberty and equality. Note, however, that the right to freedom of expression cannot be derogated from, although the limitations already contained in the right allow for wide discretion to regulate the media in the interests of, for example, defence and public order.

2.6 Key institutions relevant to the media established under the Constitution of Botswana

As the Constitution of Botswana came into effect in the mid-1960s, it does not contain a number of institutions that are sometimes found in the constitutions of some other southern African countries, such as an ombudsman, a human rights commission or an independent broadcasting authority.

Nevertheless, there are two important institutions in relation to the media that are established under the constitution, namely, the judiciary and the Judicial Service Commission (JSC).

2.6.1 The judiciary

Chapter VI of the Constitution of Botswana, The Judicature, establishes two superior courts: the High Court and the Court of Appeal. In terms of section 95(1) of the constitution, the Botswana High Court shall have 'unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law'. Effectively, this ambit allows the High Court to enquire into any matter of law in Botswana.

Section 105(1) of the constitution provides that where a substantial question of law involving constitutional interpretation arises in any subordinate court (such as a magistrate's court), the question must be referred to the High Court.

Section 95(5) specifies that the High Court has jurisdiction to supervise any civil or criminal proceedings before any subordinate court or any court-martial and make such orders as it considers appropriate to ensure that justice is administered by such court.

Section 95(6) authorises the Chief Justice to make the practice and procedure rules of the High Court.

The Court of Appeal has a narrower jurisdiction, namely, powers conferred by the constitution or any other law.

Note that in terms of section 106 of the Constitution of Botswana, there is a right of appeal (other than in respect of frivolous or vexatious cases) to the Court of Appeal from any decision of the High Court involving constitutional interpretation, except concerning section 69(1) of the constitution, which gives the High Court the right to determine whether any person has been validly elected as a member or speaker of the National Assembly.

The judiciary or judicature is an essential institution for the media because the two rely on each other to support and strengthen democratic practices in a country. The judiciary needs the media to inform the public about its judgments and its role as one of the branches of government, and the media is essential to building public trust and respect for the judiciary, which is the foundation of the rule of law in society. The media needs the judiciary because of the courts' ability to protect the media from unlawful action by the state and from unfair damages claims by litigants.

In terms of sections 96, 99 and 100 of the Constitution of Botswana, the key judicial appointment procedures are as follows:

- the High Court is made up of the Chief Justice and judges of the High Court
- the Court of Appeal is made up of the President of the Court of Appeal, such number of justices of appeal as may be prescribed by parliament, as well as the Chief Justice and the other judges of the High Court. Furthermore, parliament can make provision for the office of the President of the Court of Appeal to be held by the Chief Justice of the High Court on an *ex officio* basis
- the Chief Justice of the High Court and the President of the Court of Appeal (unless that office is held by the Chief Justice) are appointed by the president acting alone
- the other judges of the High Court and the justices of appeal, if any, are appointed by the president acting per the advice of the JSC.

In terms of sections 97(2) and 101(2) of the Constitution of Botswana, a judge of the High Court and Court of Appeal can be removed from office only for inability to perform the functions of his or her office or for misbehaviour. The removal of any of these judges by the president requires a prior finding by a presidentially appointed tribunal recommending removal.

2.6.2 The Judicial Service Commission

The JSC is a constitutional body that is established to:

- participate in the appointment of judges to the High Court and justices to the Appeal Court
- be responsible for exercising disciplinary control (together with the president) over the registrars of the two superior courts, magistrates and members of courts, as prescribed by parliament in terms of section 104(2).

The JSC is relevant to the media because of its critical role in the judiciary, the proper functioning and independence of which are essential for democracy. In terms of section 103(1), the JSC is made up of the Chief Justice (the chairman), the president of the Court of Appeal or the most senior justice of the Court of Appeal (if the Chief Justice is the *ex officio* president of the Court of Appeal), the attorney-general, the chairman of the Public Service Commission, a member of the Law Society

nominated by the Law Society, and a person 'of integrity and experience not being a legal practitioner' appointed by the president.

Importantly, section 103(4) specifically protects the independence of the JSC by stating that it 'shall not be subject to the direction or control of any other person or authority in the exercise of its functions under this constitution.'

2.7 Enforcing rights under the constitution

A right is only as effective as its enforcement. All too often rights are enshrined in documents such as a constitution or a bill of rights, and yet remain empty of substance because they cannot be enforced.

Section 18 of the Constitution of Botswana, Enforcement of Protective Provisions, deals specifically with contraventions of the rights contained in sections 3 –16 of Chapter II of the constitution. It allows a person to apply to the High Court when a provision of those sections of Chapter II 'has been, is being, or is likely to be' contravened.

Perhaps one of the most effective ways in which rights are protected under the constitution is by the provisions of the constitution that entrench the rights contained in Chapter II, 'Protection of Fundamental Rights and Freedoms of the Individual'. Section 89(3)(a) of the constitution requires that a constitutional amendment of Chapter II needs to be passed by a two-thirds majority of all members of the National Assembly. Furthermore, any amendment to the entrenchment provision (that is, of section 89 itself) requires the support of a majority vote of the entire electorate, in addition to it having been passed by parliament, before it can be sent to the president for his assent, in terms of section 89(3)(b). Effectively, this requires a national referendum on any such constitutional amendment.

2.8 The three branches of government and separation of powers

All too often, politicians, commentators and journalists use political terms such as branches of government and separation of powers; yet working journalists may not have a clear idea what these terms mean.

2.8.1 Branches of government

It is generally recognised that governmental power is exercised by three branches of government, namely the executive, the legislature and the judiciary.

The executive

Section 47(1) of the Constitution of Botswana provides that the executive power of Botswana shall vest in the president and shall be exercised by him or her directly or by officers subordinate to him or her.

Section 30 of the Constitution of Botswana provides that the President of the Republic of Botswana is the head of state. In terms of section 32(1) of the constitution, the president is elected whenever parliament is dissolved. The election procedure is set out in section 32. The president is the person who is supported by the majority of persons elected to parliament.

Section 44 of the Constitution of Botswana provides for a Cabinet consisting of the president, the vice-president and ministers. The main role of the Cabinet is to advise the president with respect to the policy of the government. The Cabinet is responsible to the National Assembly for all things by, or under, the authority of the president, vice-president or any minister in the executive, in terms of section 50 of the Constitution of Botswana.

The vice-president is appointed by the president from among the elected members of the National Assembly. This appointment must be endorsed by the members of the National Assembly, in terms of section 39(1) of the Constitution of Botswana. The role of the vice-president is to be the principal assistant to the president, in terms of section 49 of the Constitution of Botswana.

In terms of section 42(1) of the Constitution of Botswana, the other offices of ministers (and there must be no more than six of these or such other number as set by parliament) must be established by parliament or by the president (subject to the provisions of any act of parliament). In terms of section 42(2) of the Constitution of Botswana, the offices of an assistant minister (and there must be no more than three of these or such other number as set by parliament) must be established by parliament or by the president (subject to the provisions of any act of parliament).

The president generally makes appointments to the office of minister or assistant minister from among the members of the National Assembly. Note that up to four persons who are not members of the National Assembly may be appointed as a minister or assistant minister, but they must be qualified for election as such.

The legislature

In terms of section 86 of the Constitution of Botswana, legislative or law-making power in Botswana 'for the peace, order and good government of Botswana' is vested in parliament.

In terms of section 57 of the Constitution of Botswana, parliament consists of the president and the National Assembly. In terms of section 58(2), the National Assembly consists of 57 elected members and four specially elected members.

The process for the election of the four specially elected members is set out in the first schedule to the Constitution of Botswana:

- the president nominates four candidates for a special election, and any elected member of the National Assembly nominates four candidates for special election
- a list of candidates nominated by the president and elected members of the National Assembly is prepared

- each elected member of the National Assembly votes for four candidates. The ballot is secret, and no candidate may be voted for more than once
- the four candidates securing the highest number of votes are duly elected.

A similar procedure is followed for by-elections should a vacancy arise in the number of specially elected members.

Ordinary elected members of the National Assembly are elected in terms of a constituency system (see section 63 of the Botswana Constitution). In terms of section 64, the JSC appoints a delimitation commission after every census, or when parliament has changed the number of seats in the National Assembly, to determine the boundaries of each constituency. Section 65 of the Constitution of Botswana requires the boundaries of each constituency to be such that the number of inhabitants therein is nearly equal to the population quota (that is, the number obtained by dividing the inhabitants of Botswana by the number of constituencies). Although there are certain exceptions, the necessary requirements to be registered as a voter in terms of section 67 of the Botswana Constitution, are being at least 18 years of age and having citizenship and residence in Botswana.

The judiciary

The judicial power, as previously discussed, is vested in the courts. The role of the judiciary is to interpret the law and to adjudicate legal disputes in accordance with the law.

2.8.2 Separation of powers

It is important in a functioning democracy to divide governmental power between different organs of the state to guard against the centralisation of power, which may lead to abuse of power. This is known as the separation of powers doctrine. The aim is to separate the functions of the three branches of government, the executive, the legislature and the judiciary, so that no single branch is able to operate alone, assume complete state control and amass centralised power. While each branch performs several different functions, each also plays a watchdog role in respect of the other. This helps to ensure that public power is exercised in a manner that is accountable to the general public and in accordance with the constitution.

2.9 Weaknesses in the constitution that ought to be strengthened to protect the media

There are several weaknesses in the Constitution of Botswana. If these provisions were strengthened, there would be specific benefits for the media in Botswana.

2.9.1 Remove internal limitations to certain rights

As discussed, the Constitution of Botswana makes provision for certain rights to be

subject to internal limitations, that is, the provision dealing with rights contains its own limitations clause, which sets out how government can limit the ambit of the right legitimately.

These internal limitations occur in several sections in Chapter II of the Constitution of Botswana. They deal specifically with the limitation or qualification of the particular right that is dealt with in that section. As discussed more fully above, the right to freedom of expression contains such an internal limitation. In other words, the section that contains the right also sets out the parameters or limitations allowable in respect of that right.

The rights contained in Chapter II of the Constitution of Botswana, Fundamental Human Rights and Freedoms, would be strengthened if they were subject to a single generally applicable limitations clause instead of each having its own internal limitations clause.

Such a general limitations clause would apply to all of the provisions of Chapter II of the Constitution of Botswana, that is, to the fundamental rights and freedoms. It would allow a government to pass laws limiting rights generally, provided this is done in accordance with the provisions of a limitations clause that applies equally to all rights. It makes the ambit of the rights and the grounds for limitation much clearer for the public because there would be no specific limitations provisions that apply to each right separately.

2.9.2 Provision for an independent broadcasting regulator and for a public broadcaster

Given the fact that the Constitution of Botswana came into effect in the mid-1960s, it is not surprising that it does not provide constitutional protection for an independent broadcasting regulator or for a public broadcaster. However, given the importance of both these institutions for ensuring access to news and information by the public, it is suggested that such amendments to the constitution would be in the public interest, and would serve to strengthen both the media and democracy more generally in Botswana.

3 The media and legislation

In this section, you will learn:

- what legislation is and how it comes into being
- legislation governing the publication of print media
- legislation governing the making of films
- legislation governing media practitioners
- legislation governing the broadcasting media generally
- legislation governing the state broadcasting sector
- legislation governing broadcasting signal distribution
- legislation that threatens a journalist's duty to protect sources
- legislation that prohibits the publication of certain kinds of information
- legislation that prohibits the interception of communication
- legistlation that specifically assists the media in performing its functions

3.1 Legislation: An introduction

3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed by parliament, which is the legislative authority. As we know, legislative authority in Botswana is vested in the parliament, which is made up of the president and the National Assembly. It is important to note, however, that in certain limited cases, legislation must also be referred to a body called *Ntlo ya Dikgosi*. In terms of section 88(2) of the Constitution of Botswana, the National Assembly may not proceed on any bill that would alter the provisions of the constitution or would have a bearing on traditional matters (including powers of chiefs and headmen, traditional courts, customary law or tribal organisation/property) unless a copy of the bill has been with *Ntlo ya Dikgosi* for at least 30 days.

In terms of section 77, the *Ntlo ya Dikgosi* comprises 33–35 members mostly made up of members selected by traditional authorities or appointees of the president.

As a general rule, the National Assembly and the president are ordinarily involved in passing legislation. There are detailed rules in sections 87–89 of the Constitution of Botswana, which set out the different law-making processes that apply to different types of legislation. Journalists and others in the media need to be aware that the Constitution of Botswana requires different types of legislation to be passed in accordance with particular procedures. The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the Constitution of Botswana, there are four kinds of legislation, each of which has particular procedures and/or rules applicable to it. These are:

- legislation that amends the constitution; the procedures and/or applicable rules are set out in section 89 of the constitution
- ordinary legislation; the procedures and/or applicable rules are set out in section 87 of the constitution
- legislation that deals with financial measures; the procedures and/or applicable rules are set out in section 88(1) of the constitution
- legislation that would affect traditional matters as set out in section 88(2) of the constitution.

3.1.2 The difference between a bill and an act

A bill is a piece of draft legislation that is debated and usually amended by parliament during the law-making process.

In terms of section 87(5) of the Constitution of Botswana, if a bill is passed by parliament in accordance with the various applicable procedures required for different types of bills, as set out above, it becomes an act once it is agreed to by the president. An act must be published in the Gazette and, in terms of section 87(6) of the Constitution of Botswana; it becomes law only when it is has been so published. Note, however, that it is possible for parliament to make retrospective laws in terms of section 87(6).

It is important to note that some of the laws governing certain media-related aspects came into force prior to the coming into effect of the 1966 Constitution of Botswana. As they were passed by the governing authority of the time and have yet to be repealed, they are still the law.

3.2 Legislation governing the publication of print media

Unfortunately, in terms of the Printed Publications Act, Act 15 of 1968, there are several constraints on the ability to operate as a print media publication in Botswana. In particular, Botswana requires the registration of newspapers (in some instances, even newspapers that are published outside Botswana), which is out of step with international best practice.

Even though these kinds of restrictions constitute bureaucratic and administrative requirements rather than outright restrictions, they effectively impinge on the public's right to know by setting barriers to print media operations.

There are certain critical requirements laid down by the Printed Publications Act in respect of a newspaper or other publications. The definition of a newspaper is extremely broad and includes:

> ***any publication containing news, intelligence, reports of occurrences, or any remarks, observations or comments on such news or on any other matters of public interest or of a political nature in relation to Botswana, which is printed or published for sale or free distribution at regular or irregular intervals within Botswana.***

The effect of this definition is that any publication which contains, for example, a report on any occurrence or any comment on matters of public interest or of a political nature that is intended for distribution to the public or any section of the public (even if such distribution is free or irregular) constitutes a newspaper for the Printed Publications Act. The important aspects of the Printed Publications Act are as follows:

3.2.1 Registration of newspaper

- Section 3 of the Printed Publications Act requires the minister responsible for the Printed Publications Act to appoint a registrar of newspapers by notice in the Gazette.
- Section 4 of the Printed Publications Act requires the registrar of newspapers to establish and maintain a register of newspapers.
- Section 5(5) of the Printed Publications Act makes it an offence to print or publish a newspaper without having registered the newspaper before printing and publication, and, if found guilty, the perpetrator will be liable to a fine, a period of imprisonment or both, in terms of section 13 of the Printed Publications Act.
- In terms of section 5(2) of the Printed Publications Act, the particulars required for registration are: the title of the newspaper, name and residential address of the editor, name and residential and business addresses of the proprietor (owner), publisher and printer. Furthermore, any change to a newspaper's title, editor or ownership interests must be lodged with the registrar of newspapers. Supplying false information or publishing a newspaper without having filed changes in the relevant registered information is an offence, and, if found guilty, the perpetrator will be liable to a fine, a period of imprisonment or both, in terms of section 13 of the Printed Publications Act.

3.2.2 Publication of details of the publisher

Besides the newspaper registration requirements set out above, section 6(1) of the Printed Publications Act also requires all publications (defined extremely broadly to the public or any section thereof in Botswana) to have printed on one of its

pages, in legible type, the name and addresses of the printer and publisher and the year of publication. Any person who prints a publication without complying with the requirements of section 6(1) is guilty of an offence and liable to a fine, a period of imprisonment or both, in terms of section 13 of the Printed Publications Act.

3.2.3 Duty to keep copies of publications and to produce them on demand

Section 7 of the Printed Publications Act requires the printer of any publication to keep a copy of the publication and to produce it on demand of a police officer with the rank of inspector or above. Again, any person who fails to comply with section 7 is guilty of an offence and is liable to a fine, a period of imprisonment or both, in terms of section 13 of the Printed Publications Act.

3.2.4 Foreign application of the Act

An interesting provision in the Printed Publications Act is section 9, which provides that if the minister is satisfied that any publication printed outside Botswana would constitute a newspaper if it had been printed and published in Botswana, and is of the opinion that the publication is intended primarily for circulation within Botswana, he may order the publication to be a newspaper under the Printed Publications Act, and 'thereupon the provisions of this Act shall apply to such publication', even though it is printed and published outside the country.

3.2.5 Seizures of publications

Section 11 authorises any police officer with the rank of inspector or above to seize any publication or newspaper which he or she 'reasonably suspects' has been published or printed in contravention of the Printed Publications Act. This section also empowers magistrates to issue search and seizure warrants for publications and newspapers printed in contravention of the Printed Publications Act.

3.2.6 Exemptions

Section 8 of the Printed Publications Act includes an interesting provision whereby the minister may, by order published in the Gazette, declare any newspaper to 'not be a newspaper' thus exempting that newspaper from the provisions of the Printed Publications Act. The minister may also exempt a person from any or all the provisions of the Printed Publications Act or declare that any provisions of the Printed Publications Act shall not apply to any newspaper or publication.

3.3 Legislation governing the making of films

Unfortunately, there are several constraints on the making of films in Botswana, something that obviously affects the visual media, such as television. Important aspects of the main piece of legislation governing film, namely the Cinematograph Act, Act 73 of 1970, are as follows:

- In terms of section 3 of the Cinematograph Act, no film for public exhibition or sale either inside or outside Botswana shall be made in Botswana, except

under and in accordance with a filming permit issued by the minister (presumably the minister responsible for the administration of the Cinematograph Act). If a film is made without such a permit, the person making the film (or the person(s) in control of or managing the affairs of a company, if the film is being made by a corporate entity) is guilty of an offence in terms of section 3, and, in terms of section 29, is liable to a fine, imprisonment or both. In addition, the court may order the confiscation and destruction of the film.

- Section 4 of the Cinematograph Act requires an application for a filming permit to be made in writing and to be accompanied with a full description of the scenes and the full text of the spoken parts (if any) of the entire film which is to be made, even if parts of the film are made outside Botswana. Note, however, that the minister may accept an application that is otherwise incomplete if the minister has been given such other information as he requires for the determination of the application.

- Section 5 of the Cinematograph Act empowers the minister to issue a filming permit subject to conditions. The minister may even order a person appointed by him to be present at the making of the film. Section 8(1) of the Cinematograph Act provides that any person appointed by the minister to be present at the making of a film has the authority to intervene and order the cessation of any scene which, in his opinion, endangers any person or property (other than the film producer's property), is cruel to animals or is being made in contravention of the conditions of a film permit. It should be noted that in terms of section 8(2) of the Cinematograph Act, should the person chosen by the minister intervene with the production of a film, that person is required to notify the minister of the intervention and the reasons therefor. The minister may either permit the making of the film be resumed or provide a hearing to the holder of the filming permit in relation to the intervention and then either allow the filming to resume on such conditions as the minister thinks appropriate or else refuse to allow the film making to be resumed. Should the making of a film be resumed without the consent of the minister all persons engaged in the making of the film, including the permit holder, are guilty of an offence in terms of section 8(4).

- Note, however, that section 9 of the Cinematograph Act empowers the minister to exempt any film or class of film from the above provisions of the Cinematograph Act.

- There are also several restrictions regarding the exhibition of films. These are dealt with elsewhere in this chapter.

3.4 Legislation governing media practitioners

3.4.1 Legislation that regulates media practitioners generally

A piece of legislation that was enacted in Botswana ostensibly to 'preserve the maintenance of high professional standards within the media' is the Media Practitioners

Act (MPA), Act 29 of 2008. Section 6 requires every resident media practitioner (defined in section 1 as 'a person engaged in the writing, editing or transmitting of news and information to the public, and includes a broadcaster, a journalist, editor, or publisher of a publication and the manager or proprietor of a publication or broadcasting station') to be registered and accredited by the executive committee of the Media Council established under the MPA. Failure to register is an offence punishable by a fine, imprisonment or both, in terms of section 7(5) of the MPA. There have been growing calls for the MPA to be repealed and at one point it appeared as if that had the support of the ruling party, but the vote to repeal the MPA in parliament split along party lines and the repeal motion was defeated.[7]

3.4.2 Institutions established under the MPA

The MPA establishes the Media Council and other subsidiary or related bodies:

- Section 3 establishes the Media Council, and, in terms of section 18, the governing body of the Media Council is its executive committee.
- Section 11 provides for the establishment of a complaints committee.
- Section 15 provides for the establishment of an appeals committee.

3.4.3 Functions of the institutions

The Media Council

In terms of section 5, the objects of the Media Council are to:

- preserve media freedom
- uphold standards of professional conduct and promote good ethical standards and discipline among media practitioners
- promote the observance of media ethics in accordance with the Media Council's code of ethics
- promote public awareness of the rights and responsibilities of the media
- establish links with similar organisations
- monitor activities of media practitioners
- receive complaints against media practitioners
- register and accredit media practitioners
- bring media practitioners and other media stakeholders together to exchange information
- issue accredited media practitioners with identity cards
- maintain a media register

- seek financial and other assistance for its operations
- sponsor and advise on the training of media practitioners
- undertake research into the performance of the media.

The Media Council is also required to issue a code of ethics, which is to include the following provisions, in terms of section 9 of the MPA:

- duties and obligations of media practitioners
- protection of minors
- protection of persons suffering from physical or mental disabilities
- advertising content
- fair competition in the media industry
- protection of privacy
- unlawful publication of defamatory matter.

Note that in terms of section 9(4) of the MPA, the minister must be provided with prior notice of any changes to the code of ethics.

Under section 10 of the MPA, a media outlet must provide a right of reply to any person against whom a statement has been published. The requested reply must be published:

- no later than two subsequent editions of the publication
- with the same prominence as the original statement.

The complaints committee

The main functions of the complaints committee are to:

- investigate and hear complaints against media practitioners regarding:
  - contraventions of the code of ethics, section 9(1) of the MPA
  - acts or omissions which have aggrieved any person, section 12 of the MPA.
- make rulings on the complaints, in terms of section 14 of the MPA, including:
  - dismissing the complaint
  - criticising the conduct of the media practitioner, where warranted
  - directing that a correction or apology be published
  - taking disciplinary action. In terms of section 14(2), this could include:
    - a warning or a reprimand

- a fine
- suspension of registration for a specific period
- removing the media practitioner's name from the register

- making any supplementary rulings.

The appeals committee

The primary function of the appeals committee is to hear appeals against the decisions of the complaints committee. According to section 15 of the MPA, it may dismiss, enhance, reduce, or vary a decision of the complaints committee. Note that in terms of section 15(6) of the MPA should there be a further appeal from the appeals committee to the High Court, this must be done within 30 days of the original ruling.

3.4.4 Establishment of the institutions

The Media Council

- The Media Council is a corporate body, in terms of section 3(2) of the MPA.
- Section 4 of the MPA provides that the Media Council 'shall operate without any political or other bias or interference; and shall be wholly independent and separate from the government, any political party or other body'.
- Section 5 of the MPA outlines the objectives and responsibilities of the Media Council. These have been dealt with above.
- Membership of the Media Council consists of 'all publishers of news and information, whether or not in the private or public sector,' in terms of section 7(1). Importantly, in terms of the definitions contained in section 1 of the MPA:
  - a publisher is 'a person responsible for a publication'
  - publication includes 'all print, broadcast and electronic information which is published'
  - published means 'issued for distribution, by sale or otherwise.
- Furthermore, any person 'having a legitimate interest in the development of the local media industry' may apply for associate membership, in terms of section 7(3) of the MPA.

The executive committee of the Media Council

The executive committee is made up of a chairperson, a vice-chairperson, a treasurer and six additional members, elected at a general meeting of the members of the Media Council, in terms of subsections 18(1) and (2) of the MPA. It is important to note, however, that in terms of section 35 of the MPA, the minister may dissolve the executive committee if it fails to submit an annual report and, in terms of

section 36 of the MPA, may appoint an interim executive committee until such time as the Media Council elects a replacement executive committee.

The complaints committee

The complaints committee is made up of a chairperson and eight other members who have a serious interest in the furtherance of the communicative value of the media, but who do not have financial interests and are not employed in the media (section 11(1) of the MPA).

Unfortunately, this critically important body, which in name appears to be a sub-committee of the Media Council, is not appointed by the Media Council at all but rather solely by the minister responsible for the administration of the MPA.

The appeals committee

The appeals committee is made up of the chairperson, who is required to be a legal practitioner recommended by the Law Society of Botswana, a member of the public, and a representative of the media recommended by the Media Council (section 15(1) of the MPA). Again, this critically important body, which in name appears to be a subcommittee of the Media Council, is not appointed by the Media Council but rather solely by the minister, albeit on the recommendation of other bodies in respect of two of the three appointments.

3.4.5 Funding for the institutions

The Media Council

In terms of section 32(1) of the MPA, funds for the Media Council come from:

- members' voluntary contributions, bequests and subscription fees
- fees and other monies paid for services rendered by the Media Council
- monies from the rental or sale of any property by the Media Council
- grants, gifts or donations from lawful organisations or sources.

The executive committee

Allowances paid to members of the executive committee are paid from funds generated by the Media Council, in terms of section 22(1) of the MPA.

The complaints and appeals committees

Members of these committees are paid allowances determined by the minister and paid for from monies appropriated by the National Assembly (that is, out of the national budget), in terms of section 22(2) of the MPA.

3.4.6 Regulations made in terms of the MPA

The MPA makes provision for the making of regulations by the executive committee and the minister.

The executive committee

Regulations made by the executive committee in terms of section 37 of the MPA are binding on all members of the Media Council — that is, all media practitioners resident in Botswana. These regulations deal mainly with administrative issues, including:

- the manner of application for registration and accreditation of media practitioners
- the method of application for membership of the Executive Council.

The minister

In terms of section 38 of the MPA, the minister has broad regulation-making powers, including:

- dissolving the executive committee of the Media Council for failure to submit an annual report
- any matter intended to safeguard the interests of the public and promote professional standards in the media
- giving effect to the code of ethics issued by the Media Council
- any matter relating to the registration and accreditation of non-resident media practitioners (for example, members of the foreign press).

3.4.7 Amending the legislation to strengthen the media generally

The MPA is not in accordance with international best practice, and there are several problems with its provisions.

- The MPA is not a genuine industry self-regulatory body because membership of the Media Council is not voluntary but instead mandated under the MPA. Failure to be a member is a criminal offence that brings with it penalties, namely, a fine, imprisonment or both.
- From a media freedom perspective, the most important body that is established under the MPA is the complaints committee, which is clearly a governmental body appointed solely by the minister. This body is given enormous powers, including the power to prevent a journalist from practising his or her profession by being stripped of his or her accreditation with the Media Council. Having a governmental body in charge of the disciplinary affairs of journalists is contrary to the democratic principles of media regulation.

- The premise of the MPA is unjustifiable. Regulation of broadcasting is recognised as legitimate due to the technical nature of broadcasting. As such, licensing of frequencies must be coordinated, and stricter content regulation is in order due to the differences between the print media (where the intake of content requires action — reading on the part of the reader) and the broadcast media (where the impact is much more immediate and does not require the same intentional action on the part of the listener or viewer). Internationally, executive regulation of the conduct of the print media (as is effectively provided for in the MPA) is seen as not being consistent with a commitment to freedom of expression and, particularly, to a free press.

3.5 Legislation governing the broadcast media generally

3.5.1 Legislation regulating broadcasting generally

Broadcasting in Botswana is regulated in terms of the Communications Regulatory Authority Act, Act 19 of 2012 (CRAA) which established the Botswana Communications Regulatory Authority (Bocra) and in terms of the Broadcasting Act 1998, Act 6 of 1999. The Broadcasting Act established the National Broadcasting Board (NBB). The CRAA gives Bocra the powers and responsibilities previously assigned to the NBB under the Broadcasting Act, so the Broadcasting Act exists alongside the CRAA with Bocra fulfilling the regulatory functions of both Acts.

3.5.2 The Botswana Communications Regulatory Authority

In terms of section 3(2) of the CRAA, Bocra is defined as a body corporate with full capacity to sue or be sued in its own name, and to do all such things as bodies corporate may, by law, do and as may be for the exercise of its powers and the performance of its functions under the CRAA.

3.5.3 Appointment of Bocra board members

Section 2 of the CRAA, provides that the minister appoints the members of the Bocra board taking into account their academic qualifications, experience and expertise in information and communication technology, broadcasting, media, postal services, law, consumer protection, financial accounting, economics, general business management, information and technology policy or regulation.

Interestingly, the CRAA does not contain a definition for the term 'the Minister', but we assume it is a reference to the minister responsible for communications issues in Botswana.

Section 3 of the CRAA requires that the minister publishes in the Gazette, the name of each member and his or her period of appointment.

It is noteworthy that section 4 of the CRAA states that the minister shall appoint the chairperson of the board, and the members shall appoint the vice-chairperson from among their number. In terms of section 9, each member of Bocra shall hold office for a period not exceeding three years and may be eligible for re-appointment for one further term.

Section 10 of the CRAA outlines the grounds which disqualify a person from becoming a member of the Bocra board. These include:

- being an unrehabilitated bankrupt
- having been convicted of a criminal offence in Botswana within the ten years immediately preceding the date of his or her proposed appointment
- having been convicted of a criminal offence outside Botswana which, in Botswana, would have been a criminal offence within the ten years immediately preceding the date of his or her proposed appointment
- having worked as a chairperson of, or director or senior manager in, or provided full-time independent consulting services to any regulated supplier or any affiliate of that regulated supplier, whether situated within or outside Botswana within two years immediately preceding the date of his or her proposed appointment
- being the holder of any office in any party, movement, or organisation of a political nature in Botswana
- holding office in any district, city or town council or central government
- being an executive or non-executive chairperson, director or officer in a regulated supplier
- holding any controlling interest in any regulated supplier or being the holder of a licence issued by the authority, other than a licence required for his or her personal use
- having a direct or indirect financial interest in the industries regulated by Bocra either him or herself, or through a family member
- being a serving member of the judiciary in Botswana
- not being a citizen of Botswana
- being an employee of Bocra.

In terms of section 11 of the CRAA, a board member's office shall become vacant, upon that person:

- becoming disqualified in terms of section 10 to hold office as a board member
- being adjudged bankrupt or insolvent
- being absent from three consecutive board meetings, without the permission of the board or providing a reasonable excuse to the board, or is present at less than half of the board meetings in any one calendar year
- dying

- giving three months' written notice to the minister, of his or her intention to resign from office
- becoming mentally or physically incapable of performing his or her duties as a member provided that if there arises any doubt as to whether he or she is physically or mentally incapable, he or she shall either submit him or herself to a medical examination by two registered medical practitioners the board member does not know personally
- acting in any way to bring the name of Bocra into disrepute
- coming to the end of his or her term of office and, being eligible for re-appointment for a further term of office, he or she is not re-appointed
- failing to disclose any material fact that would have disqualified him or her from appointment
- ceasing to be a citizen of Botswana
- being found guilty of unprofessional conduct.

Section 18(1) stipulates that should a member present at a meeting of the board in which any matter with which he or she is directly or indirectly interested, in a private capacity, or is the subject of discussion that he or she should declare such interest, he or she shall not unless otherwise directed by the board, take any part in the discussion or voting on such matters. Section 18(2) states that a disclosure of interest made shall be recorded in the minutes of the meeting at which it is made. This may result in a requirement to resign in accordance with the provisions of section 18(2). When a member of the board vacates their office, the chairperson of the board must inform the minister in writing, and the minister shall appoint another member.

3.5.4 Main functions of Bocra

In terms of sections 5 and 6 of the CRAA, the functions of Bocra are to:

- provide effective regulation of regulated sectors which are broadcasting, telecommunications (including internet services) and postal services
- promote universal access to communication services
- impose levies on identified operators for funding universal access in the communications sector
- ensure enhanced performance in the communication sector
- ensure the provision of safe, reliable, efficient, and affordable services in the regulated sectors throughout Botswana
- protect and promote the interests of consumers, purchasers and other users of the services in the regulated sectors, particularly in respect of the prices

charged for, and the availability, quality and variety of services and products

- monitor the performance of the regulated sectors in relation to levels of investment, availability, quantity, quality and standards of services, competition, pricing, the costs of services, the efficiency of production and distribution of services and any other matters
- facilitate and encourage private sector investment and innovation in the regulated sectors
- enhance public knowledge, awareness and understanding of the regulated sectors
- foster the development of the supply of services and technology in each regulated sector
- process applications for and issue licences, permits, permissions, concessions and authorities for regulated sectors with prior notification to the minister
- impose administrative sanctions and issue and follow up enforcement procedures to ensure compliance with conditions of licences, permits, permissions, concessions, authorities and contracts
- promote efficiency and economic growth in the regulated sectors and disseminate information about matters relevant to its regulatory function
- hear complaints and disputes from consumers and regulated suppliers and resolve or facilitate their resolution
- ensure that the needs of low income, rural or disadvantaged groups of persons are accounted for by regulated suppliers
- maintain a register of licences, permits, permissions, concessions, authorities, contracts, and regulatory decisions which is available to the public and from which the public may obtain a copy of any entry for a prescribed fee
- make industry regulations for the better carrying out of its responsibilities under the act including:
  - codes and rules of conduct
  - records to be kept
  - complaint handling procedures
- advise the minister on matters relating to the regulated sectors and proposed policy and legislation for those sectors
- take regulatory decisions in an open, transparent, accountable, proportionate and objective manner and without preference
- promote and facilitate the convergence of technologies.

3.5.5 Funding for Bocra

Section 24 of the CRAA, stipulates that Bocra's funds shall consist of:

- fees levied in respect of the application for, and granting of, amongst things, licences, approvals and permissions, and annual or other periodic renewals
- annual fees, which shall be a percentage, determined by Bocra, of the net operating revenues of each licensee.

Section 24(2) of the CRAA states that Bocra shall not accept any grant, contribution, donation or endowment that is received from any regulated supplier or its associated companies or subsidiaries.

In terms of section 24(3) of the CRAA, funding received by Bocra from the National Assembly shall be in respect only of specific projects agreed between the National Assembly and Bocra and shall be by way of loan or grant for that project and before the receipt of any loan by Bocra, the rate of interest and the period of the loan shall be agreed between Bocra and the minister responsible for finance.

Section 24(4) of the CRAA requires that Bocra set out in detail in its annual report, the sources of its funds.

The effect of this is that Bocra is required to be self-financing.

3.5.6 The licensing regime for broadcasters in Botswana

Broadcasting licence requirement

Section 31(1) of the CRAA prohibits any person from carrying out any broadcasting or rebroadcasting activities except under, and in accordance with, a licence issued by Bocra. However, section 31(2) exempts state broadcasters from requiring a broadcasting licence.

In terms of section 31(5) anyone who does not comply with section 31(1) of the CRAA is guilty of an offence and, on conviction, shall be liable to a fine, imprisonment or both.

Categories of broadcasting licences

It should be noted that the categorisation of broadcasting licences is not included in the CRAA but is dealt with in the Broadcasting Act. Section 10(2) of the Broadcasting Act makes reference to three categories of broadcasting services:

- *Private:* This is defined in section 1 of the Broadcasting Act as 'a broadcasting service operated for profit and controlled by a person who is not a public or community broadcasting licensee.' Interestingly the CRAA also contains a definition of a commercial broadcasting service which, likewise, defines this as one operating for profit.

- *Community:* This is defined in section 1 of the Broadcasting Act as a broadcasting service which:
  - is fully controlled by a non-profit entity and carried on for non-profitable purposes
  - serves a particular community
  - encourages members of the community serviced by it, or persons associated with or promoting the interests of such community, to participate in the selection and provision of programmes to be broadcast
  - may be funded by donations, grants, sponsorship, advertising, or membership fees or by any combination of them.

  It is also important to note that in section 1, the Broadcasting Act defines a community as including 'a geographically founded community' or 'any group of persons having a specific, ascertainable, common interest.' There is no mention of community broadcasting services in the CRAA.

- *Public:* This is defined in section 1 of the Broadcasting Act as 'a broadcasting service provided by any statutory body which is funded either wholly or partly through State revenues.' The CRAA does not mention public broadcasters and instead makes a single reference to a state broadcaster which is defined as a government department designated as a provider of broadcasting services, section 31(2).

Besides these three categories, there are other types of broadcasting licences or services, such as:

- a special event licence and a cable service, as provided for in broadcasting regulations which are dealt with elsewhere in this chapter
- a subscription management service which is defined in section 1 of the CRAA as 'a service operated to enable the consumption of a subscription broadcasting service.'

Broadcasting licensing process

Section 31(3) of the CRAA, states that an application for a broadcasting or re-broadcasting licence shall be made to Bocra in the prescribed manner. The process for applying for a broadcasting or re-broadcasting licence is outlined in the Broadcasting Act.

Rebroadcasting is common in Botswana and is a process of allowing the signals of a foreign broadcaster to be rebroadcast nationally. Another aspect of rebroadcasting, as the term is used in Botswana, is requiring qualifying commercial broadcasters or cable operators to carry the state broadcasting signals.

Section 10(2) of the Broadcasting Act authorises Bocra to establish different application and assessment procedures for the three types of broadcasting services, private, community and public. These procedures include invitations to tender,

and Bocra is required 'to the maximum extent possible, consistent with safety, efficiency and economy, [to] give preference to enterprises which are owned by citizens or in which citizens have significant shareholding.'

The broadcasting licensing process itself is fairly simple. In terms of section 12(2) of the Broadcasting Act, an application for a broadcasting or rebroadcasting service licence is made to Bocra and must include:

- the name of the service
- the name and place of residence of directors or producers of the service
- the name and place of business and residence of the owner
- the prescribed fee
- any other information which the secretariat may require or as may be prescribed.

In terms of section 32 of the CRAA, Bocra may issue a licence to the applicant if it is satisfied that the applicant has fulfilled all the requirements for granting a licence and subject to the availability of frequencies. However, section 6(2)(i) of the CRAA requires Bocra to give prior notification to the minister of any broadcasting-related licensing approval. Section 32(2) of the CRAA authorises Bocra to place restrictions and conditions on licences issued by them.

Section 87 of the CRAA requires that Bocra have the issuing of any licence published in the Gazette except for the granting of a radio frequency licence.

Section 34 of the CRAA provides that no licence granted by Bocra shall be transferred, assigned, or encumbered in any way without the prior approval of Bocra. An application for the transfer, assignment or encumbrance of a licence shall be made to Bocra in such form as the minister may prescribe. Any licensee who does not obtain the requisite prior approval commits an offence, the penalty for which is a fine.

Frequency spectrum licensing

Section 47 of the CRAA states that Bocra shall ensure the rational use of the radio frequency spectrum by establishing and maintaining a national radio frequency plan and ensuring that the needs of existing and new radio services are met. Bocra is also required to establish the necessary technical standards in relation to the radio frequency spectrum, allocate radio frequencies in a manner which will avoid harmful interference and ensure that an appropriate amount of radio frequency spectrum is available for the government as well as non-government use.

3.5.7 Responsibilities of broadcasters in Botswana

Adherence to licence conditions

Section 32(2) of the CRAA specifically provides that Bocra may impose such licence

conditions and restrictions it considers necessary. Section 94 of the CRAA, which deals with offences, does not make it an offence not to comply with licence conditions. However, section 6 of the CRAA provides that Bocra may revoke a licence or otherwise impose further conditions upon a licensee for a failure to comply with its licence conditions.

However, section 31(4)(d) also empowers the minister to set licence conditions in respect of the classification of broadcasting and subscription management service licences. It seems, therefore, that both the minister and Bocra can impose licence conditions. This is obviously a glaring overlap in regulatory responsibilities.

Respect copyright

Section 33 of the CRAA prohibits licensees from broadcasting:

- any material or programme of which he or she is not the copyright owner, unless, the permission of the copyright owner has been obtained
- any broadcasting signal received by him or her for the purpose of broadcast or re-broadcasting, unless he or she has, before the broadcast or rebroadcast, obtained the written permission of the copyright owner of the material, programme or broadcast or re-broadcasting signal to do so.

Reporting obligations

Section 35 of the CRAA requires that an application for approval be made to Bocra when:

- the name of any broadcasting or re-broadcasting service is changed
- any person acquires ownership of or any ownership interest in any broadcasting or re-broadcasting service
- a director, producer, or proprietor of any such broadcasting or re-broadcasting service is changed.

The CRA has the authority to approve or refuse the requested changes. Should the CRA refuse the change, it may also revoke the licence.

Record-keeping obligations

In terms of section 36 of the CRAA, a licensee shall keep and store sound and video recordings of all programmes broadcast or rebroadcast for a minimum period of three months after the date of transmission of the broadcast or rebroadcast, or for such further period as may be directed by Bocra. Such material must be produced on demand by Bocra.

Audience advisories

In terms of section 37 of the CRAA, when a programme to be broadcast or

rebroadcast is not suitable for children, the licensee must advise members of the public.

Adherence to broadcasting regulations

It is apparent that broadcasters will be subject to regulations made in terms of the Broadcasting Act or the CRAA (these are dealt with later in this chapter). Of particular note is section 21 of the Broadcasting Act which specifically provides that regulations may prescribe a code of practice must be observed by all licensees.

3.5.8 Revocation of a broadcasting licence

In terms of section 86(1) of the CRAA, any licensee who contravenes any provision of the CRAA, or fails to comply with any lawful direction or requirement made by Bocra under the provisions of the CRAA, or where Bocra is satisfied that the conditions of any licence are not being adhered to, may have their licence revoked, suspended or have additional conditions imposed. Any action taken by Bocra against a licensee must be published in the Gazette.

It should be noted that in terms of section 86(2) of the CRAA, Bocra may not take any action against a licensee without informing the licensee, in writing, and affording the licensee an opportunity to rectify the contravention or failure to adhere to the terms of the broadcasting licence. Alternatively, Bocra is required to give a licensee a period of not less than 14 days to respond to the notice and for the licensee to state why no action should be taken against them.

3.5.9 Is Bocra an independent regulator?

Bocra cannot be said to be independent. While the CRAA says in its preamble that it for an independent regulatory authority, it does not, in fact, create a body independent from its line ministry.

Effectively, Bocra operates as an arm of the minister in the following ways:

- all Bocra board members are appointed by the minister, as is the chairperson
- the respective powers of the minister and of Bocra are unclear and appear contradictory. For example, section 6(2)(r) of the CRAA provides that Bocra is empowered to make industry regulations regarding several issues, including code of conduct and complaints handling procedures and standards applicable to regulated services. However, section 94(1) of the CRAA provides that it is the Minister that is empowered to make regulations 'prescribing anything' under the CRAA 'which is to be prescribed or which is necessary or convenient to prescribe'. Consequently, it appears that general powers to make regulations are vested with the minister while Bocra's ability to make regulations is confined to specific instances itemised in the CRAA. Similar provisions are contained in the Broadcasting Act.
- The CRA is responsible for broadcast licensing. The minister is responsible for making regulations prescribing the annual fees for broadcasting licences, the

frequency aspects for each service, the limitations in respect to the power and other technical limitations of licence holders, the locations of transmitters and geographical areas in which broadcasters may operate and the classifications of broadcasting licences. This gives him or her a significant role in respect to various licensing and general regulatory aspects which is not in accordance with international best practice as it undermines the separation between the executive and the regulator.

Consequently, it is evident that the CRAA does not comply with international best practice in its provisions regarding broadcasting regulation.

3.5.10 Amending the legislation to strengthen the broadcast media generally

There are several problems with the legislative framework for the regulation of broadcasting generally:

- the overriding problem is that Bocra is not an independent regulator
- the Broadcasting Act and the CRAA ought to be amended to deal with the following issues:
  - Bocra members ought to be appointed by the president, acting on the advice of the National Assembly, after it has drawn up a list of recommended appointees. As part of this process, the National Assembly should call for public nominations and should conduct public interviews.
  - Bocra should be empowered to make its own regulations, including with respect to radio frequency allocations and assignments.
  - the minister's role ought to be limited to developing appropriate government policy. The minister should not be involved in matters that are part of the functionality of a regulator, for example, making regulations, particularly where these deal with licensing issues, such as the technical specifications of individual frequency assignments.
  - the mandate of Bocra ought to be changed to ensure that it acts in the public interest and, in respect of broadcasting, to ensure that the citizens of Botswana have access to a diverse range of high-quality public, commercial and community broadcasting services, as well as to ensure that freedom of expression is appropriately protected from commercial and governmental interference.

3.6 Key legislative provisions governing the state broadcasting sector

Unfortunately, Botswana does not have legislation creating a public broadcaster. Both Botswana TV and Botswana Radio are operated by the Department of Broadcasting Services, which falls under the Office of the President. Both services operate as arms of government. Given how they operate, these services are clearly

state broadcasters and cannot be said to be public broadcasters. It is important to note that the relevant licence conditions of Botswana TV and Botswana Radio do contain public service requirements; however, these are insufficient to change the fundamental nature of the services that remain state as opposed to public broadcasting services.

It should be noted that section 31 of the CRAA exempts state broadcasters from licencing requirements.

3.7 Key legislative provisions governing broadcasting signal distribution

In terms of section 47 of the CRAA, Bocra is responsible for ensuring the rational use of the radio frequency spectrum in Botswana by establishing and maintaining a national radio frequency plan. Bocra is also required to ensure the needs of existing and new radio services are met, monitor radio frequency occupancy and establish standards governing the use of radio frequency bands in accordance with international regulations. Bocra is also required to negotiate with other countries and international organisations in connection with radio frequency management and to establish necessary technical standards in relation to the radio frequency spectrum.

Bocra is also responsible for the licensing of the radio frequency spectrum; this includes setting conditions and tariffs for the allocation of radio frequencies to holders of telecommunications licences, allocating radio frequencies in a manner which will avoid harmful interference and ensuring that enough radio frequency is available for government and non-government use.

3.8 Legislation that threatens a journalist's duty to protect his or her sources

A journalist's sources are the lifeblood of his or her profession. Without trusted sources, a journalist cannot obtain information that is not already in the public domain. However, sources will often only be prepared to provide critical information if they are confident that their identities will remain confidential and will be respected and protected by a journalist. This is particularly true of whistleblowers, inside sources that can provide journalists with information regarding illegal activities, whether by company or government personnel. Consequently, democratic countries often provide special protection for journalists' sources. It is recognised that, without such protection, information that the public needs to know would probably not be given to journalists.

3.8.1 Criminal Procedure and Evidence Act, Act 52 of 1938

The Criminal Procedure and Evidence Act (CPEA) was enacted prior to Botswana's independence but has been amended numerous times since then. Several provisions of the CPEA might be used to compel a journalist to reveal confidential sources:

- Section 54 of the CPEA allows a judicial officer presiding in any criminal proceedings to issue an order directing a police officer to take possession of any book, document or thing which is required in evidence in the proceeding. Failure to comply with an order to hand over any book, document or thing is an offence punishable by fine or, if the fine is not paid, imprisonment.

- Section 214 of the CPEA provides that every person is compelled to give evidence in any criminal case in any court in Botswana or before a magistrate on a preparatory examination, except those who are expressly excluded (for example, lunatics, the insane or the spouse of an accused).

- Section 65 of the CPEA allows a public prosecutor or magistrate to require the clerk of the court to subpoena any person to attend a preparatory examination to give evidence or to produce any book or document. In this regard:

    - if any persons fail to obey the subpoena, then the magistrate in charge of the preparatory examination can issue a warrant for their arrest, in terms of section 66 of the CPEA

    - if a person refuses to answer any questions or produce any document at a preparatory examination, then the magistrate may order that the person be imprisoned for up to eight days at a time until the person consents to answer the question or produces the document, in terms of section 68 of the CPEA.

- Similarly, section 201 of the CPEA allows the court to subpoena any person to attend court to give evidence or to produce any book or document during the course of a criminal trial. In this regard, if a person refuses to answer any questions or produce any document at a trial, then the court may order that the person be imprisoned for up to eight days at a time until the person consents to answer the question or produce the document, in terms of section 202 of the CPEA.

It is, however, imperative to note the provisions of section 257 of the CPEA, which provide that no witness shall be compelled or permitted to give evidence in any criminal proceeding if, as a matter of public policy and concerning the public interest, such a case were being held in the Supreme Court of the Judicature in England and it was found that the evidence would be privileged from disclosure. This allows for reference to English legal practice on matters of public policy regarding compelling witnesses to give evidence.

3.8.2 Penal Code, Law 2 of 1964

The Penal Code was enacted before Botswana's independence but has been amended numerous times since then. Part II of the Penal Code sets out a list of crimes. Division II of Part II contains Offences Against the Administration of Lawful Authority, the second part of which is headed Offences Relating to the Administration of Justice. Section 123 of the Penal Code falls under that heading and deals with offences relating to judicial proceedings. In terms of section 123(1)(b), it is an offence to refuse to answer a question or produce a document if

one has been called upon to give evidence in a judicial proceeding. The penalty is imprisonment and, if this takes place before the court, an additional fine.

3.8.3 National Security Act, Act 11 of 1986

Section 13(1) of the National Security Act provides that where the director of public prosecutions is satisfied that there are reasonable grounds for suspecting that an offence under the National Security Act has been or is about to be committed and that a particular person can furnish information about the matter, he or she may require a named police officer to compel that person to give such information to the police officer in writing. Failure to disclose the information to the named police officer is an offence, and anyone found guilty of either failing to comply or giving false information is liable to a period of imprisonment (section 18).

3.8.4 Cybercrime and Computer Related Crimes Act, Act 22 of 2007

Section 22 of the Cybercrime Act empowers a police officer, or any person authorised by the commissioner of police or by the director of the Directorate on Corruption or Economic Crime, to apply in writing to a judicial officer for an order compelling, among other things, a person to submit specified data in that person's possession, which is stored on a computer or computer system.

Clearly, these provisions might well conflict with a journalist's ethical obligation to protect his or her sources. However, it is important to note that whether or not requiring a journalist to reveal a source is, in fact, an unconstitutional violation of the right to freedom of expression depends on the particular circumstances in each case, particularly on whether the information is available from any other source. Consequently, it is extremely difficult to state that these provisions are, by themselves, a violation of the right to freedom of expression under the constitution.

3.9 Generally applicable legislation that prohibits the publication of certain kinds of information

Several statutes contain provisions which, looked at closely, undermine the public's right to receive and the media's right to publish information. These statutes target or prohibit the publication of certain kinds of information, including:

- information relating to legal proceedings
- information relating to defence, security, prisons, the administration of justice, public safety, public order, sedition, 'alarming' information, defamation of foreign princes or insults to Botswana
- information which is obscene or contrary to public morality
- information which constitutes criminal defamation
- information which poses a danger to public health

- information which promotes hatred
- information which incites violence or disobedience of the law
- information which wrongfully induces a boycott
- information with intent to wound religious feelings
- information that relates to economic crime
- information by public officials, and
- information that the speaker of the National Assembly has ruled out of order.

3.9.1 Prohibition on the publication of information relating to legal proceedings

In terms of section 123(1)(e) of the Penal Code, Law 2 of 1964, it is an offence to publish a report of the evidence taken in any judicial proceeding which has been directed to be held in private. The penalty is imprisonment.

3.9.2 Prohibition on the publication of state security-related information

Penal Code, Law 2 of 1964

Division I of Part II of the Penal Code contains Offences Against Public Order, which is divided into three parts:

- treason and other crimes against state authority
- offences affecting relations with foreign states and external tranquillity
- unlawful societies and assemblies, riots and other offences against public tranquillity.

The prohibitions on publication relating to the above grounds are dealt with in turn.

Treason and other crimes against state authority

Prohibited publications

In terms of section 47(1) of the Penal Code, if the president believes that a publication is contrary to the public interest (defined in section 47(8) as including being in the interests of defence, public safety and public order), he may, in his absolute discretion, declare it to be a prohibited publication. Note that:

- the order must be published in the Gazette and such local newspapers as he considers necessary
- the order can declare the following to be prohibited publications:

- a particular publication
- a series of publications or
- all publications published by a particular person or association

- if the order specifies the name of a periodical publication, then all subsequent issues and any substitution thereof will also be prohibited publications (unless a contrary intention is expressly stated), section 47(2)
- if the order prohibits all the publications of any class published by a specified person, then the order applies to all publications published after the date of the order too, section 47(3)
- any person who prints, imports, publishes, sells, supplies, or even possesses a prohibited publication is guilty of an offence and is liable, on conviction, to imprisonment, section 48
- section 49 empowers any police or administrative officer to seize any prohibited publication.

An obvious problem with the provisions of section 47 of the Penal Code is that they are not objective. In other words, the publication does not have to pose a genuine, realistic or objective threat to defence, public safety or public order; the president merely has to believe this is the case before he makes an order prohibiting a publication. This does not comply with internationally accepted standards for prohibiting the publication of information.

Seditious publications

Section 51(1)(c) of the Penal Code provides, among other things, that any person who prints, publishes, sells or distributes a seditious publication is guilty of an offence and is liable to imprisonment. It should be noted that section 51(1)(d) provides that any person who imports a seditious publication is guilty of an offence 'unless he has no reason to believe that is seditious'. In terms of section 52(2) no person shall be prosecuted under section 51 of the Penal Code without the written consent of the Director of Public Prosecutions.

Furthermore, any seditious publication is to be forfeited to the state. Note that:

- In terms of section 50(1), a seditious intention is an intention, among others, to:
  - excite disaffection against the president or government of Botswana
  - excite the inhabitants of Botswana to procure the alteration, by illegal means, of any matter established by law
  - excite disaffection against the administration of justice in Botswana
  - promote feelings of ill-will or hostility between different classes of the population of Botswana

- raise discontent or disaffection among the inhabitants of Botswana.

- Section 50(1) also explicitly provides that a publication is not seditious by reason only that it intends to:
  - show the president has been misled or is mistaken in any of his measures
  - point out errors or defects in the government or Constitution of Botswana, or in the legislation or administration of justice in Botswana, with a view to remedying these
  - persuade the inhabitants of Botswana to attempt to procure changes by lawful means
  - point out, with a view to their removal, any matters which are producing feelings of ill-will between different classes in the population.

Alarming publications

Section 59(1) of the Penal Code provides, among other things, that any person who publishes any false statement, rumour or report that is likely to cause fear and alarm to the public or to disturb the public peace, is guilty of an offence. Note, however, that section 59(2) specifically provides a defence to this offence, namely, that before publication, the person took 'such measures to verify the accuracy of such statement, rumour or report as to lead him reasonably to believe that it was true'.

Defamation of foreign princes

Section 60 of the Penal Code falls under the heading Offences Affecting Relations with Foreign States and External Tranquillity. It makes it an offence to publish anything tending to degrade, revile, expose to hatred or contempt any foreign prince, potentate, ambassador or other foreign dignitary, with the intent to disturb the peace and friendship between Botswana and that person's country.

Insults to Botswana

Section 91 of the Penal Code falls under the heading Unlawful Societies, Unlawful Assemblies, Riots and Other Offences against Public Tranquillity. It makes it an offence to publish any writing with intent to insult, or bring into contempt or ridicule, the arms or ensigns armorial, the national flag, the standard of the president or the national anthem of Botswana. The penalty for this offence is a fine.

National Security Act, Act 11 of 1986

The National Security Act contains several provisions that not only prohibit the publication of certain information, but which could also hinder the media's ability to perform its news-gathering functions. In this regard:

Activities prejudicial to Botswana

Section 3 of the National Security Act sets out a list of activities that are prejudicial

to Botswana if they are for 'any purpose prejudicial to the safety or interests of Botswana'. The penalty for violating this provision is a term of imprisonment. The activities that are particularly relevant to the media include:

- being in, or in the vicinity of, a 'prohibited place'. Note that this means a place where any work of defence is taking place, or any place declared to be a prohibited place by the president
- making a sketch or note that might be useful to a foreign power or disaffected person (that is, someone carrying on 'seditious activity')
- obtaining or publishing any official secret codes, passwords, documents or information that might be useful to a foreign power or disaffected person (that is, someone carrying on 'seditious activity'), or
- hinders or interferes with, or does any act, which is likely to damage, hinder or interfere with any necessary service.

Wrongful communication of information

A list of prohibited communication-related issues is set out in section 4 of the National Security Act. The penalty for violating this provision is a term of imprisonment. The activities that are particularly relevant to the media include the following:

- Having in one's possession secret official codes, passwords, documents or information that relate to a prohibited place or which has been obtained in contravention of the National Security Act, and communicating the code, password, document or information to any unauthorised person or retaining it when having no right to do so, section 4(1). This pertains specifically to the:
  - use of information in his or her possession for the benefit of any foreign power or in any other manner or for any purpose prejudicial to the safety or interests of Botswana
  - communication of any code, password, sketch, plan, models, article, note, document or information to any person other than to whom he or she is authorised in the interest of Botswana
  - failure to take reasonable care of or endanger the safety of, the sketch, plan, model, article, note, document, official secret codes, password, or information
  - retention of the sketch, plan, model, note, document or article in his or her possession or control when they have no right to retain it or when it is contrary to their duty to retain it, or fails to comply with any lawful directions issued regarding its return or disposal.
- Having in one's possession secret official codes, passwords, documents or information that relate to munitions of war, and communicating same to any person for any purpose prejudicial to the safety or interests of Botswana, section 4(2).

- Receiving any official secret codes, passwords, documents or information knowing or having reasonable grounds to believe that the codes, passwords, documents or information have been communicated in contravention of the National Security Act, section 4(3).
- Communicating any information relating to the defence or security of Botswana to any person other than someone to whom he is authorised by an authorised officer to communicate it to or to whom it is, in the interests of Botswana, his duty to communicate it to, section 4(4).

Protection of classified information

Section 5 of the National Security Act prohibits the communication of any classified matter to any person other than someone to whom he is authorised by an authorised officer to communicate it to or to whom it is, in the interests of Botswana, his duty to communicate it to.

Intelligence and Security Service Act, Act 16 of 2007

Although not directed at the media itself, certain of the provisions of the Intelligence and Security Service Act relate to the unauthorised disclosure of intelligence-related information and could indirectly hamper the media's reporting ability. However, it is important to note that the provisions do comply with internationally accepted grounds for preventing the disclosure of security-related information:

- section 19 prohibits the disclosure by any intelligence or security service officer (or someone who has held such a position) of the identity of a confidential source of information to the Directorate of Intelligence and Security or someone who is involved in covert operational activities of the directorate.
- section 20 prohibits, among other things, the disclosure by an officer or a member of the support staff of the intelligence or security services of any information gained by virtue of his or her employment.
- failure to comply with sections 19 or 20 is an offence, and the penalty is a term of imprisonment.

3.9.3 Prohibition on the publication of information which is obscene or contrary to public morality

Penal Code, Law 2 of 1964

Expression contrary to public morality

Section 47 of the Penal Code states that if the president is of the opinion that a publication is contrary to the public interest of Botswana, he may at his absolute discretion declare it to be a prohibited publication. This section is relevant here as public morality is included in the definition of public interest as defined in section 47(8) of the Penal Code. Note that:

- the order must be published in the Gazette and such local newspapers as he or she considers necessary
- the order can declare the following to be prohibited publications:
  - a particular publication
  - a series of publications
  - all publications published by a particular person or association
- if the order specifies the name of a periodical publication, then all subsequent issues and any substitution thereof will also be prohibited publications (unless a contrary intention is expressly stated), section 47(2)
- if the order prohibits all the publications of any class published by a specified person, then the order applies to all publications published after the date of the order too, section 47(3)
- any person who prints, imports, publishes, sells, supplies or even possesses a prohibited publication is guilty of an offence and is liable, on conviction, to imprisonment, section 48
- section 49 empowers any police or administrative officer to seize any prohibited publication.

An obvious problem with the provisions of section 47 of the Penal Code is that they are not objective. In other words, the publication does not have to pose a genuine, realistic or objective threat to defence, public safety or public order; the president just has to believe this is the case before he makes an order prohibiting a publication. This does not comply with internationally accepted standards for prohibiting the publication of information.

Traffic in obscene publications

Division III of Part II of the Penal Code contains Offences Injurious to the Public in General, the fourth part of which is headed Nuisances and Offences against Health and Convenience. Section 178 of the Penal Code falls under that heading and deals with traffic in obscene publications. In terms of section 178(1)(a), it is an offence 'for the purpose of distribution' to produce or have in one's possession 'any one or more obscene writings, printed matter, photographs and, cinematograph films, intending to corrupt morals'. The penalty is a fine or imprisonment.

Cybercrime and Computer Related Crimes Act, Act 22 of 2007

Section 16 of the Cybercrime Act regulates the electronic traffic in pornographic and obscene material. In terms of section 16(2), any person who, among other things:

- publishes pornographic or obscene material through a computer or computer system

- possesses pornographic or obscene material in a computer or computer system or on a computer data storage medium
- accesses pornographic or obscene material through a computer or computer system

is guilty of an offence and the penalty is a fine, imprisonment or both. Note that in terms of section 16(3), where the material relates to child pornography, the penalty fines are higher and periods of imprisonment longer.

3.9.4 Prohibitions on the publication of information which constitutes criminal defamation

Part II, Division III of the Penal Code contains Offences Injurious to the Public in General, the fifth part of which is headed Defamation and makes criminal defamation an offence.

Definition of criminal defamation

Section 192 of the Penal Code provides for the offence of criminal defamation, which is, in the part that is relevant for the media, the unlawful publication by print or writing of any defamatory matter (defined in section 193 as matter 'likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation') concerning another person, with the intent to defame that person.

When is the publication of defamatory matter unlawful?

Section 195 provides that any publication of defamatory matter will be unlawful unless:

- the matter is true, and publication was in the public interest
- publication is privileged.

There are two types of privilege recognised under the Penal Code, absolute privilege and conditional privilege.

Absolute privilege

In terms of section 196 of the Penal Code, the publication of defamatory matter is privileged in the following cases:

- publications published under the authority of the president in any official document
- publications in the National Assembly or *Ntlo ya Dikgosi* by any member thereof
- publications by order of the National Assembly
- publications to and by a person having authority over an individual who is

subject to naval, military or air force discipline about that person's conduct

- publications arising from judicial proceedings
- fair reports of anything said, done or published in the National Assembly or the *Ntlo ya Dikgosi*
- if the publisher was legally bound to publish the matter.

Once the publication of defamatory matter is absolutely privileged, it is immaterial if the matter is false or published in bad faith.

Conditional privilege

In terms of section 197 of the Penal Code, the publication of defamatory matter is conditionally privileged provided:

- it is published in good faith
- the relationship between the parties by and to whom the publication is made is such that the persons publishing and receiving the matter are under a legal, moral or social duty to publish/receive same or have a legitimate personal interest in publishing/receiving same
- publication does not exceed, either in extent or subject matter, what is reasonably sufficient for the occasion.

In addition, the publication of defamatory matter is conditionally privileged if the matter published:

- is a fair and substantially accurate report of court proceedings which were not being held *in camera*
- is a copy or a fair abstract of any matter which has previously been published and which was absolutely privileged
- is an expression of opinion in good faith as to the conduct of a person of a judicial, official or other public capacity or as to his personal character, in so far as it appears in such content
- is an expression of opinion in good faith as to the conduct of a person as disclosed by evidence given in a public legal proceeding, or as to the conduct or character of any person as a party or witness in any such proceeding
- is an expression of opinion in good faith as to the merits of any book, writing, painting, speech or other work, performance or act published or publicly made or otherwise submitted by the person to the judgment of the public, or as to the character of the person in so far as it appears in such work
- is a censure passed by a person in good faith on the conduct or character of another person in any matter where he or she has authority over that person

- is a complaint or accusation about an individual's conduct or character made by a person of good faith to a person having authority over the individual and having authority to hear such complaints
- is in good faith for the protection of the rights or interests of the person
  - publishing it
  - to whom it was published.

Definition of good faith

In terms of section 198 of the Penal Code, a publication of defamatory matter will not be deemed to have been made in good faith if it appears that either:

- the publication was made with an intention to injure to a substantially greater degree than was necessary in the public interest, or for private interest in respect of which a conditional privilege is claimed, or
- the matter was untrue, and he or she did not believe it to be true (unless there was a duty to publish, irrespective of whether it was true or false).

However, in terms of section 199 of the Penal Code, there is a presumption of good faith if the defamatory matter was published on a privileged occasion unless the contrary is proved.

3.9.5 Prohibition on the publication of information which poses a danger to public health

Section 47 of the Penal Code (discussed above) states that if the president is of the opinion that a publication is contrary to the public interest of Botswana, he may at his absolute discretion declare it to be a prohibited publication. This section is relevant here as public health is included in the definition of public interest in section 47(8) of the Penal Code. Note that:

- the order must be published in the Gazette and such local newspapers as he or she considers necessary
- the order can declare the following to be prohibited publications:
  - a particular publication
  - a series of publications
  - all publications published by a particular person or association
- if the order specifies the name of a periodical publication, then all subsequent issues and any substitution thereof will also be prohibited publications (unless a contrary intention is expressly stated), section 47(2)
- if the order prohibits all the publications of any class published by a specified person, then the order applies to all publications published after the date of the order too, section 47(3)

- any person who prints, imports, publishes, sells, supplies or even possesses a prohibited publication is guilty of an offence and is liable, on conviction, to imprisonment for up to three years, section 48
- section 49 empowers any police or administrative officer to seize any prohibited publication.

An obvious problem with the provisions of section 47 of the Penal Code is that they are not objective. In other words, the publication does not have to pose a genuine, realistic or objective threat to defence, public safety or public order; the president merely has to believe this is the case before he makes an order prohibiting a publication. This does not comply with internationally accepted standards for prohibiting the publication of information.

3.9.6 Prohibition on the publication of information which promotes hatred

Part II, Division I of the Penal Code II contains Offences against Public Order, which is divided into three parts, one of which is Unlawful Societies, Unlawful Assemblies, Riots and Other Offences against Public Tranquillity. Section 92 of this part makes it an offence to publish any writing expressing ridicule or contempt for any person mainly because of their race, tribe, place of origin, colour or creed. The penalty is a fine.

3.9.7 Prohibition on the publication of information which incites violence or disobedience of the law

Part II, Division I of the Penal Code contains Offences against Public Order, which is divided into three parts, one of which is Unlawful Societies, Unlawful Assemblies, Riots and Other Offences against Public Tranquillity. Section 96 of this part makes it an offence to publish any words implying that it is desirable to:

- bring about the death or physical injury to any person or class, community or body of persons
- damage or destroy any property
- defeat by violence, or other unlawful means, the enforcement of any written law
- defy or disobey any written law or lawful authority.

The penalty is a period of imprisonment.

An obvious problem with the provisions of section 96 of the Penal Code is that they go far beyond internationally accepted grounds for prohibiting expression. This is particularly so with the prohibition against words implying that it is desirable to disobey written laws.

3.9.8 Prohibition on the publication of information which wrongfully induces a boycott

Part II, Division I of the Penal Code II contains Offences against Public Order, which is divided into three parts, one of which is Unlawful Societies, Unlawful Assemblies, Riots and Other Offences against Public Tranquillity. Section 98(2) of this part makes it an offence to further any designated boycott. Section 98(1) contains the provisions setting out what a designated boycott is. Essentially, it is one declared to be such by the president if he or she is satisfied that it is intended, among other things, to:

- excite disaffection against the government
- endanger public order
- jeopardise economic life
- raise discontent or disaffection among the inhabitants of Botswana
- engender feelings of hostility between different classes or races of the population.

The penalty is a period of imprisonment.

One problem with the provisions of section 98 of the Penal Code is that they go far beyond internationally accepted grounds for prohibiting expression. Most democracies accept that boycotts are, generally speaking, a legitimate form of non-violent direct protest action. It should not, therefore, be an offence for a publication to merely support a boycott.

Another problem with the provisions of section 98 of the Penal Code is that they are not objective. In other words, the boycott does not have to pose a genuine, realistic or objective threat to, for example, public order or to Botswana's economic life; the president just has to be satisfied that this is the case before he or she makes an order designating the boycott. This does not comply with internationally accepted standards for prohibiting the publication of information.

3.9.9 Prohibition on the publication of information which intends to wound religious feelings

Part II, Division III of the Penal Code contains Offences Injurious to the Public in General, the first part of which is headed Offences Relating to Religion. Section 140 of the Penal Code falls under that heading and deals with 'Writing or uttering words with intent to wound religious feelings.' In terms of section 140, it is an offence to '[write] any word' with 'the deliberate intention of wounding the religious feelings of any other person.' The penalty is a period of imprisonment.

3.9.10 Prohibition on the publication of information which relates to economic crime

Section 44 of the Corruption and Economic Crime Act, Act 13 of 1994, makes it an offence to publish, without lawful authority or reasonable excuse:

- the identity of any person who is the subject of an investigation in respect of an offence suspected to have been committed by that person under the Act
- any details of an investigation in respect of an offence under the Act.

The penalty on conviction is a fine, imprisonment, or both.

3.9.11 Prohibition on the publication of information by public officials

Section 34 of the Public Service Act, Act 30 of 1998, requires every public officer to comply with certain rules of conduct. Section 34 states that no public employee may, except with due authority, be interviewed on any matter relating to defence or the military or directly or indirectly reveal any information that has come to his or her knowledge, except in the proper discharge of his or her duties.

Section 63(1) of the Public Service Act prohibits any person from publishing or disclosing any information without written permission from the minister, except in the exercise of his or her duties. Any person who does disclose information without written permission is guilty of an offence, the penalty for which is a fine or imprisonment.

This extremely broad prohibition effectively renders the government unable to communicate with the media, except via official channels or spokespeople. The prohibition is rendered more draconian by the fact that failure to comply is an offence which carries a penalty of a fine or imprisonment, or both.

3.9.12 Prohibition on the publication of information which the speaker of the National Assembly has ruled out of order

Section 29 of the Powers and Privileges Proclamation 24 of 1961, provides that where the speaker of the National Assembly rules that any words used by a member are out of order, he or she may also order that such words, or any words from which they arose, or arising out of them, shall not be published in any matter. Publication thereof is an offence, and on conviction, the person concerned would be liable to a fine or imprisonment.

3.10 Legislation prohibiting interception of communication

The legality of intercepting communications is becoming an increasingly important issue for the media. This issue is governed by the Cybercrime and Computer Related Crimes Act, Act 22 of 2007.

Section 9 of the Cybercrime Act makes it an offence to intentionally (and without

lawful excuse or justification) intercept (defined as acquiring the content of any communication through the use of any device):

- any non-public transmission to, from or in a computer or computer system
- electro-magnetic emissions that are carrying data from a computer or computer system.

The penalty is a fine, imprisonment or both.

3.11 Legislation that specifically assists the media in performing its functions

In countries that are committed to democracy, governments pass legislation that specifically promotes accountability and transparency of both public and private institutions. Such statutes, while not specifically designed for use by the media, can and often are used by the media to uncover and publicise information in the public interest.

Botswana has yet to enact access to information legislation.

3.11.1 National Assembly (Powers and Privileges), Proclamation 24 of 1961

Section 25 of the Powers and Privileges Proclamation provides that in any proceedings instituted for publishing a report, summary or abstract of any proceedings in the National Assembly, the defence is that this was done in good faith and without malice. Although this provision is somewhat unclear, it allows the media to report (in good faith) on the activities of the National Assembly without fear of litigation as a result.

3.11.2 Whistleblowing Act, Act No. 9 of 2016

The Whistleblowing Act intends to provide for how a person may disclose conduct contrary to the public interest; to provide for the manner of reporting and investigating disclosures of impropriety; and the protection against victimisation of persons who make the disclosures.

Section 3 of the Whistleblowing Act sets out the type of information that secures whistleblower protection. This includes information that the whistleblower has reasonable cause to believe demonstrates that:

- a criminal or unlawful act has been, is being or is likely to be committed
- another person has failed, is failing or is likely to fail to comply with any obligation to which that person is subject
- a miscarriage of justice has occurred, is being or is likely to occur
- the health or safety of any person has been, is being or is likely to be endangered

- the environment has been, is being or is likely to be endangered
- the conduct of a person, public officer or not, could adversely affect, either directly or indirectly, the honest or impartial performance of official functions by a person, public officer or public body
- dishonesty or partiality on the part of a public officer in the performance of his functions
- conduct of a person or public body that amounts to a breach of public trust
- conduct of a public officer, or former public officer or public body that amounts to a misuse of information or material acquired in the course of the performance of public functions whether for the benefit of that person, public body or otherwise
- conduct of a person that amounts to maladministration
- conduct that would if proven, be a criminal offence, a disciplinary offence, a serious and substantial waste or abuse of financial or other public resources or assets or reasonable grounds for dismissal.

Section 4 of the Whistleblowing Act provides that disclosure of impropriety is protected if it is made in good faith, the whistleblower reasonably believes the disclosure is true, and the disclosure is made to an authorised person who is appointed, in terms of section 8 of the Whistleblowing Act, by the Directorate on Corruption and Economic Crime, the Auditor-General, the Directorate of Intelligence and Security, the Botswana Police Service, the Ombudsman, the Botswana Revenue Service, the Financial Intelligence Agency, the Competition Authority, the Botswana Defence Force and the Botswana Prisons Services. There is no provision for the press or media to be counted as an authorised person to whom disclosures can be made.

Section 5 of the Whistleblowing Act allows for the discontinuation of an investigation of a disclosure by a whistleblower by an authorised person if he is of the opinion that the disclosure was made maliciously, in bad faith or for an illegal purpose. In such cases, the disclosure is not protected under this Whistleblowing Act. Section 6 of the Whistleblowing Act states a disclosure made that questions the merits of government policy is not protected by the Whistleblowing Act.

Section 9 of the Whistleblowing Act outlines the procedure for making a disclosure, declaring that it can be made either orally or in writing. A disclosure of impropriety must contain a number of details which are set out in that section.

Section 14 of the Whistleblowing Act allows for the protection of whistleblowers. This section dictates that a whistleblower shall not be subjected to victimisation by his employer, fellow employees, or any other person. A whistleblower will be considered to have been victimised if:

- the whistleblower being an employee:
  - is dismissed or suspended

- has his or her post declared redundant
- is denied promotion
- is transferred
- is harassed or intimidated
- is threatened
- is discriminated against

- the whistleblower not being an employee is:
  - harassed
  - intimidated
  - discriminated against.

It should be noted that in section 4(3) of the Whistleblowing Act it is indicated that a whistleblower will not be considered having been subjected to victimisation should his or her employer and fellow employees, against whom the victimisation charge is levied, have the right under the law to take the action complained about and it is determined to be unrelated to the disclosure of the impropriety by the whistleblower.

Section 21 makes it an offence to victimise a whistleblower, and the penalty is a fine, imprisonment or both.

Section 15 of the Whistleblowing Act determines that a whistleblower shall not be liable to either civil or criminal proceedings in respect of the disclosure of impropriety.

Section 17 of the Whistleblowing Act states that a person who knowingly makes a disclosure that is false commits an offence. The penalty for this offence is a fine, imprisonment or both.

Section 18 of the Whistleblowing Act states that any person who unlawfully discloses, directly or indirectly, the identity of a whistleblower commits an offence. The penalty for this offence is a fine, imprisonment or both.

Section 19 of the Whistleblowing Act states that a whistleblower who, after making a disclosure of impropriety under this Act, discloses the same information to a third party, commits an offence. The penalty for this offence is a fine or a term of imprisonment or both. This is noteworthy because it criminalises a whistleblower going to the media even if no action is taken by the authorised person on the information provided by the whistleblower.

Section 22 of the Whistleblowing Act states that an authorised person who wilfully fails to take action on receipt of a disclosure made to him or her commits an offence. The penalty for this offence is a fine, imprisonment or both.

4 Regulations affecting the broadcast media

In this section, you will learn:

- ▷ what regulations are
- ▷ regulations governing broadcasting content
- ▷ other aspects of broadcasting-related regulations

4.1 What regulations are

Regulations are subordinate legislation. They are legal rules made in terms of a statute. Broadcasting regulations and rules are legal mechanisms for allowing a body other than parliament to make legally binding rules governing an industry or sector, without parliament having to pass a specific statute thereon. As is more fully set out elsewhere in this chapter, the empowering statute, the CRAA, empowers both Bocra and the minister to make regulations regarding broadcasting issues.

4.2 Regulations governing broadcasting content

4.2.1 The Broadcasting Regulations, promulgated on 29 October 2004 are contained in Chapter 72:04 — Broadcasting: Subsidiary Legislation (Broadcasting Regulations)

The Broadcasting Regulations contain several provisions setting out requirements to which broadcasting licensees in Botswana must adhere. Note that the regulations predate the CRAA as they were originally prescribed by the minister under the authority of the Broadcasting Act. The Broadcasting Regulations cover many issues, including in brief:

Advertising, sponsorships and infomercials

In terms of sections 5–8 of the Broadcasting Regulations, licensees are required to follow certain rules when broadcasting advertisements, sponsored programmes and infomercials.

Section 5 specifically focuses on 'fairness in advertising' and requires that any licensee that broadcasts advertising ensure that the advertisements are lawful, honest, decent and in conformity with the principles of fair competition in business. Licensees are specifically required to ensure that the advertisements they broadcast do not contain material that may mislead the public or unfairly attack

or discredit other advertisers. Licensees are forbidden from unfairly discriminating against, or in favour of, any advertiser.

In terms of section 6 of the Broadcasting Regulations, when scheduling advertisements, licensees are required to ensure the advertisements are suitable for children during times when children are expected to be watching or listening. Advertisements are required to be clearly distinguishable from broadcast programmes.

In terms of section 7 of the Broadcasting Regulations, licensees may not accept sponsorships for news programming but may accept sponsorships for weather, financial or traffic broadcasts. Licensees are required to ensure that sponsorship of an informative programme does not compromise its impartiality or accuracy. Licensees may not discriminate in favour of or against any particular sponsor. Sponsored programmes must be clearly acknowledged both before and after the programme, and any link between the commercial activities of the sponsor and the content of the broadcast must be made clear. It should be noted that section 7(5) of the Broadcasting Regulations prohibits licensees from broadcasting programming sponsored by a political party.

In terms of section 8 of the Broadcasting Regulations infomercials are prohibited from being broadcast:

- for more than three hours a day
- during prime time or
- during children's programming.

Infomercials must be distinguishable from other types of programming and licensees shall ensure that infomercials are lawful, honest, decent and in conformity with the principles of fair competition in business.

Local content

In terms of section 10(1) of the Broadcasting Regulations, except as otherwise stated in their licence conditions, licensees are required to air 20% local programmes for television broadcasts and 40% local programmes for radio broadcasts. Section 10(3) stipulates that except otherwise stated as a specific licence condition, local news is required to constitute the majority of a licensees news broadcast.

Broadcasting standards

Section 11 of the Broadcasting Regulations prohibit licensees from broadcasting material that is offensive to good taste or decency, contains frequent use of offensive or blasphemous language, presents sexual matters in an explicit or offensive way, glorifies or depicts violence in an offensive manner or is likely to incite hatred or violence on account of race, ethnicity, nationality, gender, sexual preference, age, disability, religion or culture.

Protection of children

In terms of section 12 of the Broadcasting Regulations, licensees are required to ensure that due care is exercised to avoid broadcasting content that is harmful to children at times when children can be expected to be watching or listening.

Accurate, fair and impartial reporting

In terms of section 13 of the Broadcasting Regulations, licensees are required to report news and information that is accurate, fair and impartial.

In terms of section 14 of the Broadcasting Regulations, licensees shall not broadcast reports not based on fact unless this is clearly stated. Where the accuracy of a report is not possible to determine, this must be mentioned in the report and licensees may not broadcast any report in which there is sufficient doubt to its accuracy, and it is possible to verify accuracy prior to broadcast.

In cases where there has been a factual inaccuracy, section 15 of the Broadcasting Regulations requires the licensee to broadcast a correction without reservation as soon as possible after the error was committed and with the same degree of prominence and timing as the original report and shall include an apology.

Reporting on controversial issues

In terms of section 16 of the Broadcasting Regulations, when licensees broadcast reports on controversial issues, they are required to provide a wide range of views and opinions on the subject, either in the same programme or else in a series of programmes. Any person or organisation whose views have been criticised on controversial issues of politics, industrial or public importance, and who makes representations in a reasonable period to the licensee, must be offered the opportunity to reply by the licensee. The reply must be broadcast with the same degree of prominence and timing as the original report.

Conduct of interviews

In terms of section 17 of the Broadcasting Regulations, persons being interviewed must be advised of the subject of the interview and informed before the interview whether the interview is to be recorded or broadcast live. In cases where a minor is being interviewed, permission must be requested from the parent or guardian of the minor. Licensees must exercise sensitivity when conducting interviews with the bereaved and survivors or witnesses of trauma.

Comments

In terms of section 18 of the Broadcasting Regulations, any comments that are broadcast by a licensee, or by any person invited by a licensee, shall be presented in a manner that clearly indicates that it is a comment and that it is made on facts which are clearly stated.

Invasion of privacy

In terms of section 19 of the Broadcasting Regulations, licensees shall not broadcast any material which invades a person's privacy unless there is a justifiable reason, in the public interest, for doing so.

Consent to broadcast

In terms of section 20 of the Broadcasting Regulations, licensees shall not broadcast any information acquired from a person without that person's consent, unless the information so acquired is essential to establish the credibility and authority of a source, or where the information is clearly in the public interest.

Sexual offences

In terms of section 21 of the Broadcasting Regulations, licensees may not disclose, in a broadcast, the identity of a victim of a sexual offence unless such victim consents, in writing, to the disclosure of his or her identity, and may not disclose, in a broadcast, the identity of a minor where such minor is a victim of a sexual offence.

Licensees must avoid the use of unnecessary or repetitive detail when broadcasting the circumstances of a sexual offence.

Any person who fails to comply with or contravenes a provision of this regulation shall be guilty of an offence and liable to a fine, imprisonment or both.

Payment of criminals

In terms of section 22 of the Broadcasting Regulations, licensees may not pay any person involved in a crime, or any person who has been convicted of a criminal offence, to obtain information unless there is a compelling reason in the public interest to do so.

It is critical to note that sections 11 to 22 of the Broadcasting Regulations (dealt with above) deal with a range of programming restrictions and requirements that have been essentially replicated in later regulations containing the Broadcasters' Code of Practice which is dealt with below. However, the Broadcasters' Code of Practice applies only to commercial television and radio broadcasters, and so the above content-related requirements are important as they are the only mechanism for holding public/state and community broadcasters accountable for content-related issues.

Public notices of emergencies or public disaster announcements

In terms of section 23 of the Broadcasting Regulations, licensees shall provide public notice of emergency service or a public disaster announcement made by any Government department, free of charge.

Special event broadcast licence

In terms of section 24 of the Broadcastings Regulations, a person wishing to apply for a special event broadcasting licence must do so to Bocra at least ten working days before the event.

There are different fees payable, depending on whether the applicant is a profit- or non-profit-making entity.

External satellite feed

In terms of section 25 of the Broadcasting Regulations, licensees shall not carry out an external satellite feed without a special event broadcast licence. Licensees can apply for a special event broadcast licence to Bocra, in writing, to carry out an external satellite feed.

Application for special event broadcasting licences to carry out an external satellite feed must be accompanied by the name of the licensee and the type of external satellite feed which the licensee intends to carry out. Successful applicants will be required to pay a licence fee.

Where a licensee's application is rejected by Bocra, the licensee may appeal within 14 days to the minister who will decide on whether or not to grant such an application.

A foreign broadcaster which transmits audio and visual broadcasts via satellite or other remote transmission modes shall pay radio licence and service fees, which shall be determined on the basis of reciprocity of fees.

4.2.2 Broadcasters' Code of Practice (2018)

The Broadcasters' Code of Practice sets out the ethical and community standards to which licenced commercial television and sound broadcasters must adhere

The Broadcasters' Code of Practice is outlined in brief below:

Community Standards, section 1:

- The licensee shall not broadcast content which, measured by contemporary community standards:
  - offends against good taste or decency
  - contains the gratuitous use of offensive language, including blasphemy
  - presents sexual matters in an explicit and offensive manner
  - glorifies violence or presents violence in a gratuitous and offensive manner
  - is likely to incite crime or lead to disorder
  - is likely to incite or perpetuate hatred or vilify any person or section of

the community on account of race, ethnicity, nationality, gender, sexual preference, age, disability, religion, or culture.

Protection of Children, section 2:

When broadcasting programmes at times where a large number of children may be expected to be watching or listening, a licensee must exercise due care in avoiding content that may disturb or be harmful to children, this includes but is not limited to:

- offensive language
- explicit sexual or violent materials, including music with violent or sexually explicit lyrics.

In determining when a large number of children are part of the audience, the licensee shall take into account available audience research as well as the time of broadcast.

Fairness, Accuracy and Impartiality in News and Information Programmes, section 3:

Licensees shall report news and information accurately, fairly and impartially.

News and information shall be presented in the correct context and in a balanced manner without intentional or negligent departure from the facts, whether by:

- distortion, exaggeration, or misinterpretation
- material omissions
- summarising or editing.

The licensee may present as fact only matters which may reasonably be true, having regard to the source of the news or information, and facts shall be broadcast fairly with due regard to context and importance.

Where reports are not based on fact or are founded on opinions, suppositions, rumours or allegations, the licensee shall present it in such a manner as to indicate clearly that this is the case.

Where there is reason to doubt the correctness of a report and it is practicable to verify the correctness thereof, it shall be verified. Where such verification is not practical, the fact shall be mentioned in the report.

Corrections of factual errors shall be broadcast without reservation, as soon as it is reasonably possible after the error has been committed.

Corrections of errors shall be presented with such degree of prominence and timing as may be adequate and fair so as to easily attract attention and shall include an apology where appropriate.

Opinions must be clearly presented as such.

Reporting news and information programmes on controversial issues, section 4:

The licensee shall ensure that, in reporting on controversial issues of political, industrial, or public importance, an appropriate range of views is reported, either in a single programme or a series of programmes, which are as adjacent as reasonably possible.

When covering controversial issues of political, industrial or public importance during phone-in programmes, a licensee shall endeavour to ensure that a wide range of opinions is represented over a reasonable period

A person or organisation whose views have been criticised during a programme on a controversial issue of public importance shall be offered a reasonable opportunity by the licensee to reply to such criticism. Such a reply shall be:

- given a similar degree of importance
- broadcast during a similar timeslot as soon as reasonably possible after the original criticism.

For the purposes of this section 'programme' includes news bulletins, current affairs and information programmes, interviews and panel and phone-in discussions.

Conduct of Interviews, section 5:

People who are to be interviewed shall be:

- advised of the subject of the interview
- informed beforehand whether the interview is to be recorded or broadcast live.

Before conducting an interview with a child, the licensee shall request permission from the child's parent or guardian to conduct the interview.

The licensee shall exercise due sensitivity in conducting interviews with bereaved persons or survivors or witnesses of traumatic incidents.

Comments, section 6:

- A comment, whether by the licensee or by a person invited on air by the licensee, shall be presented in a manner that clearly indicates that it is a comment.
- A comment shall be an honest expression of opinion and shall be made only on facts which are clearly stated.

Privacy, section 7:

The licensee shall not present material which invades a person's privacy unless there are public interest reasons for doing so.

The licensee shall not use information acquired from a person without the person's consent unless the information so acquired is essential to establish the credibility and authority of a source, and where the programme for which the information is required is clearly of important public interest.

Subject to the law, the journalists' convention in relation to the protection of sources which require confidentiality shall be respected.

The licensee shall ensure that the identity of a victim of a sexual offence is not divulged in any broadcast, unless the victim consents, in writing, to the disclosure of his or her identity.

Licensees shall ensure that the identity of a child victim of a sexual offence is not divulged in any broadcast under any circumstances.

The licensee shall avoid gratuitous and repetitive detail in covering sexual offences.

Paying Criminals for Information, section 8:

The licensee shall not pay to obtain information from persons involved in crime or persons who have been engaged in crime unless there is a compelling public interest in doing so.

Prohibition on Party-Political Broadcasts, section 9:

The licensee shall not permit party-political broadcasts under any circumstances except during an election period.

The licensee shall not permit party-political adverts under any circumstances.

Elections, section 10:

Party-political broadcasts: The licensee shall be required to air contesting party-political broadcasts, affording all contesting political parties similar opportunities.

Equitable treatment of political parties by licensees:

- If during an election period, the programming of any licensee extends to the elections, political parties and issues relevant thereto, the licensee shall provide reasonable opportunities for the discussion of conflicting views and shall treat all political parties equitably.
- In the event of any criticism against a political party being levelled in a particular programme of any licensee without such party having been afforded an opportunity to respond in the same programme or without the view of such political party being reflected, the licensee concerned shall afford such a party

a reasonable opportunity to reply to the criticism.

- If within 48 hours before the commencement of the polling period, a licensee intends broadcasting a programme in which a particular political party is criticised, the licensee shall afford the political party a reasonable opportunity to reply in the same programme, or as soon as is reasonably practicable and before polling day,
- The opportunity to reply shall be broadcast with the same degree of prominence and, where applicable, in substantially the same time slot as the original criticism.

In accordance with Bocra's complaints handling procedure which is found at the end of the Broadcasters' Code of Practice, if a member of the audience has been aggrieved by a broadcaster not adhering to the code while providing the broadcasting service, the member of the audience is required to raise the complaint first with the station manager. In the event that the complaint is not resolved to the audience member's satisfaction, then it should be escalated to Bocra.

4.3 Other aspects of broadcasting-related regulations

4.3.1 The Broadcasting Regulations

Broadcasts conducted without Bocra's authority

In terms of section 26 of the Broadcasting Regulations, licensees shall not conduct any broadcasts, other than those permitted in their licence. Licensees must apply to Bocra, in writing, to conduct broadcasts which are not permitted in their licence.

Applications to broadcast programming outside the scope of a licensee's licence must include the name of the licensee, the date on which the licensee was granted their licence by Bocra and the type of broadcasts which the licensee intends to conduct.

Successful applications will require the licensee to pay an additional annual fee to Bocra.

Licensees whose applications have been rejected by Bocra may appeal to the minister, within 14 days of the rejection, who shall decide on whether or not to grant the application.

Amendment of licence conditions by Bocra

In terms of section 27 of the Broadcasting Regulations, Bocra may amend any licence condition to such extent as may be necessary by virtue of an international agreement or convention to which Botswana is a party; or where the amendment does not cause substantial prejudice to the licensee. Bocra is required to inform the licensee that they intend to amend a licence condition and provide the licensee 30 days' notice of its intention to do so.

Licensees may make a written representation to Bocra in respect of the intended amendment within three months or within a period determined by Bocra.

Amendment of licence conditions at request of licensee

In terms of section 28 of the Broadcasting Regulations, licensees may apply to Bocra to amend their licence conditions at any time.

Applications for the amendment of a licence must include the reasons for the proposed amendment and be accompanied by any relevant documents or information.

Bocra may invite other licensees to make representations on the applicant's proposed amendment; or indicate to Bocra, in writing, whether the proposed amendment, if granted, will be prejudicial to their interests.

Where other licensees make representations on the applicant's intended amendment, such representations shall be delivered to the applicant on the same day.

The applicant shall be given such period as may be determined by Bocra to respond.

Restrictions on dealing with foreign governments

In terms of section 29 of the Broadcasting Regulations, licensees shall not acquire any licence, right, privilege or concession from a foreign government, or enter into any agreement with such government, without the approval of Bocra.

Obligations on different types of broadcasting licensees

Fees payable by different broadcasting licensees

The schedule to the Broadcasting Regulations outlines the different fees payable by each of the different broadcasting licence categories.

Cable broadcasting

In terms of section 30 of the Broadcasting Regulations, a cable owner is required to re-transmit the terrestrial television broadcasts of a local public television service which is licensed in Botswana. A television terrestrial broadcast which is re-transmitted via cable must have the use of at least one channel of a cable network. In cases where the re-transmission of a programme is obligatory, re-transmission shall be via channels that are available to every subscriber to a cable network. In cases where a cable network utilises three or fewer channels, the broadcasts of Botswana Television shall be subject to obligatory transmission.

Cable owners must identify the broadcasts that its subscribers wish to have re-transmitted via the cable network and must broadcast its subscribers' choices. Where there are unutilised channels in a cable network, after a cable owner has broadcast its subscribers' choice of broadcasts, the cable owner may utilise the channels to broadcast any programmes, provided that the cable owner notifies its subscribers of its intentions regarding such use at least two months before the commencement of broadcasting.

Should a majority of a cable owner's subscribers oppose the cable owner's intention to utilise channels to broadcast any programmes, the cable owner may only utilise such channels if it ensures that shielding is provided, at no extra cost, to the subscribers who do not wish to receive the broadcasts.

Community broadcasting

In terms of section 31 of the Broadcasting Regulations, community licensees shall broadcast the following programming services on a community broadcasting service:

- community programming
- announcements promoting broadcasting services
- public service announcements
- information programmes funded by public service organisations or the government
- announcements providing information about the programmes to be broadcast on the community broadcasting service channel.

Where a licensee does not broadcast community programming on a community broadcasting service channel, the licensee may distribute the programming service of a local radio station or an educational radio programming service on that channel. This is a very confusing provision because it appears to allow a community radio broadcaster to carry the programming of any existing Botswana radio station, whether public, commercial or otherwise, or educational radio programming.

Commercial broadcasting

In terms of section 32 of the Broadcasting Regulations, commercial licensees who engage in commercial broadcasting shall ensure that advertisements are broadcast in the allotted breaks in a programme and in the interval between the end of one programme and the beginning of another. Additionally, they are prohibited from having more than four advertising breaks per hour in the case of television broadcasts.

Commercial broadcasters, both television and radio, are required to adhere to the following restrictions concerning advertising:

- The advertising content of any programme shall not exceed:
  - 30 seconds, in a programme lasting five minutes
  - two minutes, in a programme lasting ten minutes
  - three minutes, in a programme lasting 15 minutes
  - five minutes, in a programme lasting 35 minutes.
- In a period of programming lasting for 60 consecutive minutes, there cannot

be more than 12 minutes of advertising unless:

- a licensee broadcasts the programme as a public service
- there was a national broadcast (we assume that this is akin to a public service announcement) which interrupts a scheduled programme and results in the loss of advertising time.

A licensee shall be entitled to compensate advertisers for any loss caused by interruptions in broadcasts over a period of seven days following the day on which the interruption occurred, by increasing the specified advertising time in an hour-long programme to not more than 14 minutes.

Licensees who engage in commercial broadcasting shall keep a record of:

- the title of every broadcast programme
- the time at which every broadcast programme commences and ends
- the use of electro-mechanical reproduction in the course of a broadcast and the form and nature of such reproduction
- the time at which any advertisement or programme is broadcast and the duration thereof
- the name of the sponsor of an announcement
- the time at which an interruption of a broadcast occurs and the duration of and reason for such interruption
- in respect of the broadcast of a speech:
  - the name of the speaker
  - the organisation, if any, under whose auspices the speech is given
  - the name of the political party or the political affiliation of the person giving the speech, where a speech is made on behalf of a political party for the purpose of promoting the election of any person.

Should Bocra intend to inspect the records of a licensee, they must notify the licensee.

Public broadcasting

In terms of section 33 of the Broadcasting Regulations, public broadcasters shall do all such acts as may be required by Bocra or under a licence granted by Bocra. Public broadcasters are required to ensure, as far as is reasonably possible, that the programmes they broadcast:

- consist of a wide range of subject-matter
- serve the needs of different audiences

- are transmitted at appropriate times, considering, the children who may be watching, or listening to, such programmes
- are accurate, fair and impartial
- do not contain any material expressing the opinion of the broadcaster on current affairs or matters of public policy
- do not cause offence to the religious views and beliefs of the persons belonging to a particular religion or religious denomination
- provide a public service for the dissemination of information, education and entertainment
- reflect the diversity of cultural activities in Botswana
- provide coverage of sporting and other leisurely interests
- contain educational material.

Complaints

In terms of section 34 of the Broadcasting Regulations, licensees are required to establish procedures to investigate and deal with complaints levelled against them by members of the public. These procedures must be submitted to Bocra before licensees begin operating. Where there is a change in procedures previously submitted to Bocra, the change must be submitted to Bocra within seven days of being made.

Licensees are required to broadcast information on the procedure for lodging complaints at least three times per week during prime time.

Should a complaint be referred to Bocra, licensees must submit, on request, any recordings or documentation required by Bocra and respond to queries from Bocra relating to allegations of non-compliance with the CRAA or with their licence conditions. Licensees are also required to submit, on request by Bocra, written reports or written responses to allegations of non-compliance with the CRAA or with their licence conditions, when requested, before Bocra during the adjudication of any complaint or investigation into any alleged non-compliance with the CRAA or with their licence conditions.

Bocra shall invite licensees to make written or oral representations within such period as may be specified where it intends to investigate any alleged non-compliance with the CRAA or with licence conditions, or any complaint relating to the licensee's failure or refusal to deal with, or the unsatisfactory handling of any complaint made by a member of the public.

Where Bocra finds that a licensee has failed to comply with any provisions of the CRAA or has breached any of its licence conditions, the board may make such order as it considers appropriate provided that where the Bocra imposes a fine.

Bocra may, under the broadcasting regulations, order a licensee to broadcast an apology, correction or retraction, in such terms as it may specify.

Dispute resolution

In terms of section 35 of the broadcasting regulations, in any dispute between licensees, or between a licensee and any other party, either party may refer the matter to Bocra for dispute resolution.

Bocra may order that the parties engage in mediation before it accepts referral of a matter for dispute resolution. Should Bocra accept a matter for dispute resolution, Bocra may:

- appoint a person to assist in the resolution of the dispute
- proceed to render a decision.

Information provided to Bocra relating to the resolution of a dispute shall be kept confidential unless Bocra determines that the information is in the public interest.

Information provided to Bocra by any of the parties to a dispute, for the purpose of dispute resolution, may not be used by the parties for other purposes unless the prior consent of the party providing the information has been sought.

During the dispute resolution process, the person appointed by Bocra may request:

- additional information from the parties
- the parties' attendance at any meeting to discuss the matter in dispute.

Should a party to a dispute referred to Bocra not comply with a request the person appointed by Bocra may refer the matter to Bocra. Bocra may then order the party to comply with the request.

Any agreement reached by the disputing parties after the dispute resolution process shall be in writing and signed by all the parties to the dispute.

Should no agreement be reached after the dispute resolution process, the person appointed by Bocra shall submit a report to Bocra concerning all the unresolved matters about the dispute.

Bocra may, after accepting the referral of a matter for dispute resolution, render a decision concerning any unresolved matters.

General penalty

In terms of section 36 of the Broadcasting Regulations, any person who contravenes a provision of the broadcasting regulations for which no specific penalty is prescribed, shall be guilty of an offence and liable to a fine.

5 Media self-regulation

The Press Council of Botswana (a voluntary self-regulatory body distinct from the Media Council, discussed earlier in this chapter) has published a code of ethics. It governs the conduct and practice of all media practitioners, media owners, publishers and media institutions. It is enforced by the Press Council of Botswana. The key elements contained in the code are highlighted under the headings as they appear in the code:

5.1 General duties

- **General standards**
  - to maintain the highest professional and ethical standards
  - to inform, educate and entertain the public professionally and responsibly
  - to disseminate accurate and balanced information, and ensure that comments are genuine and honest
  - never to publish information known to be false, or maliciously make unfounded allegations about others, intending to harm their reputations.
- **General duties**
  - to maintain the highest professional and ethical standards by being honest, fair and courageous in newsgathering, reporting and interpreting information
  - to defend the principle of freedom of the press and other mass media by striving to eliminate news suppression and censorship.

5.2 Good practice

- **Accuracy**
  - Check facts when compiling reports.
  - Editors and publishers must take proper care not to publish inaccurate material.
  - Both reporter and editor must ensure that all reasonable steps have been taken to check the accuracy of a report.
  - Facts should not be distorted by out-of-context reporting.
  - Special care must be taken when reports could harm individuals, organisations or the public interest.
  - Before publishing a story of alleged wrongdoing, all reasonable steps must be taken to obtain responses from the named individual or organisation.

- **Correction of inaccuracy or distortion**
  - On discovering the publication of a significant distortion of the facts, a media institution must publish a correction promptly and with comparable prominence. If a person's reputation has been damaged, an apology must also be published promptly and with comparable prominence.
  - Any finding by the Press Council on its performance must be reported on fairly and accurately by the media institution concerned.
- **Right of reply/rebuttal**

  A fair opportunity to reply must be given to a person or organisation that is the subject of an inaccurate or unfairly critical report.
- **Comment, conjecture and fact**
  - Clear distinctions must be made between comment, conjecture and fact.
  - Comment must be a genuine expression of opinion relating to fact.
  - Comment or conjecture must not be presented in such a way as to create the impression that it is fact.

5.3 Rules of the profession

Undue pressure or influence

- There can be no suppression or distortion of information that the public has a right to know due to pressure or influence from advertisers or others who have a corporate, political or advocacy interest in the media institution concerned.
- A media practitioner must not succumb to cultural, political or economic intimidation intended to influence reporting.

Public interest

A media practitioner must act in the public interest without undue interference from any quarter.

Payment for information

- No report may be published, suppressed, omitted or altered in return for a payment of money or other gift or reward.
- No person can be paid to act as an information source unless there is a demonstrable public interest in the information, and the resulting report must indicate that information has been paid for.

Reporting of investigations

Reports may inform the public about arrests of suspects by the police, but they

should not contain the names of suspects until the police have filed formal charges unless it is in the public interest to do so.

Privacy

- It is normally wrong to intrude into a person's private life and report on it without his or her consent.
- Such reporting can only be justified when this would be in the public interest, such as:
  - detecting or exposing criminal conduct
  - detecting or exposing anti-social conduct
  - protecting public health and safety
  - preventing the public from being misled by the public statements or actions of an individual, which is contradicted by his or her private conduct.

Intrusions into grief or shock

In cases involving personal grief or shock, enquiries and approaches must be made with sympathy and discretion.

Interviewing or photographing children

- Interviewing or photographing a child under the age of 16 should not normally be done without the consent of a parent or guardian.
- When interviewing or photographing a child in difficult circumstances or with disabilities, special sympathy and care must be exercised.
- Children must not be approached or photographed at schools without the permission of the school authorities.

Children in criminal cases

The name of any child offender under the age of 16 arrested by the police or tried in the criminal courts must not be published.

Victims of crime

- Victims of gender violence must not be identified unless they have consented to such publications, and the law authorises them to do so.
- Where such consent is given subject to conditions, these conditions must be respected.

Innocent relatives or friends

The relatives and friends of a person accused or convicted of a crime should not

be identified unless this is necessary for the full, fair and accurate reporting of the crime or the criminal proceedings.

Gathering of information

- Gathering information should be done openly, and media practitioners should identify themselves as such.
- Information and pictures should, as a general rule, not be obtained by misrepresentation, subterfuge or undercover techniques.
- Surreptitious methods of information-gathering may be used only where open methods have failed to yield information. This must be in the public interest, for example, to detect or expose criminal activity, or to bring to light information that will protect the public.

5.4 Editorial rules

Hatred and disadvantaged groups

- Material that is intended or is likely to cause hostility or hatred to persons on the grounds of their race, ethnic origins, nationality, gender, physical disabilities, religion or political affiliation must not be published.
- Utmost care must be taken to avoid contributing to the spread of ethnic hatred or to the dehumanisation of disadvantaged groups when reporting events and statements of this nature.
- Dehumanising and degrading pictures of a person may not be published without his or her consent.

National security

- Material must not be published that will prejudice the legitimate national security interests of Botswana in regard to military and security tactics and strategy, or intelligence material held for defence.
- However, the above does not prevent the media from exposing corruption in security, intelligence and defence agencies, or from commenting on their levels of expenditure and overall performance.

Plagiarism

Plagiarism (making use of another person's words or ideas without proper acknowledgement and attribution of the source of those words or ideas) must not be engaged in.

Protection of sources

When sources are promised confidentiality, that promise shall be honoured unless released by the source.

6 Case law and the media

In this section, you will learn:

- ▷ the definition of common law
- ▷ how Botswana's courts have dealt with defamation matters
- ▷ how Botswana's courts have dealt with government withdrawing advertisements from newspapers as a response to press criticism

6.1 Definition of common law

The common law is judge-made law. It is made up of judgments handed down in cases adjudicating on disputes brought by people, whether natural (individuals) or juristic (for example, companies). In common law legal systems such as Botswana's, judges are bound by the decisions of higher courts and also by the rules of precedent. This requires that rules laid down by the court in previous cases be followed unless they were clearly wrongly decided. Legal rules and principles are, therefore decided on an incremental, case-by-case basis.

This section focuses on a number of judgments in relation to defamation, as well as on an important judgment on the constitutionality of withdrawal of government advertisements as a response to press criticism.

6.2 Defamation

This chapter has already dealt extensively with the general issue of defamation as it arises in respect of criminal defamation. It is important to note, however, that defamation is more usually dealt with in civil contexts, where a person who has been defamed seeks damages to compensate for the defamation. All the cases dealt with in this section arise in the context of civil cases of defamation.

6.2.1 Defences to an action for defamation

There are several defences to a claim based on defamation.[8] These defences include:

- truth in the public interest
- absolute privilege, for example, a member of the National Assembly speaking in parliament

- qualified privilege, statements made in the discharge of a duty. For example, the duty to provide information in connection with the investigation of a crime, enquiries as to the creditworthiness of a person and so on.

Besides the above, which constitute defences to a charge of criminal defamation, there are other defences available in a civil defamation claim, including:

- fair comment on true facts and which are matters of public interest.
- self-defence (to defend one's character, reputation or conduct).
- consent.

Below are two cases that deal with defences to an action for defamation.

In *Khimbele v Sebenego and Others; Caphers v Sebenego and Others* 2001 (2) BLR 105 (HC), a defamation action was brought by two people named in a newspaper report as having been bribed by an attorney. In fact, the people had received unsolicited cash from the attorney but had immediately handed the money over to their superior and acted entirely appropriately and honestly. The newspaper raised a number of defences, two of which merit particular attention because of how the court analysed the journalist's conduct.

- The first defence was that the report was comment. The court rejected this, saying that to be justifiable as fair comment, the comment:

  > ***must appear as comment and must not be mixed up with the facts that the reader cannot distinguish between what is a report and what is comment. Care should therefore be taken to keep such comments as are made separate from the fact reported so that readers may be able readily to distinguish between the two*** [At page 114].

  The court found that it did not appear 'that the allegation [was] intermingled with any opinion' and that in its view the statement that the attorney corruptly gave money to the plaintiffs was 'a statement of fact and not a comment' [At page 115].

- The second defence was that the report contained a fair and accurate report of proceedings in a court, that is, was subject to qualified privilege. However, the court did not accept this, saying that the statement that the attorney corrupted (as opposed to attempted to corrupt) the plaintiffs by giving them money was a 'substantial inaccuracy and not privileged at common law' [At page 117].

In *Tibone v Tsodilo Services (Pty) Ltd t/a The Sunday Sun and Others* Case No CVHLB-000235-7 (as yet unreported) the then-minister of minerals, energy and water resources brought a defamation action against the Sunday Sun regarding allegations that he was involved in corruption concerning a tender. The newspaper raised a defence of privilege, saying it was reporting on a debate that had taken place in parliament. This was rejected by the court, which found correctly that:

> ***Honest, balanced and responsible journalism demands that the readership is presented with a balanced picture of what is reported and where a report or article deals with debate, especially debate of national importance such as we are dealing with here, then the readership is presented with the negative and positive aspects of the debate*** [At page 32].

The judge went on to find on the facts that he 'cannot accept … that the articles represented balanced reporting' and that 'the manner of reporting brings into focus my concern that imputations of corruption are made against the plaintiff … without any factual basis whatsoever as the allegations of corruption [made in parliament] were not aimed at anyone in particular' [At page 33].

The journalists involved had, among other things:

- interviewed only those MPs who had made adverse comments
- not published the press statement released by the permanent secretary of the relevant department
- not published the press statement released by the Directorate of Corruption and Economic Crimes that its investigation had revealed no corruption
- produced no hard evidence that the minister in question had 'apologised', as he was alleged to have done in the report.

The court found that the defendants had acted in bad faith and maliciously. The defence of qualified privilege regarding the reporting on events in parliament failed in this case.

6.2.2 Remedies for defamation

There are three main remedies in respect of defamation in the absence of a defence:

Publication of a retraction and an apology by the media organisation concerned

Very often a newspaper or broadcaster will publish a retraction of a story or allegation in a story, together with an apology, where it has published a false, defamatory statement. Whether or not this satisfies the person who has been defamed will depend on several factors, including the seriousness of the defamation; how quickly the retraction and apology is published; and that prominence is given to the retraction and apology (this is a combination of the size of the retraction, the position in the paper and on the particular page concerned).

Action for damages

This is where a person who has been defamed sues for monetary compensation. It takes place after the publication has occurred, and damages (money) are paid

to compensate for the reputational damage caused by the defamation in circumstances where there are no defences to defamation. The quantum of damages (the amount to be paid in compensation) will depend on several, including whether or not an apology or retraction was published and also the standing or position in society of the person being defamed.

In *Dibotelo v Sechele and Others* 2001 (2) BLR 588 (HC), the plaintiff in the action for damages for defamation was a senior judge who had been defamed by a newspaper, which had alleged (wrongly) that he had misappropriated funds. In making a substantial damages award, the judge made several important statements, namely, that:

- The only way of impressing on 'all concerned that … unfounded attacks are not to be made is by awarding exemplary damages' [At page 594].
- He was 'anxious not to create the impression that the courts, by their protection of a person's right to unsullied reputation, unwittingly whittle down the press's freedom of speech' [At page 595].
- Any damages awarded to the plaintiff 'should reflect the delicate balance between the two competing interests' [At page 595].

This has been echoed in *Tibone v Tsodilo Services (Pty) Ltd t/a The Sunday Sun and Others* Case No CVHLB-000235-7 (as yet unreported) in which the judge held that while he was:

> ***mindful of the effect of robust or excessive damages on freedom of speech, courts should not … be seen to condone irresponsible journalism or malicious reporting by an award of damages so low as to embolden rather than discourage errant publication*** [At page 38].

Prior restraints

This is where the alleged defamatory material is prevented from being published in the first place. Where a person is aware that defamatory material is going to be published, he or she may be able to go to court to, for example, obtain an interdict prohibiting the publication, thereby preventing the defamation from occurring. Prior restraints such as these are dangerous because they deny the public (readers of a publication or audiences of a broadcaster) the right to receive the information that would have been publicised had it not been for the interdict. Prior restraints are seen as being a last resort mechanism. The legal systems of countries that protect the right to freedom of expression usually prefer to allow publication and to deal with the matter by damages claims, in other words, using after publication remedies.

6.3 Withdrawal of government advertising as a response to press criticism

In a critically important case, *Media Publishing (Pty) Ltd v The Attorney-General and*

Another 2001 (2) BLR 485 (HC), the Botswana High Court, in an application for an interim interdict, granted the applicant, the owner of two newspapers, an interdict declaring that a government directive banning all government advertising in the two newspapers was wrongful and unlawful. The directive had been issued by the president shortly after the newspaper had published a number of articles that were critical of the president and the vice-president. In reaching its decision, the court made a number of extremely important statements, including:

> ***Government cannot act with a view to taking away an individual's benefits as an expression of its displeasure for the individual's exercise of a constitutional right as this would tend to inhibit the individual in the full exercise of that freedom for fear of incurring punishment … The message implicit in the directive is that an individual, being a beneficiary to governmental patronage, who in the exercise of its freedom of expression goes beyond what the government is comfortable with, faces the possible unpleasant consequence of losing certain benefits which it would otherwise have received. This hinders the freedom to express oneself freely*** [At page 496].

The court found on the facts that the applicant had established a prima facie right:

> ***that the executive's act of withdrawing advertisement patronage from the applicant's papers in order to express its displeasure regarding what it perceived to be exceeding the limit of editorial freedom amounts to an infringement of the … applicant's freedom of expression*** [At page 497].

Notes

1 https://www.worldometers.info/world-population/botswana-population/ [Last accessed 23 April 2020]

2 http://www.statsbots.org.bw/poverty [Last accessed 23 April 2020]

3 https://www.se4all-africa.org/seforall-in-africa/country-data/botswana/ [Last accessed 23 April 2020]

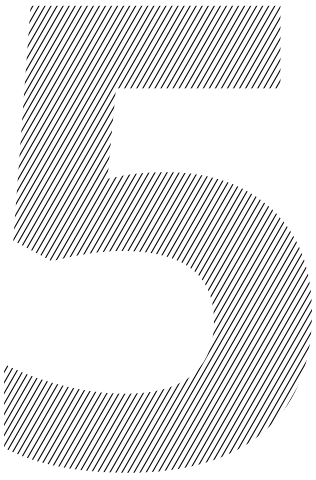
4 https://www.internetworldstats.com/africa.htm#bw [Last accessed 23 April 2020]

5 https://www.itu.int/en/ITU-D/Spectrum-Broadcasting/DSO/Pages/dataminer.aspx [Last accessed 23 April 2020]

6 Bocra ISDB-T Standards of Botswana, Issued by Botswana Communications Authority, Document Number DTT002, Revision 1, Date 10/03/2015. [Last accessed 23 April 2020]

7 https://www.mmegi.bw/index.php?aid=80548&dir=2019/april/15 [Last accessed 18 May 2020]

8 See FDJ Brand, 'Defamation', *LAWSA*, 2nd ed, Volume 7, paras 245ff. Note that the common law of South Africa is frequently cited and followed in Botswana's courts.



Democratic Republic of the Congo

1 Introduction

The Democratic Republic of the Congo (DRC) is the second-largest country in Africa, with a population of approximately 84 million people.[1] The DRC gained independence from Belgium in 1960. Its post-independence history is bloody: the first post-independence leader, Patrice Lumumba, was assassinated in 1961. In 1965, military officer Mobutu Sese Seko assumed power after a period of civil war. Mobutu ruled his one-party state (which he renamed Zaire) until 1996, when he was ousted by an armed coalition led by Laurent Kabila. However, the country remained dangerously unstable and effectively in a state of civil war. In 2001, Laurent Kabila was assassinated by his bodyguard and was succeeded by his son, Joseph Kabila. Although Joseph Kabila is credited with introducing a number of important reforms, most notably a new constitution, his democratic credentials remained extremely poor. The last election which he won (in 2011) is disputed and lacked credibility due to widespread irregularities. President Kabila's second five-year term of office ended in December 2016, but the DRC failed to hold elections and he ruled without an electoral mandate, albeit with the backing of the Constitutional Court. In May 2016, the Constitutional Court, in a heavily criticised judgment, interpreted section 70 of the constitution, which provides that the president continues in office until the assumption of office of his successor, as entitling President Kabila to remain in office without an election having taken place. Critics argue that the Constitutional Court should have found section 75 of the constitution applicable — this provides for the Head of the Senate to assume office temporarily in the case of a presidential vacancy.[2]

In August 2018, President Kabila announced he would not be running for a third term and the ruling party chose Emmanuel Shadari, seen as a Kabila loyalist,[3] as its candidate for the presidential elections. The presidential elections were held on 30 December 2018.[4] The outcome of the election was extremely controversial. The Electoral Commission and the Constitutional Court certified that Felix Tshisekedi, an opposition figure, won the election. However, powerful institutions, such as the Catholic Church, disputed this, and it, and the international press, reported that another opposition leader, Martin Fayulu, had, in fact, won by a landslide as evidenced by leaked election data.[5]

At the time, the African Union called for the DRC to delay announcing the election results due to serious discrepancies between the provisional results announced by the Electoral Commission and the actual ballots cast.[6] This was ignored and, on 24 January 2019, Mr Tshisekedi (apparently with former-President Kabila's backing) was sworn in as the country's new president.[7] Mr Tshisekedi's election has since been accepted by the European Union and the United States of America. The AU also backtracked on its objections to the election results as it elected Mr Tshisekedi the second vice-president of the AU on 16 February 2019.[8]

The eastern part of the DRC remains in a state of armed conflict, and most of the population lives in dire poverty despite the country having an abundance of

This chapter is also available in French as a downloadable pdf file at www.kas.de/MediaLawAfrica.

natural resources.[9] At the time of writing, more than 13 million Congolese need humanitarian aid and more than 4.5 million are displaced — the highest number for the DRC in more than 20 years.[10]

Nevertheless, the twenty-first century has, in a number of respects, heralded a new era for the media in the DRC. Since the fall of Mobutu, independent newspapers and broadcasters — both radio and television — have flourished. There have also been significant changes in the regulation of the broadcast media, particularly through the establishment of the High Council for Broadcasting and Communications, a constitutionally recognised body. However, the DRC continues to be a country that clearly does not foster freedom of the press and the situation has deteriorated since President Kabila's second term of office came to an end in December 2016.[11] A number of laws limit the ability of the press to inform the public about matters of the day. All too often journalists are arrested and detained, and independent media houses are often raided and banned. In the case of broadcasters, many have had their broadcasting distribution signals suspended without notice.[12] The DRC features regularly on international lists of poor media environments, and there is little doubt that the country is, sadly, not in line with international standards for democratic media regulation. Internet and social media shut downs are frequent[13] even though internet penetration is extremely low at approximately 6%.[14]

In this chapter, working journalists and other media practitioners will be introduced to the legal environment governing media operations in the DRC. The chapter is divided into four sections:

- Media and the constitution
- Media-related legislation
- Media-related regulations
- Media self-regulation
- Media-related case law

This chapter aims to equip the reader with an understanding of the main laws governing the media in Botswana. Critical weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Botswana, to enable the media to fulfil its role of providing the public with relevant news and information better, and to serve as a vehicle for government-citizen debate and discussion.

2 The media and the constitution

In this section, you will learn:

- ▷ the definition of a constitution
- ▷ what is meant by constitutional supremacy
- ▷ how a limitations clause operates
- ▷ which constitutional provisions protect the media
- ▷ which constitutional provisions might require caution from the media or might conflict with media interests
- ▷ what key institutions relevant to the media are established under the DRC Constitution
- ▷ how rights are enforced under the constitution
- ▷ what is meant by the 'three branches of government' and 'separation of powers'
- ▷ whether there are any clear weaknesses in the DRC Constitution that ought to be strengthened to protect the media

2.1 Definition of a constitution

A constitution is a set of rules that are foundational to the country, institution or organisation to which they relate. For example, you can have a constitution for a soccer club or a professional association, such as a press council. Constitutions such as these set out the rules by which members of the organisation agree to operate. Constitutions can also govern much larger entities, indeed, entire nations.

The current Constitution of the DRC was adopted after a national referendum held in 2005. It came into force on 18 February 2006 and has been amended since then. The constitution contains the underlying principles and values of the DRC.

A key constitutional provision in this regard is the introductory section entitled 'Description of rationales'. This section sets out a number of essential principles of

the DRC Constitution. In brief, these are:

- *State and sovereignty:* This principle sets out that the DRC is divided into the capital and 25 provinces, with juristic personality and powers. However, it is important to note that, in practice, the DRC still operates with 11 provinces and has yet to implement these provincial constitutional provisions. This principle also reaffirms the democratic principle that all governmental authority emanates from the Congolese people.

- *Human rights, fundamental freedoms and duties of the citizen and the state:* This principle reaffirms the DRC's commitment to internationally accepted human rights and fundamental freedoms. Note that gender equality is specifically mentioned.

- *Organisation of governmental authority:* This principle lists the new institutions of the DRC, namely: the president, parliament, Cabinet and the courts. The objectives of all governmental institutions are to: ensure harmonious functioning of the state; avoid conflicts; institutionalise the rule of law; counter any tendency towards dictatorship; guarantee good governance; combat impunity; and preserve the principle of democratic succession.

2.2 Definition of constitutional supremacy

Constitutional supremacy means that the constitution takes precedence over all other law in a particular country, for example, legislation or case law. It is important to ensure that a constitution has legal supremacy: if a government passed a law that violated the constitution — was not in accordance with or conflicted with a constitutional provision — such law could be challenged in court and could be overturned on the grounds that it is 'unconstitutional'.

The constitution of the DRC does not explicitly refer to constitutional supremacy. In addition, the constitution is contradictory as to whether or not constitutional supremacy is in fact recognised. For example, section 221 stipulates that: 'Provided that they are not contrary to the present constitution, legislative and regulatory texts currently in force, remain valid until abolition or amendment.' This demonstrates an intention towards constitutional supremacy.

On the other hand, almost every fundamental right and freedom contained in the DRC Constitution is subject to an internal limitation, which essentially provides that the right is subject to ordinary legislation. Clearly, such provisions (and there are many in the DRC Constitution) undermine the notion of constitutional supremacy.

2.3 Definition of a limitations clause

It is clear that rights are not absolute as society would not be able to function. For example, if the right to freedom of movement were absolute, society would not be able to imprison convicted criminals. Similarly, if the right to freedom of expression were absolute, the state would not be able to protect its citizens from hate speech

or false defamatory statements made with reckless disregard for the truth. Clearly, governments require the ability to limit rights in order to serve important societal interests; however, owing to the supremacy of the constitution this can only be done in accordance with the constitution.

The DRC Constitution makes provision for two types of legal limitations on the exercise and protection of rights, which are contained in Part II of the constitution, Human Rights, Fundamental Freedoms and Duties of the Citizen and the State.

2.3.1 State of emergency derogations

Section 85 of the Constitution of the DRC provides that the president may declare a state of emergency when circumstances exist that endanger the independence or territorial integrity of the country, or which disrupt the proper functioning of state institutions.

The president is first required to consult with the prime minister and with the presidents of both parliamentary chambers, that is, the National Assembly and the Senate. Section 85 further provides that the state of emergency is to be regulated by law.

Importantly, section 61 sets out the fundamental rights that may not be derogated from, even in a declared state of emergency. Unfortunately, the only right of real relevance to the media that is so protected from emergency provisions is the right to freedom of thought, conscience and religion.

2.3.2 Rights-specific limitations

The second type of limitation that is unfortunately common in the Constitution of the DRC, is the undermining of a right contained in Part II in the actual wording of the right itself. Many constitutions contain a general limitations provision. General limitations provisions apply to the provisions of a bill of rights or other statement setting out the fundamental rights. These types of clauses allow a government to pass laws limiting rights, provided this is done in accordance with the constitution. These general limitations provisions usually contain wording which make it clear that statutory limitations of rights can be enacted only if these are reasonable and recognised internationally as being necessary in an open and democratic society.

The DRC Constitution, however, contains no such general limitations clause, and each right that ostensibly protects the public and the media is subject to an internal limitation of that right in the wording of the right itself.

The wording of the internal limitations contained in the provisions of Part II is consistent. In brief, such internal limitations take the following form: the right is subject to legislation.

There are no limitations on the nature of the legislation (or restrictions) that can be passed, such as being reasonable, in line with international rights and freedoms, or being necessary in an open and democratic society.

The effect of this limitation formulation is the almost universal undermining of the very concept of constitutional supremacy. The protection given by a constitutional right is entirely subjugated to the content of legislation passed by parliament, and no special requirements in respect of such rights-limiting legislation are required. The content of the various applicable limitations is dealt with in the discussion on the specific rights, below.

2.4 Constitutional provisions that protect the media

The Constitution of the DRC contains a number of important provisions in Part II, Human Rights, Fundamental Freedoms and Duties of the Citizen and the State, which directly protect the media, including publishers, broadcasters, journalists, editors and producers. There are, however, provisions elsewhere in the constitution that assist the media as it goes about its work of reporting on issues in the public interest, and these are also included in this section.

2.4.1 Rights that protect the media

Freedom of expression

The most important basic provision that protects the media is section 23, which states: 'Every person has the right to freedom of expression. This right implies the freedom to express one's opinions or beliefs, notably through speech, writings or pictures; in compliance with statutory provisions, public order and good morals.'

This provision needs some detailed explanation.

- The freedom applies to 'every person' and not just to certain people, such as citizens. Hence *everybody* enjoys this fundamental right.
- The freedom is not limited to spoken or written words but extends to non-verbal or non-written 'expression'. This provision expressly includes pictures within the right to freedom of expression.

There are, however, some serious concerns with the formulation of this right, given that it contains the internal limitation that the right is exercised 'in compliance with statutory provisions, public order and good morals'. Clearly, legislation that governs freedom of expression trumps the constitutional right to such expression. This renders the right effectively meaningless.

Access to information and freedom of the press

Linked to the right to freedom of expression, but of more explicit importance for the media, is section 24, which provides that:

> ***Everyone has the right of access to information. Press freedom, freedom of access to information and broadcasting through radio and television, the print media or by the use of any other means of communication, are guaranteed, subject to the preservation of public***

> ***order, good morals and the rights of others. Legislation is to govern the exercise of these rights. State-owned audio-visual and print media are public entities, to which fair access is guaranteed to all political and social trends. The status of the State-owned media is governed by national law which guarantees the objectivity, impartiality and pluralistic approach to opinions in the processing and dissemination of information.***

This provision is very important for a number of reasons:

- It specifically and explicitly guarantees the right of access to information and does not distinguish between state-held or privately-held information.
- It specifically protects the right to broadcast, and to use the print media and other forms of communication.
- It specifically mentions state-owned media (broadcast and print) and stipulates that these are to be governed by laws guaranteeing objectivity, impartiality and pluralism.

There are, however, some serious concerns with the formulation of this right, given that it contains the internal limitation that 'legislation is to govern the exercise of these rights'. Obviously, legislation that governs the exercise of the right to access to information and press freedom trumps the constitutional right to such freedoms. Again, this renders the rights effectively meaningless.

Privacy

Section 31 of the DRC Constitution provides that 'Everyone has the right to privacy and is entitled to confidentiality in respect of personal correspondence, telecommunications or any other form of communication'. These rights may be infringed upon only in instances provided for in legislation. It is important to note the protection given to personal communication which also protects journalists' notebooks, computers and general communication with their sources.

There are, however, some serious concerns with the formulation of this right, given that it contains the internal limitation that 'these rights may be infringed upon in instances provided for in legislation'. Clearly, legislation that details how rights may be infringed upon trumps the constitutional right to such rights. Again, this renders the rights effectively meaningless.

Freedom of thought, conscience and religion

The right to freedom of opinion is specifically provided for in section 23, dealt with above. However, it is important to note that section 22 also protects the right to freedom of thought, conscience and religion. Section 22 specifically recognises the right of everyone freely to express his or her 'personal convictions', either alone or in a group, privately or in public. However, this is subject to law, public order, good morals and the rights of others. Furthermore, section 22 specifically provides that this freedom is to be governed by legislation.

The freedom to hold and impart opinions is important for the media as it protects journalistic commentary on public issues of importance.

There are, however, some serious concerns with the formulation of this right, given that it contains the internal limitation that these rights are 'subject to law, public order, good morals and the rights of others'. Legislation that details how rights may be infringed upon trumps the constitutional right to such rights. Again, this renders the rights effectively meaningless.

Freedom of association

Another important protection is provided for in section 37, in which the state guarantees freedom of association. Section 37 also stipulates that public authorities are to cooperate with those associations that promote the social, economic, intellectual, educational, moral and spiritual development of society. This protects the rights of the press to form press associations as well as to form media houses and operations. Similarly, section 38 guarantees the right to form trade unions. This protects journalists and media workers who want to form media-related trade unions.

There are, however, some serious concerns with the formulation of these rights, given that both sections 37 and 38 specifically provide that laws are to prescribe how the rights are to be exercised. It is clear that legislation that details how rights may be infringed upon trumps the constitutional right to such rights. Again, this renders the rights effectively meaningless.

2.4.2 Other constitutional provisions that assist the media

Note that there are provisions in the DRC Constitution, apart from the human rights provisions, which are important and which assist the media in performing its functions.

Provisions regarding illiteracy eradication

Section 44 specifically commits the state to eradicating illiteracy and the government is under a constitutional obligation to develop a programme to do so. Having a literate population is particularly important for the growth and development of the print and online media.

Provisions regarding intellectual property rights and cultural heritage protection

Section 46 of the DRC Constitution protects, among other things, the rights of authors. Intellectual property rights are guaranteed and stated to be protected by law. Furthermore, the state undertakes in this section to protect the 'national cultural heritage' to ensure its promotion. Arguably, the latter state undertaking could support local media.

Provisions regarding the functioning of parliament

Section 107 of the constitution deals with actions that can be taken against members of parliament (MPs). The first sentence in section 107 specifically states that no MP may be prosecuted, arrested, detained or convicted on the basis of opinions expressed or votes taken while in office. However, the next three sentences of section 107 provide for a number of instances in which MPs can be arrested, prosecuted or detained. These are for crimes outside parliament and special protections, including authorisation by parliament itself, are required. The provisions enable MPs to speak freely during parliamentary proceedings without facing arrest or legal proceedings.

Section 118 of the constitution provides that sessions of the National Assembly and the Senate (that is, of parliament) are open to the public, unless held *in camera*. This means that, generally speaking, the media has access to the workings of parliament by being able to be physically present in parliament.

Provisions regarding the functioning of the courts

Section 20 provides that court proceedings are to be held in public unless such proceedings will endanger public order or offend public morality. Section 21 further provides, among other things, that all judgments must be read out in public.

The effect of these provisions is that, unless proceedings are held *in camera*, the media will have access to the workings of the courts by being able to be physically present in court, both for proceedings and judgments.

2.5 Constitutional provisions that might require caution from the media or might conflict with media interests

As set out above, all the rights or freedoms that ostensibly protect the media contain internal limitations which give law-makers the power to limit or otherwise deny individuals and the media their fundamental rights and freedoms. Furthermore, there are other rights or freedoms that can be used to protect individuals and institutions from the media. It is important for journalists to understand which provisions in the constitution can be used against the media. There are a number of these in the DRC Constitution.

2.5.1 Right to dignity

The right to human dignity is provided for in section 11, which provides that 'All human beings have equal status in dignity'. Dignity is a right that is often raised in defamation or slander cases because defamation, by definition, undermines the dignity of the person being defamed. This right is one that is often set up against the right to freedom of the press, requiring a balancing of constitutional rights. Interestingly, there is no internal limitation on the right to dignity.

2.5.2 Right to privacy

Similarly, the right to privacy (discussed in some detail above) is often raised in litigation involving the media, with subjects of press attention asserting their rights not to be photographed, written about or followed in public, among other things. The media does have to be careful in this regard. Journalists should be aware that there are always 'boundaries' in respect of privacy that need to be respected and which are dependent on the particular circumstances, including whether or not the person is a public figure or holds public office and the nature of the issue being dealt with by the media.

2.5.3 Respecting the rights of others

Section 16 contains an interesting provision which may affect the work of journalists and the media generally. The second sentence of this section provides that everyone has the right to life, physical integrity and to freely develop his or her personality, while abiding by the law, public order, public morality and avoiding infringing upon the rights of others. This is an extraordinary provision because it not only envisages a balancing of rights between individuals, but it elevates legislation and public order and public morality to the same level as the constitutional rights of individuals. This provision is so broadly framed that it could be used to justify a number of limitations on the expressive rights of the press and the media, as well as on the informational rights of individuals.

2.5.4 States of emergency provisions

It is also important to note the provisions in sections 85 and 61 of the DRC Constitution. These deal with states of emergency and non-derogation of rights, respectively, and have already been dealt with under the discussion on limitations above.

2.6 Key institutions relevant to the media established under the Constitution of the DRC

There are a number of important institutions in relation to the media which are established under the DRC Constitution. These include the High Council of Broadcasting and Communication, the Human Rights Commission and the judiciary.

2.6.1 The High Council of Broadcasting and Communication

Section 212 of the DRC Constitution establishes the High Council of Broadcasting and Communication (HCBC), which is vested with legal personality. The section provides that the HCBC's role, in compliance with the law, is to:

- protect and preserve freedom of the press
- protect and preserve all means of mass communication

- enforce compliance with a code of conduct regarding matters relating to information
- monitor fair access to state-owned media by all political parties, associations and citizens.

The HCBC is therefore confined to operating within the strictures of broadcasting and/or related communications legislation. Section 212 also provides that the HCBC's composition, powers, organisation and functions are to be governed by parliamentary legislation (as opposed to presidential ordinances).

It is important to note that section 212 is the only section under Part V, 'Institutions that support democracy '.

2.6.2 The Human Rights Commission

Section 222 of the constitution empowers parliament to establish any other institution that would support democracy. Parliament has enacted the Human Rights Commission Act, Act 13/011 of 2013 (the HRC Act).

Section 1 of the HRC Act establishes the Human Rights Commission (the HR Commission) as an independent body with legal personality.

In terms of section 14 of the HRC Act, the HR Commission consists of nine members. In terms of section 16 of the HR Act, the National Assembly develops a list of recommended candidates of twice the number of commission seats to be filled. In terms of section 17, the president appoints the commissioners from the list of recommended candidates by way of a presidential ordinance. Their terms of office are for five years and this is renewable once — section 19. The HR Commission has the ability to establish committees in terms of section 12 with specified mandate areas such as: civil, political, socio-economic and cultural rights, as well as rights of particular groups such as women, children and the disabled.

Section 15 read with section 18 of the HRC Act, sets out the criteria to be a commissioner. Persons who are disqualified in terms of section 18 include: members of government, the police or military, magistrates, public servants, members of political parties and employees of state-owned enterprises. The positive criteria for appointment set out in section 15 include: DRC Citizenship, being at least 30 years of age, be a university graduate and have at least five years of professional experience with a manifest interest in the field of human rights.

The powers of the HR Commission are set out in section 6 of the HRC Act and they include the power to:

- investigate any alleged violation of human rights
- assist complainants in court cases involving human rights violations
- conduct prison visits to uphold human rights in the prisons
- safeguard the rights of women, children, the disabled and the elderly, as well as those living with HIV Aids

- promote awareness of human rights within the society
- assist other human rights organisations to protect human rights
- make recommendation for legislative amendments to parliament.

The HR Commission submits its Annual Report to the president and to the National Assembly in terms of section 7. It is noteworthy that the HR Commission has the power to require police cooperation (section 30) and to enter any premises in furtherance of its work in terms of section 31. People seeking the assistance of the HR Commission have the right to remain anonymous in terms of section 32 of the HRC Act.

Importantly, from a freedom of expression point of view, section 35 provides that communications (verbal and written) by HR Commissioners cannot be subject to litigation, whether defamatory, in breach of official secrets and the like.

2.6.3 The judiciary

Part III of the DRC Constitution is headed 'Judicial authority'. In terms of section 149, judicial authority is exercised in the DRC by the following courts and tribunals:

- *Constitutional Court:* In terms of sections 160, 161 and 164, the Constitutional Court is responsible for:
  - certifying the constitutionality of legislation
  - interpreting provisions of the constitution
  - adjudicating disputes regarding elections
  - adjudicating disputes between branches (for example, the executive versus the legislature) and tiers of government (for example, national versus provincial)
  - hearing appeals from the Supreme Court of Appeal or the State Council regarding jurisdictional issues
  - operating as a criminal hearing for charges against the president or prime minister.

  The composition of the Constitutional Court is provided for in section 158 of the constitution. The Constitutional Court is made up of nine judges. Three of these are personally appointed by the president, three are appointed by parliament and three are nominated by the High Council of the Judiciary.

  At least two-thirds of the judges of the Constitutional Court must be jurists from either the judiciary, the bar or legal academia.

- *Supreme Court of Appeal:* This is the final court of appeal in all matters heard by civil and military courts, in terms of section 153 of the Constitution of the DRC. Furthermore, it is also the court of first instance in respect of offences alleged to have been committed by people holding high public office, including MPs,

Cabinet members, the judiciary and provincial premiers.

- *State Council:* This is the final court of appeal dealing with infringements of measures, regulations and decisions of central administrative authorities, in terms of section 155 of the constitution.
- *Military High Court:* In terms of section 156, military courts deal with offences committed by members of the armed forces and the police.
- Other civil and military courts and tribunals.

The judiciary is an important institution for the media as the two rely on each other to support and strengthen democratic practices in a country. The judiciary needs the media to inform the public about its judgments and its role as one of the branches of government, and the media is essential for building public trust and respect for the judiciary, which is the foundation of the rule of law in a society. The media needs the judiciary because of the courts' ability to protect the former from unlawful action by the state and from unfair damages claims by litigants.

Section 150 of the DRC Constitution provides that the judiciary is the custodian of individual freedoms and fundamental rights of citizens. It further provides that judges are subject to the authority of the law alone. Section 151 emphasises that members of the executive and the legislature may not:

- instruct judges in matters relating to jurisdiction or judgments
- obstruct the course of justice
- oppose the execution of a judicial decision.

Section 151 also specifically renders null and void any legislation designed to circumvent pending litigation.

Section 152 deals with the High Council of the Judiciary, which is the body established to perform managerial functions in the exercise of judicial authority. It issues recommendations for the appointment, promotion and dismissal of judicial officers and is the disciplinary authority of judicial officers. The High Council may also issue advisory opinions regarding applications for pardon.

Legislation determines organisational matters and functions of the High Council of the Judiciary. According to section 152, the High Council comprises the judge president of the Constitutional Court; the state prosecutor assigned to the Constitutional Court; the judge president of the Supreme Court of Appeal; the state prosecutor assigned to the Court of Appeal; the judge president of the State Council; the state prosecutor assigned to the State Council; the judge president of the Military High Court; the state attorney assigned to the Military High Court; the judge presidents of the courts of appeal and the state prosecutors assigned to these courts; the judge presidents of administrative courts of appeal and the state prosecutors assigned to these courts; the judge presidents of military courts and the state attorneys assigned to those military courts; two chief magistrates of the

circuit courts of appeal elected by the magistrates of such circuits; two magistrates of the circuit courts of appeal elected by the magistrates of such circuits; one chief magistrate and one magistrate per military high court jurisdiction.

2.7 Enforcing rights under the constitution

A right is only as effective as its enforcement. All too often rights are enshrined in documents, such as a constitution or a bill of rights, and yet remain empty of substance because they cannot be enforced properly. Section 150 specifies that the judiciary is the custodian of individual freedoms and fundamental rights of citizens.

An interesting aspect of the DRC Constitution is Principle 4 of the objects of the constitution, which provides that no constitutional amendment can be made to constitutional provisions regarding the republican form of state, universal suffrage, the representative form of government, term of office of the president, judicial independence and political pluralism.

2.8 The three branches of government and separation of powers

All too often, politicians, commentators and journalists use political terms such as 'branches of government' and 'separation of powers', yet working journalists may not have a clear idea as to what these terms mean.

2.8.1 Branches of government

It is generally recognised that governmental power is exercised by three branches of government, namely, the executive, the legislature and the judiciary.

The DRC Constitution differs somewhat from international norms as section 68 recognises that the state institutions in the DRC are the president, parliament, government, and courts and tribunals. Nevertheless, it is clear that the executive comprises both the president and the government, so these will be discussed under the same heading.

The executive

In terms of section 69 of the DRC Constitution, executive power is vested in the president. The president is elected by a simple majority of the electorate in terms of section 71 of the constitution and, in terms of section 70, serves for a five year term which is renewable only once. In this regard, it is important to reiterate that President Kabila's second term of office expired at the end of 2016 and he remained in office unconstitutionally for two years thereafter.

The president appoints the prime minister and all other members of Cabinet in terms of section 78 of the constitution.

Sections 79–89 set out a number of the functions of the president. These include:

- chairing the Council of Ministers, essentially the Cabinet
- promulgating legislation passed by parliament
- legislating by means of issuing ordinances
- appointing provincial premiers and deputy premiers
- appointing, suspending or dismissing various high-ranking public officials, including members of the Cabinet, ambassadors, civil servants, members of the military and state-owned enterprise officials
- appointing, suspending or dismissing judges or public prosecutors on the recommendation of the High Council of the Judiciary
- chairing meetings of the Defence High Council
- conferring honours
- declaring states of emergency or war
- granting pardons.

Section 90 sets out the composition of the Ministerial Cabinet, namely:

- the prime minister and deputy prime minister
- ministers and their deputies
- ministers of state and delegated ministers, if any.

Section 91 sets out the functions of the Ministerial Cabinet. These are to define, together with the president, state policies and to assume responsibility therefor.

Section 92 of the DRC Constitution sets out the responsibilities of the prime minister, these are to:

- implement legislation
- issue regulations
- appoint lower-ranking civil servants and army officers.

Note that the prime minister is empowered to delegate the above powers to other ministers in the Cabinet.

Section 93 of the DRC Constitution sets out the responsibilities of individual ministers, these are to:

- assume responsibility for their own departments

- oversee the implementation of Cabinet's programme within their ministry, subject to the direction of the prime minister
- issue regulations by way of ministerial decrees.

The legislature

Section 100 of the DRC Constitution provides that legislative authority is exercised by parliament, consisting of the National Assembly and the Senate. However, as discussed above, the president has legislative powers through his/her ability to issue ordinances. There is, therefore, an overlap between the legislative authority of the legislature (i.e. parliament), and the president (who is head of the executive). Indeed, section 130 specifically provides that the right to initiate legislation belongs concurrently to Cabinet, each member of the National Assembly and each member of the Senate.

In terms of section 101 of the DRC Constitution, members of the National Assembly are elected by universal, direct and secret suffrage. Candidates to membership of the Senate are nominated by political parties or by individuals, in terms of section 104, and are elected by provincial assemblies.

Note that, in terms of sections 101 and 104 respectively, the number and eligibility of members of the National Assembly and the Senate are determined by electoral law and not by the constitution.

The judiciary

As already discussed, judicial power in the DRC is vested in the courts and military tribunals.

2.8.2 Separation of powers

It is important, in a functioning democracy, to divide governmental power between different organs of the state in order to guard against the centralisation of power, which may lead to abuse thereof. This is known as the 'separation of powers' doctrine. The aim is to separate the functions of the three branches of government — the executive, the legislature and the judiciary — so that no single branch is able to operate alone, assume complete state control and amass centralised power. While each branch performs a number of different functions, each also plays a 'watchdog' role in respect of the other. This helps to ensure that public power is exercised in a manner that is accountable to the general public and is in accordance with the constitution.

Unfortunately, the Constitution of the DRC does not protect the principle of separation of powers as the president has such prodigious powers in respect of all aspects of government. For example, section 79 entitles the president 'to legislate by means of ordinances'. In other words, presidential ordinances have the force of legislation. This is entirely out of step with international constitutional and democratic norms of the separation of powers.

2.9 Weaknesses in the constitution that ought to be strengthened to protect the media

There are a number of weaknesses in the DRC Constitution. If these provisions were strengthened, there would be specific benefits for the media in the DRC.

- It is deeply troubling that the constitutional provisions regarding fundamental human rights all contain internal limitations, which essentially undermine the supremacy of constitutional rights by making such rights subject to legislation.
- The section in the constitution establishing the HCBC does not specifically protect the independence of the Council, thereby undermining its ability to carry out media-related functions in support of democracy.
- The DRC Constitution does not sufficiently provide for the separation of powers, given the very real legislative functions provided to members of the executive, particularly the president. This undermines a key construct of democratic government, namely the legislature

3 The media and legislation

In this section, you will learn:

- ▷ what legislation is and how it comes into being
- ▷ legislation governing the operations of the media in general
- ▷ legislation governing the making and exhibition of films
- ▷ legislation governing the broadcast media generally
- ▷ legislation governing the state broadcast media
- ▷ legislation governing the state newsgathering agency
- ▷ legislation that threatens a journalist's duty to protect sources
- ▷ legislation that prohibits the publication of certain kinds of information

3.1 Legislation: An introduction

3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed by parliament, or ordinances issued by the president, both of which have legislative authority. Legislative authority in the DRC is a complex matter as it is vested both in parliament — which is made up of the National Assembly and the Senate — and in the president.

In respect of parliamentary legislation, the process is as follows:

- parliament and the president are ordinarily involved in passing legislation — sections 135 and 136 of the Constitution of the DRC
- within six days of a statute's adoption by both chambers of parliament, the statute is to be transmitted to the president for promulgation — section 136 of the Constitution of the DRC
- within 15 days of the adoption of the statute, the president is entitled to request parliament to deliberate anew on the entire statute or particular provisions thereof, which request cannot be refused — section 137 of the Constitution of the DRC
- within 15 days of adoption, a statute may be referred to the Constitutional Court for a declaration of constitutionality by a range of people, including the president; the prime minister; the presidents of either the National Assembly or the Senate; or by one-tenth of the total number of members of the National Assembly and of the Senate. Such a ruling must be issued within 30 days — section 139 of the Constitution of the DRC
- the president promulgates the statute within 15 days of the expiry of the deadlines set out in sections 136, 137 and 139, failing which the statute is deemed to have been promulgated by operation of law — section 140 of the Constitution of the DRC
- statutes are published in the Government Gazette (section 141 of the constitution) and acquire the force of law 30 days after such gazetting, unless the statute provides otherwise — section 142 of the Constitution of the DRC.

3.1.2 The difference between a bill and an act

A bill is a draft law that is debated, and usually amended, by parliament during the law- making process.

If a bill is passed by the DRC Parliament in accordance with the various applicable procedures set out above, it becomes an act once it is so passed.

As mentioned, an Act must be published in the Government Gazette and becomes law only 30 days after it has been published unless otherwise stated, in terms of section 142 of the DRC Constitution.

3.2 Legislation governing the operation of the media in general

The DRC has a number of colonial-era media laws that apply alongside post- independence media laws. Some laws dealing with the day-to-day employment and conduct of journalists and their accreditation include:

- Ordinance 23-113 of 25 April 1956
- Criminal Code, 1940
- Ordinance 81-012 of 2 April 1981
- The High Council of Broadcasting and Communications Act, Act No. 11-001 dated 10 January 2011.

It is important to note that a number of colonial-era statutes or ordinances (as they were called when passed under the colonial administration) have not been repealed.

3.2.1 Ordinance 23-113 of 25 April 1956: Travel Documents for the Press

This ordinance governs official accreditation documentation that is required by journalists when travelling around the country undertaking official press duties. It is extremely draconian, requiring journalists to apply for such travel passes at least every three years.

Articles 1 and 2, read together, require journalists (print or broadcast media) to obtain certain passes and badges issued by the director-general of the National Information Service. Journalists need these in order to conduct press business when they travel around the country to cover events. They include the following:

- *Individual travel passes and badges:* These are governed by articles 3, 4, 6, 9 and 12.
    - any journalist employed in the print media, the broadcast media or in a news agency must make an application, in accordance with the prescribed form, for an individual press pass to travel within the DRC
    - the application is required to include the journalist's qualifications, the nature of the journalist's work (his/her habitual assignment) and the reason for the need to travel
    - importantly, article 5 specifies the application will be granted provided that the journalist's travel in the relevant area will not undermine public order and public safety
    - the press pass is valid for a maximum period of three years, but this is left to the director-general's discretion
    - once an individual press pass has been granted, the holder may then apply for a travel badge

- the travel badge is required to be worn in a visible place
- note that the director-general can cancel the press pass at any time. It appears that the badge must be applied for each year as it ceases to be valid on 31 December annually, or upon the lapsing of the individual travel pass.

- *Vehicle travel passes and badges:* These are governed by articles 7 and 8, and 13–16.
  - the holder of an individual press pass may also apply for a vehicle pass
  - the application must be made in accordance with the prescribed form
  - a vehicle pass has the same period of validity as the individual press pass that it relates to
  - importantly, article 8 also specifies the application will be granted provided that the journalist's travel in the relevant area will not undermine public order and public safety
  - once a vehicle pass has been granted, the holder may then apply for a vehicle travel badge
  - the travel badge is required to be placed on the car in a visible place
  - note that the director-general can cancel the vehicle badge pass at any time. It appears that the vehicle badge must be applied for each year as it ceases to be valid on 31 December annually, or upon the lapsing of the vehicle pass.

- *Special travel passes:* These are governed by articles 17–20.
  - the provisions govern the issuing of 'special' travel passes for journalists (and their vehicles) depending on the needs of public order, peace and security
  - the director-general may issue these special passes (which have a different colour and bear the word 'Special' thereon). They are exceptional, temporary and only valid for a particular locality
  - Article 23 requires the director-general to keep a register of all individual, vehicle and special travel passes and badges granted by him or her
  - Article 24 requires journalists who leave the profession to return all passes (whether valid, expired or cancelled) to the director-general.

3.2.2 Criminal Code, 1940

Most of the provisions of the Criminal Code do not directly pertain to the media; however, it is important to note the provisions of section 150(h). This makes it an offence not to publish the full and correct name and address of any author or publisher of any published writing. The penalty is imprisonment or a fine.

3.2.3 Ordinance 81-012 of 2 April 1981: Statute to Govern Journalists

This general statute governs the day-to-day work of journalists in the DRC. It contains a number of provisions governing the employment and operations of journalists. The statute is implemented by the Ministry of Information.

- *Press cards:* articles 5 and 6 of the ordinance require all journalists, including trainee journalists, to apply for a card (either a press card or a trainee press card) from the Press Union of the DRC. The card is cancelled upon the person leaving the profession or for violating professional ethics.

- *Qualifications:* articles 7 and 8 provide that, after completing studies at a recognised school of journalism, the candidate must pass a national examination to be recognised as a professional journalist. No press outlet can employ a journalist who has not passed such examination. Note that trainee journalists (who serve an apprenticeship for 24 months or, if they have educational qualifications from a recognised journalism institution, for 12 months) may not constitute more than one-third of the workforce within a press outlet. In addition, all trainee journalists must be declared fit and proper persons before taking the national examination.

- *Categories of journalistic employment:* articles 9–11 set out the various employment positions within a press outlet. These are:
  - executive positions:
    - editorial director
    - editorial secretary general
    - editor-in-chief
    - deputy editor
    - editorial secretary.
  - contributing staff:
    - general administrator
    - heads of various departments and design
    - senior reporters
    - junior reporters.

  Note that these are guidelines and press outlets are free to structure themselves differently if they so wish. Promotions are governed by the press outlets' internal rules and procedures. However, article 11 specifies that vacancies are to be filled temporarily by the immediate subordinate (with corresponding pay increases and the like), until such time as the position is filled. If the position is not filled within 12 months, the immediate subordinate assumes the position on a permanent basis.

- *Professional status of journalists:* articles 12–27 deal with the professional status of journalists. Every journalist is required to be categorised into one of four statuses:
  - **Active**: This is where the journalist actively conducts his/herself as a professional journalist on behalf of his/her employer. Note that the ordinance sets out employment-related provisions for active journalists including that:
    - journalists be paid in accordance with work performed
    - 'risky' assignments require the journalist to be covered by life insurance
    - leave be given: 30 days' annual leave, sick leave, 15 days' study leave every three years and public holidays.
  - **On secondment**: This is where a journalist, whether in the public or private sector, stops conducting his/herself as a journalist in order to take up a temporary position:
    - in an organisation which acts in the public interest or is foreign or professional
    - in the military during wartime
    - in accordance with a Cabinet resolution based either in the military or in any other capacity in the public interest
    - in public office.

    Note that when the secondment expires, the journalist automatically resumes his/her previous position. The employment requirements of this ordinance do not apply while the journalist is on secondment if these contradict the employment tenets of the organisation to which the journalist is seconded. The institution is responsible for remuneration. In addition, the secondment activities are required to count towards promotion.
  - **Available**: A journalist is considered to be 'available':
    - if he/she has taken up further studies or is on a professional development course
    - if he/she is sick.

    The editorial director of a press outlet must declare a particular journalist as being 'available'. The duration of 'availability' is taken into account in the calculation of the length of service of the particular journalist.
  - **Suspended**: A journalist may be 'suspended' by the editorial director or his/her deputy of the press outlet for a period of between 48 hours and one month, if there are sufficiently serious grounds. Note that disciplinary proceedings must be instituted and completed within a month, otherwise the suspension is withdrawn. Note, however, that if the misconduct

constitutes an offence, then the suspension continues until the completion of the judicial process. If the judicial process results in an acquittal, then the journalist is retrospectively reinstated and all his/her rights are retrospectively restored, including salary and other benefits.

- *Working hours:* Article 28 provides that journalists are to work six days a week. Overtime requires compensatory rest periods.
- *Remuneration of journalists and other benefits:*
  - Articles 29–34 regulate the remuneration of journalists. In essence, a journalist's basic salary is based on the particular employment position in question (and the schedules to the statute contain these). The basic salary increases, depending on the number of years worked in that position and the results of performance assessments, based on particular prescribed percentages. Further, the editorial director has discretion to pay additional amounts for seniority, educational qualifications and long-service awards. The press outlet may make additional payments in accordance with its capabilities.
  - Article 35 provides for social and other benefits for journalists, including child and medical and disability benefits, accommodation, vacation benefits and travel expenses. The rates thereof are determined through a process of collective bargaining within the press outlet concerned.
- *Disciplinary procedure:* Articles 36–39 deal with disciplinary action against journalists.
  - In brief, there are three disciplinary measures that can be taken against a journalist:
    - › reprimand
    - › temporary suspension
    - › dismissal.

  Note that, in terms of article 46, grounds for immediate dismissal include acts of dishonesty (such as theft and fraud), insubordination, corruption, intentional prejudice caused to the press outlet and acts of violence.

  The statute is, however, entirely silent on what conduct would warrant disciplinary action.

  Furthermore, the actual rules of procedure in any disciplinary matter are to be determined by the press outlet concerned.

  In the event of legal proceedings against a journalist arising out of facts that have also given rise to disciplinary proceedings, the administrative authority (which essentially regulates bureaucratic matters) has the power to review a disciplinary proceeding finding of guilt if a court of law finds the journalist not guilty for lack of evidence.

Where a journalist is sentenced by a court to three or more months in prison, the media outlet may dismiss the journalist without a hearing.

A journalist has the right to appeal a disciplinary finding and to be represented by his/her trade union.

- *Rights, duties and conflicts of interest:* These are dealt with in articles 40-43. In brief, these are the following:
  - A journalist must fulfil his/her duties with professionalism.
  - A journalist must accept the terms of his/her employment that conform with this statute.
  - A journalist must personally fulfil his/her responsibilities.
  - A journalist is personally accountable to his/her superiors for the performance of specific instructions.
  - It is strictly forbidden for journalists to demand gifts and benefits of any kind.
  - A journalist must adhere strictly to the relevant code of conduct applicable to journalists.
  - A press outlet is expected to protect its journalists against personal threats and physical attacks while on assignment and, where applicable, to compensate its journalists for injuries suffered.
- *Termination of employment:* articles 44–52 cover the provisions regarding termination of employment. In brief, these are the following: a journalist's employment (and accreditation) terminates upon death, dismissal, resignation and retirement (the retirement age is 55, but a journalist may apply for retirement after 20 years of service). Note that the statute provides for so-called 'deemed' resignations, which include being absent without leave, refusing to perform functions during his/her notice period in the case of a voluntary resignation and after being incapacitated (this requires medical certification) for a period of two years.

  Note that the administrative authority plays a role in that it has to accept a letter of resignation from a journalist.

  The statute contains a number of detailed provisions regarding pension benefits for journalists.

  The statute also provides that a journalist may repudiate a contract of employment where the press outlet commits grave infringements against a journalist, including physical injury, intentional prejudice, exposure to grave danger and the like. In such cases, the journalist does not need to tender his/her resignation and serve a notice period.
- *Trade unions:* articles 53–54 entitle a journalist to join and hold office in a trade union.

3.2.4 High Council of Broadcasting and Communications Act 11/001 dated 10 January 2011

The HCBC's main functions

In terms of articles 8 and 9 (where other sections apply these are specified), the general functions of the HCBC include:

- guaranteeing freedom of the press, information and mass communication
- overseeing adherence to a code of conduct in respect of information provision
- overseeing equitable access to state providers of information and communication by all political parties and associations
- developing a code of conduct
- mediating in media-related disputes
- promoting excellence in media production
- promoting a culture of peace, democracy, human rights and fundamental freedoms
- promoting a national culture through the media
- protecting children
- filing reports to parliament
- providing advisory opinions on draft laws to parliament or to the government — article 10.

Overall, the HCBC is responsible for the day-to-day oversight of the media.

In terms of article 17, any person wishing to operate a print, broadcast or online media service must submit a dossier to the Council of the HCBC for compliance checks. Unfortunately, no additional information is given in the act as to what the dossier is to contain. We surmise that it requires a detailed description of the content of the service. The statute is entirely silent on licence and permit applications.

Sanctions

In terms of article 58, the HCBC is entitled to investigate and impose sanctions on the media for:

- non-adherence to the content of the annexures to permits (again, we stress the statute is silent as to who is responsible for granting and drafting these permits)
- illegally operating as a professional journalist or illegally exercising any other function in relation to the print or broadcast media

- illegally altering share capital and means of financing
- illegally loaning money to third parties
- refusing to furnish information requested by the HCBC
- unlawfully broadcasting television or radio programmes or creating interferences with third-party frequencies
- failing to disclose tariffs to subscribers
- fraudulently broadcasting additional radio or television channels
- failing to observe sanctions imposed by the HCBC
- unlawful copyright infringements of broadcast material.

In terms of article 59, the HCBC has alarmingly wide powers to suspend a broadcast service for a period not exceeding three months or to seize documents, films, video cassettes and other media-related information.

No limitations on this discretion are provided for (unlike the grounds set out above) and no grounds for such action are stated in the statute. The HCBC, therefore, has broad power to act with impunity.

3.3 Legislation governing the making of films

There are a number of constraints on the making of films in the DRC — something that obviously impacts upon the visual media, such as television.

The main piece of legislation governing film in the DRC is Ordinance 53 of 1936 (or the Film Ordinance).

Some key aspects of it are as follows:

- In terms of article 1 of the Film Ordinance, no one may produce a film in a public place unless authorised to do so by the director-general of information services. Any person contravening this section is guilty of an offence and is liable to imprisonment or a fine, in terms of article 8 of the Film Ordinance.
- In terms of articles 2 and 3, applications for authorisation to make a film must be in writing and lodged with the director-general at least one month prior to the proposed commencement of filming. The applications must include a range of information such as the names, addresses and nationalities of the applicant, the travel route and the duration of the planned filming. Note that, where non-'European' or 'Asian' actors are to be used, specific information regarding their roles is required to be provided. If the film is a documentary, then the documentary genre must be specified — that is, indigenous life, flora, fauna, landscape, etc.
- In terms of article 4, the director-general has the discretion to exempt the

applicant from submitting a detailed film script for his/her prior approval.

- In terms of article 5, the director-general may issue his approval of the application conditional upon the presence of a state official to monitor filming at the applicant's expense. The state official may impose restrictions on filming and has broad discretion in this regard.

3.4 Legislation governing the broadcast media generally

3.4.1 Legislation that regulates broadcasting generally

Broadcasting in the DRC is regulated by the:

- High Council of Broadcasting and Communications (HCBC) Act, Act 11-001 dated 10 January 2011
- Press Freedom Act, Act 96-002 dated 22 June 1996
- Telecommunications Act, Act 13-2002 dated 16 October 2002
- Post and Telecommunications Act, Act 14-2002 dated 16 October 2002.

3.4.2 Establishment of the HCBC and the Regulatory Authority

The DRC has more than one regulatory authority for broadcasting and signal distribution. While regulators are established in terms of a number of different statutes, it is clear that real power in respect of broadcasting resides in the executive branch of government and, in particular, with the Ministry of Press and Information. Despite being a constitutionally mandated body, the HCBC operates alongside a Regulatory Authority, which deals with technical matters, and is overshadowed by the very real powers exercised by the executive.

The HCBC

As required by the constitution, article 2 of the HCBC Act establishes the HCBC as an institution supporting democracy. Article 2 provides that the HCBC is independent, autonomous and endowed with legal personality.

The Regulatory Authority

Article 8 of Telecommunications Act establishes the Regulatory Authority, which is a public service with legal personality. This same body is, however, also established in terms of article 1 of the Post and Telecommunications Act as being a juristic entity, which is an independent organ of regulatory authority.

3.4.3 Main functions

The HCBC

In terms of article 8 of the HCBC Act, the HCBC's main functions are to:

- guarantee freedom of the press, information and mass communication
- oversee adherence to a code of conduct in respect of information provision
- oversee equitable access to state providers of information and communication by all political parties and associations
- develop a code of conduct
- mediate in media-related disputes
- promote excellence in media production
- promote a culture of peace, democracy, human rights and fundamental freedoms
- promote national culture through the media
- protect children
- file reports to parliament
- provide advisory opinions on draft laws to parliament or to the government.

It is clear that licensing — a key regulatory function in terms of international good practice — is not a function of the HCBC.

The Regulatory Authority

In terms of article 8 of the Telecommunications Act, the aims of the Regulatory Authority with regard to signal distribution include:

- overseeing adherence to laws and regulations relating to telecommunications matters
- processing licence applications and permits. Note that the section is extremely vague as to exactly what kinds of licences and permits are being referred to, but it appears that these are technical licences and permits appropriate to signal distribution matters
- operating a register of licences
- managing frequency bands
- enforcing compliance with the provisions of the Telecommunications Act.

In terms of article 25 of the Telecommunications Act, the Regulatory Authority issues a technical permit after approval of the minister in charge of telecommunications. In terms of article 57 of the Press Freedom Act, this technical permit appears to be a pre-condition for obtaining a broadcasting permit or licence.

3.4.4 Appointment of members

The HCBC

In terms of article 24 of the HCBC Act, there are 15 members of the HCBC, namely:

- one member chosen by the president
- two members chosen by the National Assembly
- two members chosen by the Senate
- one member chosen by government
- one member chosen by the High Council of the Judiciary
- three members chosen by professional media associations (print, radio and television)
- one member representing the advertising sector
- one member chosen by the National Council of Advocates
- one member chosen by the Association of Parents and Students
- two members chosen by associations for the protection of media rights.

However, in terms of article 26, the president formally appoints all members of the HCBC.

The Regulatory Authority

Article 9 of the Post and Telecommunications Act stipulates that the Regulatory Authority is made up of a seven-member council consisting of a president, a deputy-president and five councillors. Further, article 10 stipulates that all council members are officially appointed by the president of the DRC, who personally designates its president and deputy, while parliament nominates two of the five councillors and the minister in charge of telecommunications nominates the last three.

3.4.5 Funding for the regulators

The HCBC

Article 53 of the HCBC Act provides that the HCBC is operating and financial costs are to be provided for from monies appropriated by parliament — In other words, specifically allocated to the HCBC in the national budget.

The Regulatory Authority

Article 21 of the Post and Telecommunications Act provides that the Regulatory

Authority is funded through various sources of income, including service and administrative fees and taxes.

3.4.6 Licensing regime for broadcasters and signal distributors in the DRC

Broadcast licensing

Broadcasting-related licensing in the DRC is not conducted by an independent authority. Article 56 of the Press Freedom Act provides for a system of governmental permits to provide commercial radio and television broadcasting services. An applicant needs to submit a declaration, either to the Ministry of Press and Information, or to the relevant regional entity responsible for press and information matters. In terms of article 57, such a declaration must include:

- the company registration number
- channels to be broadcast
- names, birth dates, criminal records (if any) and certificates of good conduct of both the owner and head of programming
- statement on the nationality of the head of programming
- addresses of the head office and any subsidiary companies
- a copy of the company's internal rules and regulations
- a copy of the schedule of programmes to be broadcast
- a copy of the licence granted by the Ministry of Post and Telecommunications. Note that this appears to be a signal distribution licence — the technical licence identifying spectrum to be used, which is obtained in terms of section 33 of the Telecommunications Act.

It appears that the Ministry of Press and Information is able to impose conditions in respect of such broadcasting permits. Note that there are no specific references to community broadcasting services in the DRC statutes, although a number of community broadcasters are operational in the country.

Frequency spectrum licensing

This is an important aspect of broadcasting because all terrestrial and satellite signals are distributed through radio waves and, consequently, make use of the radio frequency spectrum.

In terms of article 33 of the Telecommunications Act, the Regulatory Authority assigns frequencies to licensed broadcasters, both radio and television, after consulting with the minister of information.

3.4.7 Responsibilities of broadcasters in the DRC

Adherence to licence conditions and other requirements

In terms of article 87 of the Press Freedom Act, no person may provide a broadcasting service without adhering to the requirements of the Press Freedom Act.

In terms of articles 63(a), 64(b) and 65 of the Press Freedom Act, the head of programming and the producer of the particular programme in question, are criminally liable for any breach of the conditions imposed by the Ministry of Press and Information when granting a permit for the commercial broadcasting service. They are to be sentenced in accordance with the provisions of the Criminal Code.

In terms of articles 63(b) and 64(a) of the Press Freedom Act, the owner, head of programming and the producer of the specific programme that breached the relevant condition, are also liable for civil damages in respect of such breach of the conditions imposed by the Ministry of Press and Information when granting a permit for the commercial broadcasting service.

In terms of article 58 of the HCBC Act, the HCBC is entitled to investigate and impose sanctions on the media for:

- non-adherence to content of the annexures to permits (again, we stress that the statute is silent as to who is responsible for granting and drafting these permits)
- illegally operating as a professional journalist or illegally exercising any other function in relation to the print or broadcast media
- illegally altering share capital and means of financing
- illegally loaning money to third parties
- refusing to furnish information requested by the HCBC
- unlawfully broadcasting television or radio programmes or creating interferences with third-party frequencies
- failing to disclose tariffs to subscribers
- fraudulently broadcasting additional radio or television channels
- failing to observe sanctions imposed by the HCBC
- unlawful copyright infringements of broadcast material.

In terms of article 59 of the HCBC Act, the HCBC has extremely wide powers to suspend a broadcast service for a period not exceeding three months or to seize documents, films, video cassettes and other media-related information. No limitations on this discretion are provided for (unlike the grounds set out above) and no grounds for such action are stated in the statute. This gives the HCBC broad power

to act with impunity. The HCBC, however, cannot permanently cancel a frequency allocation without a court order.

Adherence to local content requirements

Article 66 of the Press Freedom Act requires all broadcasters to ensure that at least 50% of all programming broadcast is locally produced.

Right of reply

In terms of articles 67–72 of the Press Freedom Act, any person is entitled to reply, free of charge, to any matter that affects his/her or its honour or reputation, which has been broadcast by any broadcasting service, within 15 days of the original broadcast. The person seeking to exercise the right of reply must specify the allegations to be addressed. The length of reply may not exceed the duration of the original allegation, unless absolutely necessary.

Any state official is automatically entitled to a right of reply, provided such reply relates to factually inaccurate material broadcast. The reply in this instance may be up to twice the duration of the original broadcast. The right of reply ought to take place in the next airing of the programme following the receipt of the request to exercise the right of reply.

Any refusal to allow a right of reply is subject to sanctions imposed in terms of article 83 of the Press Freedom Act. Article 83 empowers the minister of, or regional authority responsible for, press and information to: order the seizure of documents, suspend the broadcast of one or more offending programmes or suspend a broadcasting service for a period not exceeding three months in the following circumstances:

- for refusing to grant a right of reply
- for broadcasting material in contravention of laws, good morals or public order.

Adherence to ownership and control limitations for private broadcasting services

Article 7 of the HCBC Act imposes ownership and control restrictions on broadcasters. It provides that not more than 40% of shares of a commercial broadcaster be owned by foreigners. If a Congolese person or entity owns more than 50% of the shares in a commercial broadcaster, he/she or it cannot do so on behalf of a foreign person or entity.

Similarly, article 61 of the Press Freedom Act provides that Congolese citizens must constitute the majority of shareholders in a broadcasting service company.

Adherence to statutory prohibitions on broadcasting content

The only clear prohibition relates to reporting on court proceedings. These provisions are set out in detail in the section dealing with the prohibition on the

publication of information relating to court proceedings, covered later in this chapter.

Providing information regarding a service

In terms of article 17 of the HCBC Act, any person wishing to operate a print, broadcast or online media service must submit a dossier to the HCBC Council for compliance checks. Unfortunately, no additional information is given in the statute as to what the dossier is to contain. We surmise that it requires a detailed description of the content of the service. The statute is entirely silent on licence/permit applications, which are required in terms of the Press Freedom Act.

3.4.8 Are the HCBC and the Regulatory Authority independent regulators?

The HCBC and the Regulatory Authority are not independent bodies.

The HCBC

While article 2 of the HCBC Act provides that the HCBC is independent and autonomous and article 53 provides that it is funded by parliament, the HCBC's independence is compromised in the following ways:

- All its members are appointed by the president, although a number of different institutions are involved in choosing the appointees. The body as a whole is not required to act in the public interest and there is no public nominations process or other public involvement in the appointments.
- The HCBC cannot be said to act as a broadcasting regulator in the general sense because it is not involved in licensing in any way and has no regulation-making powers. The HCBC appears to be only a content-related oversight body, with extremely limited remit of powers.

This means that the HCBC does not meet international best practice standards with regard to appointment requirements for independent bodies and institutional independence.

The Regulatory Authority

The Regulatory Authority plainly works closely with the ministers for post and telecommunications and press and information and does not act to grant permits or licences without the ministers' approval. The Regulatory Authority is not independent because it functions only in conjunction with the relevant ministers.

3.4.9 Weaknesses in the legislation which should be amended

There are a number of problems with the legislative framework for the regulation of broadcasting generally in the DRC. The main problem is that none of the bodies involved in the regulation of broadcasting are independent.

Executive officers and departments are intimately involved in granting licences and

permits and there is no emphasis on the need for the public interest to be served in any of the relevant statutory provisions.

There are many different laws governing licensing, authorisations and permits, but all of these involve senior officials within the executive branch of government. There cannot be said to be genuine independent institutions governing broadcasting in the DRC, particularly in respect of the licensing of new operators.

3.5 Legislation that regulates the state broadcast media

Two statutes regulate the state broadcast media:

- Ordinance 81-050 of 1981 regulates the Congolese National Radio and Television Broadcaster (*Radio Télévision Nationale Congolaise* — RTNC). Note that the name of the national broadcaster has changed (in line with the country's general name change from Zaire to Congo), although the ordinance still refers to the old entity.
- Public Enterprises Act, Act 78-002 of 1978, regulates all public enterprises in the DRC, of which the RTNC is one.

3.5.1 Establishment of the RTNC

Article 1 of Ordinance 050 created the RTNC, which was established as a public enterprise with separate legal personality — that is, it is capable of suing and being sued. The RTNC's aims are stated to be both educational and commercial.

The Public Enterprises Act governs many aspects of the RTNC as it is a public enterprise in terms of article 1 of Ordinance 050.

Article 2 of the Public Enterprises Act provides that any public enterprise has at least one of the following characteristics. It is:

- created and controlled by state organs in order to fulfil a public mandate
- created to perform a specific function
- a joint venture among state entities to perform a specific function
- created through the initiative of other public enterprises in association with state entities to perform a specific function.

3.5.2 The RTNC's mandate

Article 2 of Ordinance 050 provides that the RTNC may establish stations or bureaus anywhere in the DRC or in foreign countries.

Article 3 of Ordinance 050 sets out the RTNC's broadcasting mandate. This is not an extensive mandate and article 3 refers only to three aspects, namely to:

- operate national radio and television broadcasting services

- provide information, training and education to the masses
- create and promote cinematographic productions.

3.5.3 The RTNC's governing structures and member appointment

In terms of article 7 of Ordinance 050, there are three structures within the RTNC: a board of directors, a managerial committee and an office of chartered accountants.

Board of directors

Article 10 provides that the board of directors is the highest authority within the RTNC when it comes to administrative acts and social responsibility.

In terms of article 8 of Ordinance 050, the RTNC is controlled by a board of directors comprising nine members: a chief executive officer, two company secretaries, representatives of the departments of Information and Portfolios (this department manages Cabinet function) and a representative of the National Parents' Association.

In terms of article 8, the RTNC board members are appointed in terms of articles 6–24 of the Public Enterprises Act. In terms of article 7 of the Public Enterprises Act, all member of the RTNC Board are appointed by the president for a renewable term of five years. Article 7 also gives the president absolute discretion to remove a board member during his/her term of office.

Managerial committee

Article 11 of Ordinance 050 requires the managerial committee to implement all decisions taken by the board of directors and to be responsible for the day-to-day operations of the RTNC, in accordance with the RTNC's internal rules and regulations.

In terms of article 11 of the Public Enterprises Act, the members of the RTNC managerial committee are appointed by the RTNC board.

Office of chartered accountants

Article 14 of Ordinance 050 provides that all financial transactions of the RTNC must be under the direction of the office of chartered accountants, which is to have between two and four accountants. Note that members of the office of chartered accountants are appointed by the president for a renewable term of two years.

3.5.4 Funding for the RTNC

Article 4 of Ordinance 050 sets out how the RTNC is funded. The four sources of funding are:

- the commercial exploitation of broadcasting, cinematographic productions, etc.

- the administration of its assets, including property
- state subsidies
- donations.

Article 31 of Ordinance 050 makes it clear that the RTNC's budget is required to be submitted to the Department of Portfolio for approval.

Articles 25–27 of Ordinance 050 provide that any net profit made by the RTNC is to be distributed as follows:

- Five per cent is to be allocated to an RTNC reserve fund, until such time as the reserve fund is equal to an amount constituting 10% of the entire capital valuation of the RTNC.
- The Department of Portfolio decides whether or not the remaining 95%:
  - is to be placed in additional reserve funds if so recommended by the RTNC Board of Directors;
  - is to be carried over for the next financial year; or
  - is to be paid over to the national treasury.

Article 32 provides that the president must approve any increase or decrease in the asset pool of the RTNC, as recommended by the Department of Portfolio.

3.5.5 The RTNC: Public or state broadcaster?

The RTNC is clearly a state broadcaster. Its board members serve entirely at the discretion of the president and its budget is approved and provided for by the Minister of Portfolio. The RTNC is also under close executive supervision. In terms of article 31 of Ordinance 050, the RTNC is required to report to:

- the Department of Information on the following issues:
  - tenders
  - organisational structure
  - personnel
  - salaries
  - building maintenance
  - annual report
  - the establishment of regional offices in the DRC or foreign bureaux.
- the Department of Portfolio on the following issues:
  - buying and selling of property
  - loans

- financial cessions and acquisitions
- general accounting issues
- budgets and financial projections
- year-end statements
- balance sheet.

Furthermore, while the RTNC board publishes an annual report, this is not presented to parliament but, instead, to the Department of Information. The RTNC's accountability, therefore, appears to be to the executive rather than to the public's elected representatives in parliament.

3.5.6 Weaknesses in Ordinance 050 which should be amended

It is clear that the RTNC is not a public broadcaster since it lacks basic independence. It ought to have a far more detailed public mandate that requires it to operate in the public interest and it should be accountable directly to parliament. Furthermore, the RTNC ought to be funded directly from parliamentary disbursements specifically provided for in the national budget.

While it is appropriate for the president to formally appoint the members of the RTNC Board, this ought to happen only after a transparent and public nomination process, as well as a short-listing and recommendation process conducted by a multi-party body such as parliament.

Lastly, RTNC board members should be removed only on objective grounds for incapacity or failure to perform.

3.6 Legislation that governs the state newsgathering agency

Two statutes govern the state newsgathering agency, the Congolese Press Agency (CPA):

- Ordinance 81-052 of 1981
- Public Enterprises Act, Act 78-002 of 1978.

3.6.1 Establishment of the Congolese Press Agency

The CPA was initially established by Ordinance 67-83 of 1967 and is currently regulated in terms of Ordinance 052. Article 1 of Ordinance 052 provides that the CPA is a public institution with legal personality (that is, it is capable of suing and being sued) and that it has as its focus technical, administrative and commercial activities.

3.6.2 The CPA's main mandate

Article 3 sets out the CPA's mandate, namely to:

- gather information that is accurate, complete and not contrary to public morals
- make this information commercially available to users
- undertake feasibility studies with regard to programming or means of communication (television or print based) in order to promote the international credibility of the DRC
- create an international network to have a worldwide presence
- promote the country's development
- ensure the education of the public through the broadcast of its content.

In order to achieve its mandate, article 4 contains a number of requirements for the CPA, including to:

- present information in a fair and impartial manner
- provide users with information on a regular and uninterrupted basis
- not allow itself to be under the influence of a political party or pressure group.

The last requirement is interesting, given that the CPA is obviously a state news agency.

3.6.3 The CPA's governing structures and member appointment

In terms of article 8 of Ordinance 052, there are three structures within the CPA: a board of directors, a managerial committee and an office of chartered accountants. In terms of article 9 of Ordinance 052, the functioning of the CPA is governed by articles 6–24 of the Public Enterprises Act.

Article 9 of Ordinance 052 provides that the CPA board is made up of nine members, including certain members of the managerial committee appointed in terms of articles 6 and 17 of the Public Enterprises Act.

Article 18 of the Public Enterprises Act provides that the managerial committee is responsible for the day-to-day implementation of board decisions.

Article 17 of the Public Enterprises Act provides that the managerial committee comprises a general manager, two administrators and a staff representative. Of these, all serve on the CPA board, except for the staff representative.

In terms of Article 9 of Ordinance of 052, the other directors are a representative of:

- the Office of the President
- the Department of Information
- the Department of Portfolio

- press bodies (three representatives).

Article 7 of the Public Enterprises Act provides that the CPA board members are appointed by the president. They serve at his discretion as he is able to remove them from office at will.

Article 23 of Ordinance 052 provides that the CPA reports directly to the Office of the President.

3.6.4 Funding for the CPA

In terms of article 5 of Ordinance 052, the CPA is funded through a range of sources, including from contracts for services rendered to its customers, donations and state subsidies.

In terms of articles 18–23, the president determines whether or not the net profit of the CPA is to be:

- carried over for the next financial year, or
- paid over to the national treasury.

Given that the CPA is both government funded and controlled through reporting directly to the presidency and, given that the CPA board serves at the will of the president, it is clear that the CPA operates as a government communications and information service.

3.7 Legislation that regulates online media

There are no internet-specific laws in the DRC but that does not mean that the internet is unregulated. The DRC has a very poor record of respecting the online rights of its inhabitants, despite the fact that only 6.1% of the population has internet access.[15] The government limits its inhabitants' rights to the internet in numerous ways:

- Internet shut downs — this is where access to the entire internet is shut down preventing any IP-related activity from taking place such as: accessing web-sites, sending emails, WhatsApp or other IP-based messaging services or being able to access social media such as Twitter or Facebook and search engines such as Google.
- Targeted shut downs — this is where particular sites are blocked, such as social media sites Twitter and Facebook and communications services such as Skype.
- Throttled internet — this is where the speed of the internet is deliberately slowed so as to render it effectively unusable.

These disruptions are said to cost the DRC's economy approximately US$2 million a day.

Some press reports have asserted that the Regulatory Authority has made use of article 3(i) of the Post and Telecommunications Act (dealt with above) which provides that the Regulatory Authority must protect the public interest, to require telecommunications companies providing internet access to suspend the internet or to shut down particular sites or services including SMS services.[16] Other press reports have asserted that it is the Minister of Posts and Telecommunications that is responsible for ordering the restrictions and quotes him as citing national security grounds for these.[17] In this regard, article 46 of the Telecommunications Act (also dealt with above) empowers the state to prohibit the use of or seize telecommunications facilities in the interests of national security.

3.8 Legislation that undermines a journalist's duty to protect his or her sources

A journalist's sources are the lifeblood of his or her profession. Without trusted sources, a journalist cannot obtain information that is not already in the public domain. However, sources will often be prepared to provide critical information only if they are confident that their identities will remain confidential and will be respected and protected by a journalist.

This is particularly true of so-called whistle blowers — inside sources that are able to provide journalists with information regarding illegal activities, whether by company or government personnel. Consequently, democratic countries often provide special protection for journalists' sources. It is recognised that, without such protection, information that the public needs to know would not be given to journalists.

The only statute in the DRC that clearly deals with this issue is the Criminal Procedure Code, 1959. The Criminal Procedure Code was enacted prior to the DRC's independence, but has been amended numerous times since then. Provisions of the Criminal Procedure Code might be used to compel a journalist to reveal confidential sources.

Article 78 of the Criminal Procedure Code, for example, provides that any person who, without a valid excuse, fails to appear in court, take the required oath or give evidence as required, may be sentenced to imprisonment, a fine or both.

This provision might conflict with a journalist's ethical obligation to protect his or her sources. However, it is important to note that, whether or not requiring a journalist to reveal a source is in fact an unconstitutional violation of the right to freedom of expression will depend on the particular circumstances in each case, particularly on whether the information is available from any other source. It is, therefore, extremely difficult to state that these provisions are, by themselves, a violation of the right to freedom of expression under the constitution.

3.9 Legislation that prohibits the publication of certain kinds of information

A number of statutes contain provisions which, looked at closely, undermine the public's right to receive information and the media's right to publish such information. These statutes are targeted and prohibit the publication of certain kinds of information, including:

- Information regarding legal proceedings
- Information relating to public safety, order and security, or which otherwise undermines government's authority (such as incitement)
- Information that constitutes state secrets
- False information that alarms the nation
- Information which insults the president
- Information which offends against public morals
- Information which constitutes xenophobia
- Information which promotes hate speech or discrimination.

3.9.1 Prohibition on the publication of information relating to legal proceedings

- Article 79(a) of the Press Freedom Act, 96-002 of 1996, prohibits the publication of any judicial matter prior to this being read out in a court of law.
- Article 79(b) of the Press Freedom Act prohibits the publication of any judicial deliberations or any information regarding activities of the High Council or of magistrates without their express permission.
- Article 79(c) of the Press Freedom Act prohibits the publication of photographs, drawings or pictures depicting crimes of violence or crimes against public morals, unless permission has been granted by the relevant chief judicial officer.
- Article 79(d) of the Press Freedom Act prohibits the broadcasting of court proceedings, unless permission has been granted by the relevant chief judicial officer.
- Article 79(e) of the Press Freedom Act prohibits the publication of the identity of a rape victim, unless the victim has given express permission for his or her identity to be revealed.
- Article 79(f) of the Press Freedom Act prohibits the publication of information regarding fines, costs and damages awarded against a litigant by a court of law. This provision is extraordinary in that it appears that the public is not

entitled to obtain any information regarding court orders dealing with fines, costs and damages awards.

- Article 81 of the Press Freedom Act provides that any person guilty of publishing the above prohibited information can be sentenced to a period of imprisonment, the payment of a fine, or both.

3.9.2 Prohibition on the publication of state security–related information

Press Freedom Act 96-002 of 1996

Articles 76 and 77 of the Press Freedom Act make it an offence to incite others (whether through speeches, writings, images or any other written means) to commit punishable offences, including theft, murder, looting, arson or any act threatening the stability of the state.

It is important to note that incitement is an offence in terms of article 77 of the Press Freedom Act, even if the incitement is not acted upon. The punishment for such incitement is to be meted out in accordance with articles 22 and 23 of the Criminal Code. Article 22 essentially provides that a person who incites anyone to commit punishable offences is to be charged as an accomplice to such crimes.

Article 23 of the Criminal Code provides that an accomplice is to receive a sentence not more than half of the prison sentence given to the perpetrator(s) of the crime. However, the law is unclear as to how such accomplices are to be sentenced if the incitement does not result in any criminal offences being perpetrated by anyone.

Article 78 of the Press Freedom Act provides that any person who incites active armed forces to switch allegiances to a foreign power in times of war is guilty of high treason. Article 181 of the Criminal Code, 1940, provides that the crime of high treason is punishable by death.

High Council of Broadcasting Act, Act 11/001 of 2011

Article 6 of the High Council of Broadcasting (HBC) Act prohibits the media from condoning criminal activity or inciting others to violence. Articles 69–73 provide that a media enterprise found guilty of the above can be sentenced to various fines.

Criminal Code, 1940

Article 209 of the Criminal Code prohibits the distribution of foreign publications which aim to destabilise the state. The penalty is imprisonment and/or a fine.

Article 211 of the Criminal Code prohibits the publication of false information that undermines public order. The penalty is a period of imprisonment and/or a fine.

3.9.3 Prohibition on the publication of information relating to state secrets

Article 188 of the Criminal Code, 1940, makes it an offence to disclose state secrets. The penalty is imprisonment.

3.9.4 Prohibition on the publication of false information that alarms the nation

Article 199B of the Criminal Code, 1940, prohibits the publication of false information that alarms the nation. The penalty is imprisonment and/or a fine.

3.9.5 Prohibition on the publication of expression which insults the president

Article 77 of the Press Freedom Act 96-002 of 1996, makes it an offence to publish anything which offends the president. In terms of article 77, read with article 76 of the Press Freedom Act, the punishment for offending the president is to be meted out in accordance with articles 22 and 23 of the Criminal Code. However, as these sections deal with accomplices to crimes, it is unclear what the punishment might be for offending the president.

3.9.6 Prohibition on the publication of expression which offends against public morals

Article 6 of the High Council of Broadcasting Act, Act 11/001 of 2011, prohibits the media from being used to offend against public morals. Articles 69 and 73 provide that a media enterprise found guilty of the above can be sentenced to various fines.

3.9.7 Prohibition on the publication of expression which constitutes xenophobia

Article 6 of the High Council of Broadcasting Act, Act 11/001 of 2011, prohibits the media from being used to promote xenophobia. Articles 69 and 73 provide that a media enterprise found guilty of the above can be sentenced to various fines.

3.9.8 Prohibition on the publication of expression which promotes hate speech or discrimination

Article 6 of the High Council of Broadcasting Act, Act 11/001 of 2011, prohibits the media from being used to promote tribal, racial or religious hatred or any other form of discrimination. Articles 69 and 73 provide that a media enterprise found guilty of the above can be sentenced to various fines.

4 Regulations affecting the media

In this section, you will learn:

- ▷ what regulations are
- ▷ key regulations governing the media generally

4.1 Definition of regulations

Regulations are subordinate legislation. They are legal rules, made in terms of an empowering statute (that is, a piece of legislation), made by a public functionary — usually by a minister or a regulatory body.

4.2 Key regulations governing the media

There are a number of regulations which govern both the print and broadcast media. Some of these regulations have been prescribed by the HCBC and some are ministerial decrees. These are the:

- Press, Radio, Television and Advertising Fees Decree
- Broadcast Press Freedom and Professional Practice Decree
- Radio and Television and Compliance Commission Decree
- Administrative Fees on Photographic or Filmed Reportage Decree
- Broadcasting Press Freedom and Professional Practice Implementing Measures Decree
- Code of Conduct for Congolese Journalists Regulations
- Foreign-owned Radio and Television Services Decree
- Migration to DTT Decree
- Election Coverage Regulations
- Licence Renewal Decree
- Accreditation of Journalists Covering Elections Regulations.

4.2.1 Press, Radio, Television and Advertising Fees Decree

The Press, Radio, Television and Advertising Fees Decree, Ministerial Decree 04/MIP/018/96, dated 26 November 1996, is a short decree. It requires administrative

fees to be paid by all press publications, television and radio stations, press agencies and advertising agencies and for authorisation to film or photograph news events. Note, however, that the regulations do not specify what the fees are.

4.2.2 Broadcast Press Freedom and Professional Practice Decree

The Broadcast Press Freedom and Professional Practice Decree, Ministerial Decree04/MIP/020/96 dated 26 November 1996, sets out a number of requirements for broadcasters operating in the DRC. It applies to all broadcasters — radio and television, public and private — in terms of Article 1.

In brief, these requirements include the following:

- In terms of article 2 of the Broadcasting Practice Decree, the content declarations required to be provided by the broadcasters in terms of Press Freedom Act, Act 96-002 dated 22 June 1996, must be in writing.
- In terms of article 3, the content of every advertisement requires approval by the Compliance Committee prior to being broadcast.
- Article 4 provides that all administrative fees payable by the broadcasters will be set by the minister of information and the press.
- Article 5 requires private broadcasters to comply with the content declaration requirement within three months of the coming into force of the decree.
- Article 7 empowers the secretary of the Ministry of Information and the Press to implement the Broadcasting Practice Decree.
- The Annexure to the Broadcasting Practice Decree sets out a list of further requirements that all broadcasters must comply with upon being granted a licence. In brief, these include the following:
  - **Ministerial Approval of Broadcast Service**: Before commencing operations, a broadcast service must obtain approval from the Minister of Information and the Press.
  - **Content**:
    - A content declaration required to be provided by the broadcasters in terms of the Press Freedom Act, Act 96-002 dated 22 June 1996, must be submitted to the Regulatory Authority.
    - Broadcasters will be held responsible for content broadcast.
    - Broadcasters are to be impartial and objective when broadcasting political content.
    - If a private broadcaster is carrying a programme of the RTNC, such programme must be broadcast delayed and in its entirety.
    - 50% of all programmes broadcast must be local. Note that what constitutes 'local' programming is not defined.

- All political propaganda is prohibited. Note that what constitutes 'political propaganda' is not defined.
- When broadcasting television content that is not suitable for children, broadcasters must ensure that a white square appears on the top right-hand corner of the television screen as an audience advisory.
- Foreign content:
  - The broadcaster must ensure that all foreign content broadcast has one or more of the following characteristics: educational, scientific or religious. It is not well-defined how such a requirement is imposed upon commercial satellite broadcasters operating in the DRC, whose programmes clearly do not comply with this requirement
  - Satellite broadcasters are responsible for all programmes broadcast on the satellite bouquet.

- **Retention of copies of programmes broadcast:** Every broadcaster must keep a copy of all broadcasts for at least 30 days.
- **Fees payable:** The Annexure contains a number of administrative and other fees payable by a broadcaster. These are the following:
  - A content declaration fee of US$500.00 is payable in the equivalent number of Congolese francs.
  - Non-commercial radio and television stations are to pay a licence fee of US$5,000.00, payable in the equivalent number of Congolese francs.
  - Commercial radio and television stations are to pay a licence fee of US$10,000.00, payable in the equivalent number of Congolese francs.
  - Press agencies are to pay a licence fee of US$500.00, payable in the equivalent number of Congolese francs.
  - Advertising agencies are to pay a licence fee of US$500.00, payable in the equivalent number of Congolese francs.
  - A monthly administrative fee payable to the Compliance Commission.
- **Copyright**:
  - Broadly, this section requires broadcasters to respect and acknowledge intellectual property rights, including copyright.
  - Copyrights must be lodged with Soneca, a national intellectual property repository.
  - Should satellite broadcasts violate intellectual property rights, the broadcaster is liable.

- **Advertising**:
  - Advertising that does not conform to the broadcaster's content declaration may not be broadcast.
  - All advertising rates must be provided for in a written contract between the advertiser and the broadcaster.
  - All advertising must be approved by the Compliance Commission prior to being broadcast.
- **Penalties:** Failure to comply with any requirements in the Annexure will be subject to penalties provided in other laws.

4.2.3 Radio and Television and Compliance Commission, Ministerial Decree

Establishment of the Compliance Commission

Article 1 of the Radio and Television and Compliance Commission, Ministerial Decree 04/MIP/006/97 dated 28 February 1997, provides for the establishment of a Compliance Commission by the Ministry of Information and the Press. Article 3 of the Compliance Commission Decree provides that the compliance commission comprises six members, namely:

- a president, who is the secretary of the Ministry of Information and the Press
- an advisor on judicial matters
- an advisor on broadcasting matters
- an advisor on press matters
- an advisor on technical matters
- an administrator of broadcasting.

Although not explicit, it seems that the advisors and broadcasting administrator are appointed by the Minister of Information and the Press.

Mandate of the Compliance Commission

In terms of article 2 of the Compliance Commission Decree, the three main objectives of the compliance commission are to:

- receive and examine content declarations provided by broadcasters in terms of the Press Freedom Act
- ensure broadcasters' compliance with statutes, regulations and other applicable legal rules governing broadcasting
- make recommendations on sanctions in the event of a breach by a broadcaster of any applicable statutes, regulations and other applicable legal rules governing broadcasting.

Funding of the compliance commission

Article 4 of the Compliance Commission Decree provides that all broadcasters must pay 10% of their advertising revenues to the compliance commission, calculated on a monthly basis.

4.2.4 Administrative Fees on Photographic or Filmed Reportage Ministerial Decree

The Administrative Fees on Photographic or Filmed Reportage Ministerial Decree 04/MIP/008/97, dated 3 May 1997 is a very short decree that essentially sets administrative fees for photographic and filmed reportage.

Although the terms of the decree are extremely vague, it appears that each photographic or film assignment requires the payment of a US$50.00 fee to the secretary-general of information — a significant reduction on the previous fees set.

4.2.5 Broadcasting Press Freedom and Professional Practice Implementing Measures — Ministerial Decree

The Broadcasting Press Freedom and Professional Practice Implementing Measures — Ministerial Decree 04/MCP/011/2002, dated 20 August 2002, contains a number of content restrictions upon or information requirements for radio and television broadcasters operating in the DRC. In brief, these are as follows:

- Article 1 prohibits the broadcasting of any content that does not comport with the declaration of content made by the broadcaster in terms of the Press Freedom Act.
- Article 2 requires the prior approval of every advertisement to be broadcast by the Compliance Commission.
- Article 3 prohibits the broadcast of any content that contradicts Congolese laws or which disturbs public order or infringes on good morals.
- Article 4 prohibits the broadcast of films, images or documentaries of a pornographic nature.
- Article 5 establishes a watershed period for television; films depicting violence and horror may be broadcast only after 22h00.
- Article 6 requires applicants for licences to submit a report to the Compliance Committee setting out their broadcasting technical capacity.
- Article 7 creates a penalties provision. Depending on the seriousness of the contravention, non-compliance with the Broadcasting Decree can result in the:
  - seizure of documents and films or video cassettes belonging to the offender
  - suspension of one or more programmes on the broadcasting service

- suspension of the broadcasting service itself for a period not exceeding three months
- withdrawal of the licence.

4.2.6 The Code of Conduct for Congolese Journalists Regulations

The Code of Conduct for Congolese Journalists — Regulation by the High Council of Broadcasting and Communications dated 4 March 2004, regulates all journalists, whether working in print, online or broadcast media.

The code of conduct is divided into two sections: Part A sets out the duties of journalists, while Part B sets out the rights of journalists. These are summarised in brief:

- **Part A: Duties of journalists**
  - to promote freedom of opinion and the public's right to access to information
  - to demonstrate fairness, honesty and independence when reporting on individuals and society
  - to be impartial when reporting on controversial issues
  - to be responsible for published work
  - not to engage in defamation, insult, slander, unsubstantiated accusations, falsification of documents, distortions of facts, lies, incitement to hatred, as well as not to condone values that are contrary to the practice of journalism
  - to uphold the truth by relying on established facts and avoiding blackmail or the violation of a third party's good faith
  - not to take bribes
  - to identify sources of information, where possible, unless such sources request confidentiality
  - not to engage in the distortion or embellishment of facts or information
  - to rectify errors promptly and grant timely right of reply
  - to respect human dignity and privacy of persons, particularly with regard to personal intimacy
  - to promote national culture, citizenship and the virtues of the DRC, which are tolerance, pluralism of opinion, democracy and the universal values of peace, equality, human rights and social progress
  - to exercise circumspection with regard to information that might harm vital state interests
  - to show solidarity with fellow journalists and to abide by decisions taken by the HCBC

- not to publish corrections to articles that never existed in the first place.

- **Part B: Rights of journalists**

  Journalists are entitled to the protections sect out in articles 16 to 20 as summarised below and must comply with the provisions of article 21 also as summarised below:

  - protection of sources of information
  - free access to sources of information and the right to investigate all facets of public life. Secrecy can be requested of a journalist only with regard to public and private matters in exceptional circumstances
  - to refuse to carry out instructions of a superior which are contrary to journalistic ethics. A journalist cannot be forced to express him/herself in a manner that is contrary to his/her beliefs or opinions, and if so forced, he/she may choose to resign
  - the editorial team of any media outlet must be informed of any decision that affects the existence of such outlet and must be consulted in respect of employment-related managerial decisions
  - journalists have the right to engage in collective bargaining
  - journalists must abide by the code of conduct.

4.2.7 Foreign-owned Radio and Television Services Decree

The Foreign-owned Radio and Television Services Decree (No. CAB/M-CM/LMO/010/2016 was promulgated by the Minister of Communications in 2016. It seeks to regulate the levels of foreign ownership of radio and television services broadcasting in the DRC as follows:

- The majority shareholding in any broadcasting service must be by DRC citizens in accordance with the requirements of article 61 of the Press Freedom Act (dealt with above) — article 1.
- All broadcasters had 30 days from the date the Decree came into effect to comply with the majority Congolese shareholder requirement provided for in article 1 failing which, the broadcasting service was prohibited from operating — article 2.
- Foreign media outlets that do not broadcast to the DRC may nevertheless establish a partnership with a local broadcaster as a programme content provider to such local broadcasters, provided prior written approval is obtained from the Minister of Communications. However, the minister may cancel any such contract within 10 days of approving same if he or she is of the opinion that the partnership terms are not been adhered to — articles 3-5.
- Should a partnership agreement between a foreign content provider and a local broadcaster be cancelled in terms of article 5, or if the contract is

terminated by either party, the local broadcaster is required to cease broadcasting the foreign content immediately and existing parties to such contracts are given 45 days to amend their existing contracts accordingly — articles 6 and 7.

- Enforcement of the Decree is to be carried out by the secretary-general of the Ministry of Communications — article 8.

4.2.8 Migration to DTT Decree

The Migration to DTT Decree (No. 002/TNT/CAB/MCM/LMO/2015) was promulgated by the Minister of Post and Telecommunications, together with the Minister of Media and Communication, in 2015 in terms of the Post and Telecommunications Act (dealt with above). The Decree deals with the migration of television from analogue terrestrial to digital terrestrial. In brief, it provides as follows:

- the migration from analogue to DTT in the UHF and VHF frequency bands in the DRC began on 25 April 2015 and the digital switchover is to be completed by 17 June 2020 — articles 1 and 3.
- from 25 April 2015, the manufacturing or importation of any analogue television signal receiver device was prohibited — article 4.
- enforcement of the Decree is to be carried out by the secretary-general of the Ministry of Post and Telecommunications — article 6.

It is noteworthy that two ministers are responsible for the migration to DTT. This is probably because the aim of migrating to DTT is to free up spectrum in the UHF and VHF frequency bands for use primarily by mobile broadband services.

4.2.9 Election Coverage Regulations

The HCBC has promulgated the Election Coverage Regulations No. CSAC/AP/001/2015, that were intended to provide election coverage regulations for the media for the 2016 elections which never took place. However, we assume that they will be used for the proposed 2018 elections, assuming these take place, and so we include them here. In brief the key provisions are as follows:

- Article 3 provides that all media (note includes broadcasting and other media) must report accurately on all events during the election period.
- Article 4 requires all media to refrain from publicising any materials that incite hatred or discrimination or undermine national unity.
- Article 5 requires all media to observe applicable Codes of Conduct.
- Article 6 regulates access to the state broadcaster, namely, the RTNC by the Presidential candidates and it provides that:
    - there is to be no change in the coverage of government activity as a result of the election.

    - all presidential candidates are entitled to be featured on the state broadcaster on three occasions and for three minutes for each such occasion.

- Articles 7 to 43 deal with the detail of Presidential candidates' appearances on the RTNC as provided for in article 6. They include provisions on language, disqualification by the Electoral Commission and the format of presentation of the candidate's views, such as reading from a prepared statement on engaging in a question and answer session.

- Articles 44 to 51 deal with the election coverage by privately-owned media. Essentially, they are free not to provide a platform for political parties or candidates contesting the election. However they must communicate their decision as to whether or not they are to cover the election to the HCBC. Their general obligations during the election period are to be fair and impartial.

- Article 52 deals with online media and provides that Presidential candidates may create websites for their electoral campaign. These sites are required to be interactive and comments posted by the public are required to accord with good morals, human dignity, respect for privacy and national security.

- Articles 53-60 deal with election campaign posters, pamphlets and loudhailers. They include that a presidential candidate is legally liable for the content of their posters and that the posters must be removed within seven days of the election. There are also provisions regarding the placement of posters and the required measurements of them, including provisions regarding posters pasted on vehicles. There are also provisions prohibiting the destruction or damaging of election posters. Pamphlets are to be distributed by hand. Distribution of pamphlets by aircraft is specifically prohibited. Stationary loudhailers may be used for campaigning.

- Article 61 provides that all campaigning through the media is to cease 48 hours prior to the actual election day.

- Article 62 provides that a presidential candidate may apply to the HCBC for the RTNC to cover a specific campaign event on 72 hours prior notice. Approval of such request is at the discretion of the HCBC.

- Article 63 is a generally-applicable section which requires all media to comply with the principles of fairness, objectivity, impartiality and equitable access in respect of their presidential election coverage.

- Articles 64 to 67 contain prohibitions imposed upon the media regarding election coverage. These include:

    - prohibiting commercial sponsorship of election-related coverage — article 64

    - requiring clear distinctions between regular reporting and election coverage — article 65

    - prohibitions against media incitement of violence, hatred and discrimination — article 66

- prohibiting the publication of results before the end of the election itself — article 67.

- Article 68 requires broadcasters to clearly identify campaign-related material.

- Article 69 requires all journalists, news-anchors, producers and all other media professionals to conduct themselves in accordance with high professional standards.

- Article 70 empowers the HCBC to suspend any media house for a period of seven to ninety days for violating any provision of the Electoral Coverage Regulations. It is important to note that no process is provided for in respect of such a suspension or indeed for the media house to be given a hearing in respect of the suspension.

4.2.10 Licence Renewal Decree

The Licence Renewal Decree No. CAB/MIN/PTNTIC/EON/DTC/MMW/002/2017, (the Renewal Decree), was promulgated in 2017 by the Minister of Posts and Telecommunications.

The Renewal Decree purports to make provision for how renewals of 20 year-operating licences (telecommunications, broadcasting, postal services and new technologies) are to be conducted. In brief, the Decree provides that:

- applications for renewals must be at least twenty-four months prior to the current expiry date — article 4.

- renewal applications must be submitted to both the Minister and the Regulatory Authority (dealt with earlier in this chapter) — article 5.

- the Regulatory Authority makes a recommendation to the Minister as to whether or not the renewal application is to succeed but the Minister has the discretion to refuse such renewal application — article 6.

- any refusal to renew on the Minister's part may be appealed against within three months of the refusal — article 7.

- a licence which is renewed also has a period of 20 years — article 4.

4.2.11 Accreditation of Journalists Covering Elections Regulations

Regulation 030/CENI-RDC/18, issued by the National Independent Electoral Commission of the DRC (NIEC) in 2018, sets out registration requirements for journalists wishing to report on election matters in the DRC — presidential, national and provincial.

Essentially, such journalists (who have to be already registered in terms of the laws set out above) are required to apply to the NIEC for further accreditation to cover and report on elections.

The accreditation requirements cover both national and foreign reporters. Upon accreditation, the journalist is provided with a card allowing him or her to report on election matters.

5 Media self-regulation

One of the greatest problems facing the media in the DRC is the lack of self-regulatory mechanisms for content dispute resolution.

The media has failed to develop industry-wide associations capable of developing and enforcing self-regulatory provisions for attaining appropriate professional standards for the media. This lack of self-regulation has led to disputes involving the media having to be settled in the courts.

6 Case law and the media

The DRC's court and jurisprudential system is a civil law system. Consequently, the case law is not as strictly based on precedent as is the case in common law systems (commonly found in former British colonies).

Case law in the DRC certainly affects the media and working journalists. For example, journalists are sometimes tried before military tribunals for crimes such as high treason. However, accessing Congolese case law is extremely difficult.

DRC case law is not published electronically or in law reports and there is no formal indexing system of previous judgments. The services of a lawyer who has access to the registrar of the relevant court is usually essential when trying to obtain a copy of a particular judgment.

Notes

1 http://worldpopulationreview.com/countries/dr-congo-population/ [accessed 30 April 2019]

2 http://www.refworld.org/pdfid/57da8f6c4.pd f [accessed 30 April 2019]

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6

eSwatini

1 Introduction

The Kingdom of eSwatini[1] had its name changed from Swaziland, following the Declaration of Change of Swaziland Name Notice, 2018, in Legal Notice 80 of 2018. The name change was done under section 64(3) of the constitution which provides that, subject to the constitution, the King may exercise the executive authority conferred on him by section 64(1) of the constitution, either directly or through a Cabinet minister.[2] It should be noted that section 3 of the Declaration of Change of Swaziland Name Notice, provides that any reference in any written law, international agreement or legal document to 'Swaziland' shall be read and construed as a reference to 'eSwatini'. This chapter, therefore, uses 'eSwatini' in place of 'Swaziland'.

The Kingdom of eSwatini gained independence from the United Kingdom in 1968. That event coincided with the passage of eSwatini's first constitution, which established the country as a constitutional monarchy. The first elections after independence took place in 1972, and the opposition received slightly more than 20% of the vote. In response, the then-king of eSwatini, King Sobhuza II, issued a decree in 1973 in which he repealed the 1968 constitution and assumed supreme power, expressly taking all legislative, executive and judicial powers for himself. The current king, King Mswati III, ascended to the throne in 1986 and continued to rule in terms of the 1973 decree. However, bowing to political pressure, he ratified a new constitution, which came into force in 2006.

Despite the 2006 constitution coming in to force, eSwatini cannot be said to be a democratic country. Even though the constitution ostensibly guarantees freedom of expression, eSwatini's media environment is extremely difficult. According to a paper by Richard Rooney,[3] the media in eSwatini is mostly government-controlled. Swazi TV and radio are effectively 'departments of the Swazi civil service'.[4] Although there is a non-state television channel, Channel Swazi Television (CST), founded in 2001, CST is closely aligned with the monarchy and was created 'specifically to support King Mswati III'.[5]

eSwatini is a small landlocked country surrounded by South Africa and Mozambique. It has a sparse population of 1.6 million people.[6] The electricity distribution network is well developed, with roughly 76.5% of the population having access to electricity[7] and internet penetration at approximately 57.3% of the population. Some 22% of the population has a Facebook account.[8] eSwatini has completed the switchover to digital terrestrial television having had its analogue switch-off date on 1 January 2016. eSwatini has opted for the DVB-T2 television standard in line with most SADC region countries.

In this chapter, working journalists and other media practitioners will be introduced to the legal environment governing media operations in eSwatini. The chapter is divided into five sections:

- Media and the constitution

- Media-related legislation
- Media-related regulations
- Media self-regulation
- Media-related case law

This chapter aims to equip the reader with an understanding of the main laws governing the media in eSwatini. Key weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in eSwatini, to enable the media to fulfil its role of providing the public with relevant news and information better, and to serve as a vehicle for government-citizen debate and discussion.

2 The media and the constitution

In this section, you will learn:

- ▷ definition of a constitution
- ▷ definition of constitutional supremacy
- ▷ definition of a limitations clause
- ▷ constitutional provisions that protect the media
- ▷ constitutional provisions that might require caution from the media or might conflict with media interests
- ▷ key institutions relevant to the media established under the eSwatini Constitution
- ▷ enforcing rights under the constitution
- ▷ the 'three branches of government' and 'separation of powers'
- ▷ weaknesses in the eSwatini Constitution that ought to be amended to protect the media

2.1 Definition of a constitution

A constitution is a set of rules that are foundational to the country, institution or organisation to which they relate. For example, you can have a constitution for a soccer club or a professional association, such as a press council. Such constitutions set out the rules by which members of the organisation agree to operate. However, constitutions can also govern much larger entities, indeed, entire nations.

The eSwatini Constitution came into force in 2006 and sets out the foundational rules for the Kingdom of eSwatini and contains the underlying principles and values of the Kingdom. An important constitutional chapter in this regard is Chapter V, Directive Principles of State Policy and Duties of Citizens. Section 58 sets out the political objectives of the country. In brief, these provide that:

- eSwatini shall be a democratic country.
- The state shall be guided in the conduct of public affairs by the principle of decentralisation and devolution of governmental functions and powers to levels where the people can manage and direct their affairs best.
- The state shall cultivate respect for human rights and freedoms and the dignity of the human person.
- All associations aspiring to manage and direct public affairs shall conform to democratic principles in their internal organisation and practice.
- All lawful measures shall be taken to expose, combat and eradicate corruption and abuse of power by those holding political or public office.
- The state shall promote a culture of political tolerance, and all organs of state and people of eSwatini shall work towards the promotion of national unity, peace and stability.
- The state shall provide a peaceful, secure and stable political environment, which is necessary for economic development.

Section 58 sets out some important statements of principle and admirable political objectives, which would seem to indicate that the rulers of eSwatini recognised a need to chart a new course away from the undemocratic and draconian practices of the past. It is important to note, however, that the provisions set out in section 58 are not capable of being enforced in any court, in terms of section 56(3) of the constitution.

2.2 Definition of constitutional supremacy

Constitutional supremacy means that the constitution takes precedence over all other law in a particular country, for example, legislation or case law. It is important to ensure that a constitution has legal supremacy; if a government passed a law that violated the constitution (was not in accordance or conflicted with a constitutional provision) such law could be challenged in a court of law and could be overturned on the ground that it is unconstitutional.

The eSwatini Constitution makes provision for constitutional supremacy. Section 2(1) specifically states that 'This Constitution is the supreme law of eSwatini and if any other law is inconsistent with the provisions of this Constitution that other law shall, to the extent of such inconsistency, be void'. Importantly, given the enormous power wielded by the king of eSwatini, section 2(2) specifically provides that the king, as well as: 'all citizens of eSwatini', have a duty 'to uphold and defend this Constitution'. Furthermore, section 2(3) provides that 'suspending, overthrowing or abrogating the constitution by violent or otherwise unlawful means constitutes treason.'

2.3 Definition of a limitations clause

It is clear that rights are not absolute as society would not be able to function. For example, if the right to freedom of movement were absolute, society would not be able to imprison convicted criminals. Similarly, if the right to freedom of expression were absolute, the state would not be able to protect its citizens from hate speech or false, defamatory statements made with reckless disregard for the truth.

Obviously, governments require the ability to limit rights to serve important societal interests; however, owing to the supremacy of the constitution, this can only be done in accordance with the constitution.

The eSwatini Constitution makes provision for two types of legal limitations on the exercise and protection of rights, which are contained in Chapter III, Protection and Promotion of Fundamental Rights and Freedoms.

2.3.1 Internal limitations

These are provisions that occur within specific sections of the chapter on fundamental rights and freedoms. They deal specifically, and only, with the limitation or qualification of the particular right that is dealt with in that section. Therefore, the section that contains the right also sets out the parameters or limitations allowable in respect of that right. Two of the rights that are of particular relevance to the media, freedom of expression and freedom of association, are subject to internal limitations.

2.3.2 Limitations arising from states of emergency

Section 37(1) of the eSwatini Constitution specifically provides that nothing contained in any law or done under the authority of law shall be held to be inconsistent with the provisions of Chapter III of the constitution, which sets out fundamental rights and freedoms, to the extent that the law authorises measures during a state of emergency that are reasonably justifiable.

In terms of various subsections of section 36 of the constitution, a state of emergency for up to three months may be declared by the king, acting on the advice of the prime minister, by publication in the Government Gazette, provided that:

- eSwatini is at war or about to be at war with a foreign state;

- there is a natural disaster or threatened natural disaster in eSwatini; or
- action taken or threatened by a person or body of persons is of such a nature and scale as to be likely to endanger public safety or deprive the community of supplies or services that are essential to the life of the country.

Furthermore, the state of emergency is required to be ratified by a two-thirds majority vote taken in a joint sitting of the members of the House and the Senate within 21 days of the declaration otherwise it ceases. Provision is made for the state of emergency to be extended for additional periods of three months by a three-fifths vote taken in a joint sitting of the members of the House and the Senate. Importantly, section 38 sets out the rights that may not be derogated from during a declared state of emergency. These are:

- the right to life, equality before the law and security of the person
- the right to a fair hearing
- freedom from slavery or servitude
- the right to approach the High Court for redress in respect of the contravention of constitutional rights
- freedom from torture, cruel, inhuman or degrading treatment or punishment.

Unfortunately, it is clear that the right to freedom of expression is derogable during a declared state of emergency.

2.4 Rights that protect the media

The eSwatini Constitution contains several important provisions in Chapter III, Protection and promotion of fundamental rights and freedoms, which purport to protect the media directly, including publishers, broadcasters, journalists, editors and producers.

2.4.1 Freedom of expression

The most important basic provisions that protect the media are set out in subsections 24(1) and (2), which state:

- A person has a right to freedom of expression and opinion.
- A person shall not, except with the free consent of that person, be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say
  - freedom to hold opinions without interference
  - freedom to receive ideas and information without interference
  - freedom to communicate ideas and information without interference

(whether the communication be to the public generally or any person or class of persons)

- freedom from interference with the correspondence of that person.

This provision needs some explanation.

- The freedom applies to every person and not just to certain people, such as citizens. Hence, everybody enjoys this fundamental right.
- The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many different examples of this, including physical expression (such as mime or dance), photography or art.
- Section 24(1) specifies that there is a right to freedom of opinion as well. Freedom of opinion is important for the media as it protects commentary on public issues of importance.
- Section 24(2) specifies that the right to freedom of expression includes: 'freedom of the *press* and *other media*.' This is important because it makes it clear that this right:
  - can apply to corporate entities such as a media house, newspaper or broadcaster, as well as to individuals
  - extends to both the press and other media. Thus, the section itself distinguishes between the press, with its connotations of the news media, and other media, which could include fashion, sports, gardening or business publications or television channels, thereby protecting all media.
- Section 24(2)(b) specifically enshrines the freedom to receive ideas and information without interference. This right to receive information is a fundamental aspect of freedom of expression, and this subsection enshrines the right to the free flow of information. Thus, the information rights of audiences, for example, as well as the expression rights of the media are protected. This right is important because it also protects organisations that foster media development. These organisations facilitate public access to different sources and types of information, particularly in rural areas that traditionally have little access to the media.
- Section 24(2)(c) specifically enshrines the freedom to communicate ideas and information without interference and, furthermore, specifies that this freedom relates to the right to communicate with any specific person, any class of persons or to the public generally. This is a critical freedom for the media. In at least one southern African country, government officials have argued for the narrowest possible interpretation of the right to freedom of expression by saying that the right protects the ability of individuals to have a conversation rather than the right of the media to communicate news and information to the public.
- Section 24(2)(d) specifically enshrines the freedom from interference with

correspondence. This protection of correspondence (which would include letters, emails and telefaxes) is an important right for working journalists.

It is important to note that there is an internal limitation to the right to freedom of expression which is dealt with under the heading 'Constitutional Provisions that Require Caution from the Media', below.

2.4.2 Right to administrative justice

Another important provision that protects the media is section 33, Right to Administrative Justice. Section 33(1) provides that:

> *A person appearing before any administrative authority has the right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved.*

Section 33(2) provides that 'A person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority'. This right requires explanation.

The reason why this provision is important for journalists and the media is that it protects them (as it does all people) from administrative officials who act unfairly and unreasonably and who do not comply with legal requirements. It also entitles them to written reasons for administrative action.

An administrative body is not necessarily a state body. These bodies are often private or quasi-private institutions. These constitutional requirements would therefore apply to non-state bodies as well.

Many decisions taken by such bodies are administrative. The requirement of administrative justice is, therefore, powerful as it prevents or corrects unfair and unreasonable conduct on the part of administrative officials.

This constitutional right entrenches the right to judicial review, that is the right to approach a court in respect of an administrative decision.

Having a constitutional right to written reasons is a powerful tool for ensuring rational and reasonable behaviour on the part of administrative bodies and aids in ensuring transparency and, ultimately, accountability.

2.4.3 Freedom of association

A third broad protection is provided for in section 25, Protection of Freedom of Assembly and Association. Section 25(1) grants a person 'the right to freedom of peaceful assembly and association'. Section 25(2) specifies that the right to association includes the right to 'associate freely with other persons for the promotion or protection of the interests of that person'. The effect of this is to guarantee the

rights of the press to form press associations, media houses and operations. It also guarantees the rights of, for example, civil society to form non-governmental organisations dedicated to media freedom.

It is important to note that there is an internal limitation to the right to freedom of association which is dealt with under the heading Constitutional Provisions that Require Caution from the Media, below.

2.5 Other constitutional provisions that assist the media

There are other sections in the constitution, apart from the human rights provisions, that assist the media in performing its functions.

2.5.1 Parliamentary privilege

Section 130(1) of the constitution entitles parliament to prescribe laws providing for immunities and privileges for the president, the speaker, members of parliament (MPs) and anyone else participating in or reporting on the proceedings of parliament. It is important to note that this section only entitles parliament to pass such laws and is not itself a guarantee of parliamentary privilege.

Nevertheless, such laws, including eSwatini's Parliamentary Privileges Act, 1967, do assist the media in reporting on the work of parliament because they allow MPs and other people participating in parliamentary proceedings to speak freely during these proceedings, without facing arrest or civil proceedings for what they say.

2.5.2 Public access to courts

Section 139(4) of the constitution provides that, except as may otherwise be provided in the constitution or as ordered by a court in the interest of public morality, public safety, public order or public policy, the proceedings of every court shall be held in public. This is an important provision because it allows journalists (and therefore the media) to attend court proceedings.

2.6 Constitutional provisions that might require caution from the media or might conflict with media interests

Just as there are certain rights or freedoms that protect the media, other rights or freedoms can protect individuals and institutions *from* the media. Journalists need to understand which provisions in the constitution can be used against the media. There are a number of these in the eSwatini Constitution.

2.6.1 Internal limitations on the rights to freedom of expression

Section 24(3) contains an internal limitation on the general rights to freedom of expression and opinion contained in sections 24(1) and (2). Section 24(3) provides that nothing contained in any law or done under the authority of that law shall

be held to be a contravention of the right to freedom of expression, as set out in section 24, provided that it:

- is reasonably required in the interests of defence, public safety, public order, public morality and public health
- is reasonably required for:
  - protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings
  - preventing the disclosure of confidential information
  - maintaining the independence and authority of the courts
  - regulating the technical administration or operation of telephony, broadcasting or any other medium of communication
- imposes reasonable restrictions on public officers.

Laws that protect reputations are, of course, used against the media in defamation cases. Similarly, the right to privacy in legal proceedings is often given effect by prohibiting the publication of names of complainants in sexual offences cases or divulging private details in divorce cases.

These limitations are generally not out of step with international norms for limitations on freedom of expression, except in one respect, namely, the restriction imposed on public officers. Obviously, many public officials do have secrecy obligations, particularly in defence, intelligence and police posts. Nevertheless, the general ability of whistleblowers in the public service to bring illegal conduct, including corruption, to the attention of the media in the public interest is a critical part of a functioning democracy. Consequently, such limitations provisions could have a chilling effect on public servants, unduly preventing the disclosure of official misconduct.

2.6.2 Internal limitation on the right to freedom of association

Sections 25(3) and (4) contain internal limitations on the general right to freedom of association contained in section 25(1).

Section 25(3) provides that nothing contained in any law or done under the authority of that law shall be held to be a contravention of the right to freedom of association, as set out in Section 25(1), provided that it:

- is reasonably required in the interests of defence, public safety, public order, public morality and public health
- imposes reasonable restrictions upon public officers.

Furthermore, section 25(4) provides that nothing contained in any law or done under the authority of that law shall be held to be a contravention of the right to freedom of association, as set out in section 25(1), if the law:

- deals with the registration of certain associations, for example, trade unions, employer organisations, companies, partnerships and other associations, including registration requirements, qualifications and the like
- prohibits or restricts the performance of a function or the carrying on of any business by an association that is not registered when there is a legal requirement to do so.

Although there is an express limitation on the freedom of association of the press in eSwatini, the above restrictions could be used to limit the ability of journalists to work. This is particularly true of the provisions regarding registration or qualifications as this could be used to prevent journalists who did not meet any such qualification or registration requirements from working. While these internal limitations may, theoretically, be abused to limit the press's freedom of association, they are not out of step with international norms.

2.6.3 States of emergency provisions

It is also important to note the provisions of sections 36–38 of the eSwatini Constitution, which deal with declarations of emergencies and derogations (see discussion on limitations arising from states of emergency, above).

2.7 Key institutions relevant to the media established under the constitution

The eSwatini Constitution establishes several important institutions concerning the media, namely, the judiciary, the Judicial Service Commission (JSC), and the Commission on Human Rights and Public Administration.

2.7.1 The judiciary

In terms of section 138 of the eSwatini Constitution 'Justice shall be administered in the name of the Crown by the Judiciary which shall be independent and subject only to this Constitution'. This important statement on the role of the judiciary is supported by section 140(1) of the constitution, which provides that 'The judicial power of eSwatini vests in the Judiciary. Accordingly, an organ or agency of the Crown shall not have or be conferred with final judicial power'.

The judiciary is an important institution for the media because the two rely on each other to support and strengthen democratic practices in a country. The judiciary needs the media to inform the public about its judgments and its role as one of the branches of government, and the media is essential for building public trust and respect for the judiciary, which is the foundation of the rule of law in society. The media needs the judiciary because of the courts' ability to protect the media from unlawful action by the state and unfair damages claims by litigants.

Section 139(1), read with other sections of the eSwatini Constitution, sets out the hierarchy of the courts in that country.

In brief, these are the superior courts of Judicature, comprising the:

- Supreme Court:
  - The Supreme Court is the apex court, section 146.
  - The Supreme Court has jurisdiction to hear appeals from the High Court, section 146(2).
  - The Supreme Court consists of the Chief Justice and at least four other justices of the Supreme Court, section 145(1).
- High Court:
  - The High Court has unlimited original jurisdiction in civil and criminal matters, section 151(1)(a). Note that section 151(2) further specifies that the High Court has the jurisdiction to enforce the fundamental human rights and freedoms guaranteed by the constitution, and can determine any constitutional matter. It is important to note, however, the provisions of section 151(8), which specifically take decisions regarding certain traditional matters out of the jurisdiction of the High Court and reaffirms that these will continue to be governed by 'Swazi law and Custom'.
  - The High Court consists of the Chief Justice, at least four justices of the High Court and such justices of the Superior Court of the Judicature as may be assigned to sit by the Chief Justice, in terms of section 150(1) of the constitution.
  - Specialised, subordinate and Swazi courts or tribunals exercising judicial functions, as established by law.

Section 141 of the eSwatini Constitution contains several detailed provisions designed to protect the independence of the judiciary, including provisions relating to its judicial and administrative functions as well as to the financing of the judiciary, including provisions regarding salaries, pensions and the like for judges.

In eSwatini, the Chief Justice and other judges of the superior courts are appointed by the king on the advice of the Judicial Service Commission (JSC) (section 153(1)).

Section 158 of the eSwatini Constitution deals with the removal of judges of the superior courts. Essentially, these judges may be removed only for serious misconduct or inability to perform their functions. Judges are removed by the king, acting on the advice of the JSC, after a full enquiry. The JSC also appoints and exercises disciplinary control over lower court officers such as magistrates (section 160).

2.7.2 The Judicial Service Commission

The JSC is a constitutional body established to participate in the appointment and removal of judges. The JSC is relevant to the media because of its critical role in the judiciary, the proper functioning and independence of which are essential for democracy.

In terms of section 159(2) of the eSwatini Constitution, the JSC is made up of the Chief Justice (the chairman), two legal practitioners with not less than seven years of practice and in good professional standing to be appointed by the king, the chairman of the Civil Service Commission, and two persons appointed by the king.

It is clear that the king has enormous say as to who sits on the JSC. The JSC in eSwatini is therefore not independent of executive influence.

2.7.3 The Commission on Human Rights and Public Administration

The Commission on Human Rights and Public Administration (CHRPA) is an important organisation in respect of the media. It is established in terms of Chapter XI, Part 2 of the eSwatini Constitution.

In brief, in terms of section 164, its primary functions are to:

- Investigate complaints concerning:
  - alleged violations of fundamental human rights and freedoms
  - injustice, corruption, abuse of power and unfair treatment by public officers
  - the functioning of any public service or administrative organ of the state concerning:
    - delivery
    - equitable access
    - fair administration
- take appropriate action for the remedying, correction or reversal of the above
- promote the rule of law and fair efficient and good governance in public affairs.

Section 166 of the eSwatini Constitution specifies that the CHRPA is independent in the performance of its functions and shall not be subject to the direction or control of any person or authority.

In terms of section 163, members of the CHRPA are the commissioner for human rights and public administration and at least two deputies, appointed by the king on the advice of the JSC. It is clear that the king has enormous say as to who sits on the CHRPA. The CHRPA is therefore not independent of executive influence.

2.8 Enforcing rights under the constitution

A right is only as effective as its enforcement. All too often, rights are enshrined in documents such as a constitution or a bill of rights, and yet remain empty of substance because they cannot be enforced.

Section 14(2) of the eSwatini Constitution provides that:

> ***The fundamental rights and freedoms enshrined in this Chapter [being Chapter III] shall be respected and upheld by the Executive, the Legislature and Judiciary and other organs or agencies of Government and, where applicable to them, by all natural and legal persons in eSwatini and shall be enforceable by the courts as provided for in this Constitution.***

Section 35, is headed Enforcement of Protective Provisions, and subsection (1) essentially provides that any person may apply to the High Court for redress if he or she alleges that any rights provision of Chapter III has been, is being, or is likely to be contravened in relation to that person, or concerning a group of which that person is a member, or in respect of a detained person.

While rights are generally enforceable using the courts, the constitution also envisages the rights of people, including of the media, to approach a body such as the CHRPA to assist in the enforcement of rights.

Perhaps one of the most effective ways in which rights are protected, at least theoretically, under the eSwatini Constitution is by the provisions that entrench Chapter III, the chapter setting out fundamental rights and freedoms. Section 246 of the constitution requires that a constitutional amendment to any of the provisions of Chapter III requires a vote of three-quarters of the members of both the Senate and the House, voting in a joint sitting.

2.9 The three branches of government and separation of powers

All too often, politicians, commentators and journalists use political terms such as 'branches of government' and 'separation of powers', yet working journalists may not have a clear idea what these terms mean.

2.9.1 Branches of government

It is generally recognised that government exercises power by three branches of government, namely the executive, the legislature and the judiciary.

The executive

Executive power in eSwatini is vested in the king as head of state in terms of section 64(1) of the eSwatini Constitution. Section 64(3) provides that, as a general rule, the king exercises his executive authority either directly or via the Cabinet or a minister.

Section 65 makes it clear that the king does not wield executive power unilaterally as the section requires the king to act 'on the advice of Cabinet or a minister acting under the general authority of Cabinet', except for certain specified circumstances in which he is free to act unilaterally. The effect of this is to require the king to involve and act along with, Cabinet or the relevant minister in wielding executive power.

In terms of section 66 of the eSwatini Constitution, the Cabinet consists of the prime minister (who chairs Cabinet), the deputy prime minister and as many ministers as the king may deem necessary for administering the functions of government, after consultations with the prime minister. In terms of section 67, the appointments processes for key Cabinet posts are as follows:

- The king appoints the prime minister from among members of the House of Assembly, on the recommendation of the King's Advisory Council.
- The king appoints ministers from both chambers of parliament, namely, the House of Assembly and the Senate, on the recommendation of the prime minister. Note that at least half of the ministers must be from among the elected members of the House of Assembly. Note further that, in terms of section 70, the king, after consultation with the prime minister, may assign responsibility for government business, including the administration of any government department, to the prime minister or any other minister.

Section 64(4) sets out the functions of the king as head of state, and these include:

- assenting to and signing bills
- summoning and dissolving parliament
- receiving foreign envoys and appointing diplomats
- issuing pardons, reprieves or commuting prison sentences
- declaring a state of emergency
- conferring honours
- establishing any commission or similar body
- ordering a referendum.

Section 69 sets out the functions of the Cabinet, and these include:

- keeping the king fully informed about the general conduct of government and providing the king with any information he may require regarding government;
- being collectively responsible to parliament for:
  - any advice given by it to the king
  - all things done by any minister in the execution of the office of minister
- formulating and implementing government policy in line with national development strategies or plans
- performing other functions conferred by the constitution or by any law.

The legislature

Legislative (that is, law-making) power in eSwatini is vested in 'the King-in-Parliament' in terms of section 106(1) of the constitution. Thus, both the king and the parliament are involved in making laws. Section 106(2) specifies that they: 'may make laws for the peace, order and good government of eSwatini'. In terms of section 93 of the constitution, parliament consists of 'a Senate and a House of Assembly'.

In terms of section 94 of the constitution, the Senate consists of not more than 31 members, comprising:

- ten senators (at least half of whom must be female) elected by members of the House of Assembly to represent a broad cross-section of Swazi society;
- 20 senators (at least eight of whom must be female) appointed by the king on the basis that they:
  - represent economic, social, cultural, traditional or marginalised interests not already adequately represented in parliament
  - can contribute to the good government and progressive development of eSwatini.

Note that, while there is a consultation requirement regarding these appointees, this is extremely weak as the king has the discretion to determine which bodies to consult.

In terms of section 95 of the constitution, the House of Assembly consists of not more than 76 members, comprising:

- 60 members elected from tinkhundla (constituencies based on one or more chiefdoms, section 80)
- ten members nominated by the king
- four female members specially elected from the four regions, but this is done only if, after a general election, fewer than 30% of the members elected ordinarily are female (see section 86)
- the attorney-general as an *ex officio* member.

The judiciary

The judicial power, as already discussed in this chapter, is vested in the courts.

2.9.2 Separation of powers

In a functioning democracy, it is important to divide government power between different organs of the state to guard against the centralisation of power, which may lead to abuses of that power. This is known as the separation of powers doctrine. The aim, as the eSwatini constitution has done, is to separate the functions of

the three branches of government, the executive, the legislature and the judiciary, so that no single branch can operate alone, assume complete state control and amass centralised power. While each branch performs several different functions, each also plays a watchdog role in respect of the other. This helps to ensure that public power is exercised in a manner that is accountable to the general public and in accordance with the constitution. Sadly, the actual exercise of power by the monarch in eSwatini means that there is no effective separation of powers in the country.

2.10 Weaknesses in the constitution that ought to be strengthened to protect the media

There are several important aspects in which the eSwatini Constitution is weak. If these weaknesses were addressed, there would be specific benefits for the media in the country.

2.10.1 Access to information

In an information age, where states wield enormous power, particularly concerning the distribution of resources, the right of access to information is one of the most important rights in ensuring transparency and holding public power, that is government, accountable. If one considers that the media plays an enormous role in ensuring transparency and government accountability by providing the public with information, having a right of *access* to information is critical to enable the media to perform its functions properly. It is unfortunate that there is no free-standing right of access to information in the eSwatini Constitution.

2.10.2 Access by the public to parliamentary processes

It is disappointing that the constitution does not specifically provide as a general rule that parliamentary processes are to be open to the public, including members of the media. Media reporting on the government in action is one of the most important mechanisms for ensuring an informed citizenry. The general principle of public observance of the workings of the legislature (government) ought to be enshrined in the eSwatini Constitution.

2.10.3 Independent broadcasting regulator and a public broadcaster

It is disappointing that the eSwatini Constitution does not provide for an independent broadcasting regulator to ensure the regulation of public, commercial and community broadcasting in the public interest. Similarly, it is disappointing that the constitution does not provide for an independent public broadcaster to ensure access by the people of eSwatini to quality news, information and entertainment in the public interest.

3 The media and legislation

In this section, you will learn:

- what legislation is and how it comes into being
- legislation governing the operations of the print media
- legislation governing the making and exhibition of films
- legislation governing the broadcasting media generally
- legislation governing the state broadcasting media
- legislation that threatens a journalist's duty to protect sources
- legislation that prohibits the publication of certain kinds of information
- legislation that hinders the press from performing its reporting functions

3.1 Legislation: An introduction

3.1.1 What is legislation and how it comes into being

Legislation is a body of law consisting of Acts properly passed in accordance with the constitution. As we know, legislative authority in eSwatini is vested in 'the King-in-Parliament' and consequently involves both the king and parliament (made up of the Senate and the House of Assembly).

As a general rule, both parliament and the king are ordinarily involved in passing legislation. There are detailed rules in sections 49, 107, 108, 110 and 112–117 and in Chapter XVII of the constitution which set out the different law-making processes that apply to different types of legislation. It is important for journalists and others in the media to be aware that the eSwatini Constitution requires different types of legislation to be passed in accordance with particular procedures. The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the constitution, there are five kinds of legislation, each of which has particular procedures or rules applicable to it. These are:

- legislation that amends the constitution, the procedures or applicable rules are set out in sections 107, 108(2) and Chapter XVII of the constitution

- ordinary legislation, the procedures or applicable rules are set out in sections 49, 107 and 108 of the constitution and, where the Senate and House of Assembly disagree, in section 116 of the constitution
- legislation that deals with financial matters, the procedures or applicable rules are set out in sections 107, 110(a), 111, 112 and 113 of the constitution
- legislation deemed urgent by the king, the procedures or applicable rules are set out in sections 107 and 114 of the constitution
- legislation dealing with matters involving Swazi law and custom, the procedures or applicable rules are set out in sections 107, 110(b) and 115 of the constitution.

3.1.2 The difference between a bill and an act

A bill is a piece of draft legislation that is debated and usually amended by parliament during the law-making process.

As a general rule, if a bill is passed by parliament following the various applicable procedures required for different types of bills, as set out above, it becomes an Act once it is assented to by the king. It is important to note that sections 108 and 117 of the eSwatini Constitution contain provisions regarding the process of how the king assents to legislation, including provisions that enable him to refer provisions of a bill to a joint sitting of parliament. In terms of section 109 of the constitution, the attorney-general has the responsibility to ensure that, once a bill has been duly passed and assented to, it must be published in the Gazette. It becomes law only when it has been so published.

3.2 Legislation governing the print media

The Books and Newspapers Act, Act 20 of 1963, is a colonial-era statute that has not been repealed. There are several important requirements laid down by the Books and Newspapers Act in respect of books (the definition of which specifically includes magazines and pamphlets) and newspapers:

- Section 4(1) prohibits any person from printing or publishing a newspaper (defined as any printed matter published at least monthly and intended for sale or distribution, which contains 'news, or intelligence, or reports of occurrences of interest to the public or any section thereof, or any views, comments or observations thereon') unless the editor is resident in eSwatini, and a certificate of registration has been issued. Failure to comply with these requirements is an offence, and the penalty is the payment of a fine or, in the event of non-payment, imprisonment.
- In terms of section 5, the newspaper registration requirements include the full and correct name of the newspaper and address at which it is to be published and the full names and addresses of the proprietor, printer, publisher, manager and editor of the newspaper. Section 7 also requires any changes of such

information to be provided to the Registrar of Books and Newspapers, who is appointed by the minister responsible for the administration of the Books and Newspapers Act. In terms of section 5(4) of the Books and Newspapers Act, making a false statement when giving particulars in respect of the registration of a newspaper is an offence that carries a fine as a penalty or, failing payment thereof, imprisonment.

- Section 10(1) requires the publisher of every newspaper printed in eSwatini to provide two copies of every edition to the Registrar of Books and Newspapers, at his or her own expense. In terms of section 10(4), failure to do so is an offence punishable by a fine, imprisonment or both.

- Section 9 of the Books and Newspapers Act also requires the publisher of any book (note again that the definition includes a magazine) printed and published in eSwatini to deliver two copies (and such additional ones as may be requested up to a maximum of three) of the book, at his or her own expense, to the Registrar of Books and Newspapers. In terms of section 9(8), failure to do so is an offence punishable by a fine, imprisonment or both.

- Note that the minister is empowered under section 8 of the Books and Newspapers Act to make rules to exempt compliance from the requirements of having to deposit copies of books and newspapers.

- Part IV of the Books and Newspaper Act deals with bonds. In brief, the publishers of every newspaper are to register and deliver to the Registrar of Books and Newspapers a bond as security for the payment of monetary penalties imposed or libel damages awarded as a result of publication. Publishing a newspaper without a bond is an offence in terms of section 15 of the Books and Newspapers Act, and the penalty is a fine, imprisonment or both.

- Section 16 requires the name and address of the printer and publisher and the name of the place where it is printed and published to be printed legibly and in English on the first or last page of a book or newspaper printed in eSwatini. Failure to comply is an offence, and the penalty is a fine, imprisonment or both. Note further that an additional penalty of forfeiture or destruction of all copies can be imposed by a court.

3.3 Legislation governing the making and exhibition of films

3.3.1 The making of films and the taking of photographs

There are several constraints on the making of films and even the taking of photographs in eSwatini, something that obviously affects both the print and broadcast media.

The foremost provision of the main piece of legislation governing film and photography, namely the Cinematograph Act, Act 31 of 1920, is section 3, which, without the prior written consent of the Minister for Public Service and Information, prohibits any person from:

- making a film (or taking photographs to make a film) that portrays gatherings of Africans or scenes of African life
- taking a photograph on the dates and at the places of celebration listed. These include Incwala Day, the king's birthday, the Reed Dance and Independence Day.

Failure to comply with section 3 is an offence, and the penalty is a fine or, if the fine is unpaid, imprisonment.

3.3.2 Exhibition of objectionable pictures

The Cinematograph Act also regulates the exhibition of films. Section 6(4) makes it an offence to exhibit an 'objectionable picture' (the definition of which includes any film). In terms of section 6, an objectionable picture is one that has been declared to be so by the Minister for Public Service and Information.

While the minister's powers are untrammelled in this regard (he or she can declare any picture to be objectionable, section 6(2)), the general grounds upon which he or she can make such a declaration are that the picture represents, in an offensive manner:

- impersonation of the king
- scenes holding any member of the naval, military or air forces up to ridicule and contempt
- scenes tending to disparage public characters
- scenes calculated to affect the religious convictions of any section of the public
- scenes of debauchery, drunkenness, brawling or any other habit of life not following good morals or decency
- successful crime or violence
- scenes that are in any way prejudicial to the peace, order or good government of eSwatini.

The penalty for exhibiting a prohibited picture is a fine or imprisonment.

3.4 Legislation governing the broadcast media generally

3.4.1 Statutes that regulate broadcasting generally

No legislation in eSwatini relates specifically to broadcasting. Instead, broadcasting is currently governed by legislation that regulates the communications sector generally and is done so in terms of two different pieces of legislation:

- The Public Enterprises (Control and Monitoring) Act 1989 (the PE Act)
- The eSwatini Communications Commission Act, 2010 (the SCC Act)

The SCC Act establishes the eSwatini Communications Commission (the SCC) and transfers the regulatory powers and functions from the eSwatini Television Authority, provided for under the eSwatini Television Authority Act, 1983, to the SCC established in terms of section 3 of the SCC Act.

The Public Enterprises Act is relevant in respect of the appointment of board members of the SCC and its operations in respect of funding matters.

3.4.2 Establishment of the SCC

Section 3 of the SCC Act establishes the SCC as a body corporate, which means that it has its own legal identity and provides that the SCC shall be independent in the performance of its functions and not subject to the direction or control of any person or authority. Section 9 provides that all that the SCC is empowered to do shall be undertaken and carried out by the board of directors of the SCC.

3.4.3 Functions and powers of the SCC

The powers and functions of the SCC are contained in several different sections of the SCC Acts. Broadly it is a converged regulator, regulating broadcasting, electronic communications and postal services. Concerning broadcasting, its main powers and functions include licensing of various broadcasting services, spectrum management and licensing, regulating ownership and control and general competition issues and content regulation.

3.4.4 Appointment of SCC Board Members

Section 10 of the SCC Act provides that the board shall consist of seven members appointed in terms of section 6 of the PE Act, which provides that all members of the board, except the chief executive officer (CEO), must be appointed by the minister responsible for communications in consultation with the Cabinet Standing Committee on Public Enterprises (Standing Committee). In making the appointments, the minister must ensure the overall balance of technical, professional, commercial and financial skills is maintained on the governing body and shall endeavour to ensure that in the interest of continuity, not all the members of the governing body shall be retired at the same time.

Section 11 of the SCC Act sets out the grounds for disqualification from being appointed to, and the grounds upon which a board member can be removed, from the board. These include insolvency, criminal convictions, citizenship, conflicts of interest, including involvement in the sector, mental or physical incapacity, ongoing absences and the like.

Surprisingly, none of the statutes governing the SCC provides for the terms of office of board members.

The CEO, who is also a member of the board, is appointed via a different process although the CEO is also appointed (or dismissed) by the Minister responsible for communications in consultation with the standing committee, although the board nominates the CEO in terms of section 8(1) of the PE Act. The CEO must

have relevant experience in electronic communications, broadcasting, postal, commerce, finance, law or administration as provided by section 20(3) of the SCC Act. The CEO is appointed for three years and shall be eligible for re-appointment in terms of section 21 of the SCC Act.

3.4.5 Funding for the SCC

Section 49(1) and (2) of the SCC Act provide that the SCC will receive funding from:

- monies appropriated by parliament for the SCC
- fees imposed by the SCC for authorisations issued under the SCC Act
- fees or monies imposed or made by the SCC under the SCC Act
- grants or donations from any source and raised by way of loans or otherwise such monies as the SCC requires for the discharge of its functions, subject to the approval of the minister responsible for communications.

In terms of section 49(9) of the SCC Act, the minister responsible for communications may, on receipt of the SCC business plan and budget, by notice in the Gazette prescribe fees or levies and charges for authorisations, that is payable by a category of licensees or customers set out in the notice.

Section 49(10) of the SCC Act provides that any funds or revenue of the SCC that remains unused at the end of the financial year must be remitted into the Universal Service or Access Programme. Note that this programme is designed to support the roll-out of telecommunications infrastructure only, even although broadcasters may contribute to its funds.

3.4.6 Making broadcasting regulations

The SCC Act empowers the minister responsible for communications to make regulations.

3.4.7 Categories of broadcasting licences

The SCC Act defines the types of broadcasting services that can be offered in eSwatini; these include:

- any broadcasting service provided by the eSwatini Public Broadcasting Corporation
- a broadcasting service provided by any other statutory body
- a broadcasting service provided by a person who receives funding from the State.

Although these services appear in the definitions of the SCC Act, they are not dealt with anywhere else.

3.4.8 Licensing procedures, including transfers, amendments, revocations of licences

In terms of section 34(1) of the SCC Act, the SCC is empowered to establish the procedures to be followed by applicants wishing to apply for a licence. The procedures must prescribe the:

- format of the application
- full details to be provided by an applicant
- publication of the application
- invitation for objections to the application
- period for replies to objections.

Section 34(2) of the SCC Act empowers the SCC to establish its licensing procedures which are required to be objective, transparent and non-discriminatory. In cases where the number of licences is limited, the SCC must make use of a comparative or competitive selection procedure per section 34(3) of the SCC Act.

3.4.9 Complaints handling and enforcement powers of the SCC

In terms of section 36 of the SCC Act, the SCC is empowered to establish the procedures for the investigation of alleged contraventions by a licensee of any law or the terms and conditions of a licence which the SCC is entitled to administer. It should be noted that the SCC is only obliged to commence an investigation if it has evidence that the parties involved in a complaint made to the SCC have attempted to resolve the issue between themselves before referring the matter to the SCC.

The SCC may refuse to initiate an investigation into a matter referred to them in cases where the SCC is satisfied that alternate means of timeously resolving the matter exists between the relevant parties, or legal proceedings relating to the matter have been initiated by any of the parties involved in the complaint. In the event that the SCC chooses not to investigate a matter referred to them, they are required to inform the relevant parties, in writing, of their decision.

The SCC is required to issue a decision on any investigation it commences within six months of submission of the complaint. In determining the outcome of any investigation referred to it, the SCC may issue directives to a licensee that includes:

- the reimbursement of any funds received by the licensee
- compensation payments including the costs accrued in engaging a lawyer, technical advisor or both, concerning the complaint.

3.4.10 Reviews and appeals of decisions made by the SCC

Section 45 of the SCC Act establishes the Communications Appeals Board (CAB).

The CAB is independent in the performance of its function to hear appeals made against the actions and decisions of the SCC.

Members of the CAB are appointed by the minister responsible for communications. They consist of a chairperson, who must be a legal practitioner with at least ten years' experience, and two other members selected on a case by case basis by the chairperson of the CAB. The minister appoints members selected from people with experience in either commercial, technical or financial fields of electronic communications, postal services, broadcasting, electronic commerce and other areas falling under the remit of the SCC and in respect of which the CAB has jurisdiction. All members of the CAB are appointed for three years and are eligible for re-appointment.

The chairperson and members of the CAB may recuse themselves for the same reason that judges may, or are required to, recuse themselves. In the event of a recusal, another person from the people appointed by the minister responsible for communications will be selected to serve as chairperson or another member of the CAB.

Section 46 of the SCC Act provides that the CAB must act on the request of a party aggrieved by a decision of the SCC and is empowered to compel action by the SCC considered to be unlawfully withheld or unreasonably delayed, or otherwise not per the law, and to hold unlawful and set aside any decision found to be arbitrary, capricious, abusive or otherwise not per the law.

Section 47 of the SCC Act provides the procedure to be followed when appealing a decision made by the SCC, namely:

- appeals must be made by application and filed with the secretary of the CAB after thirty days, but before sixty days, from the date of publication of the decision made by the SCC
- notice of an application for appeal must be provided to the SCC
- the SCC must, not later than twenty days from the date of the notification, file a reply to the application, with the secretary of the CAB
- the CAB will then set a date for the hearing at the earliest possible opportunity and not later than 40 days after notifying the SCC.

In making its decision, the CAB must consider the merits of the appeal, and may in whole or part, confirm, vary or rescind a decision by the SCC. The CAB must give the reasons for its decision in writing and must communicate its decision to the public and the parties involved in the appeal.

The CAB must determine an appeal within one hundred and twenty days from the expiry of the period by when the SCC must file a reply to the notification of the appeal. The SCC shall deliver the final decision of the CAB not later than sixty days from the date when the parties declare that they have concluded their evidence and made their final submissions to the CAB.

The CAB may appoint independent and impartial experts to advise it on any issue that may be relevant to any appeal lodged before it and, may make both provisional and final orders in respect of the payment of the costs and fees of the experts by any of the parties to the appeal.

The minister responsible for communications may, subject to the SCC Act, prescribe the procedure to be followed before the CAB. Subject to that procedure and any other provision of the SCC Act, the CAB may regulate its own procedure.

The minister responsible for communications may, with the concurrence of the minister responsible for finance, by regulations prescribe any such fees as are considered to be necessary for any proceedings before the CAB.

Section 48 of the SCC Act provides that any person aggrieved by a decision made by the CAB may, on a question of law, appeal to the High Court within 30 days of the date of the decision of the CAB.

3.4.11 Enforcement powers of the SCC

In terms of section 39 of the SCC Act, the SCC may require a licensee or any other person to provide the SCC with any information, including financial information and programme schedules, which it considers necessary to ensure compliance with the SCC Act, with any other law which the SCC is entitled to administer or with any decision issued by the SCC. Any information required by the SCC under section 39 must be in accordance with the performance of the functions and obligations of the SCC and must be requested with the reasons for which the SCC requires the information.

Failure to provide information requested by the SCC, in the manner requested by the SCC, is an offence, the penalty on conviction, is a fine, imprisonment or both.

Section 40 of the SCC Act provides that, in situations which present difficulties and in exceptional circumstances, the SCC may:

- at any time enter any premises or other place which the SCC reasonably suspects to be connected with any activities regulated by the SCC and search and inspect those premises and any books, documents or records found on those premises
- require any person to produce for inspection and take extracts from any books, documents or records relating to any activities regulated by the SCC which are under the control of that person
- remove and retain any books, documents or records for further examination of those books, records or documents
- require any person to maintain the books, documents or records referred to above for any reasonable period determined by the SCC
- undertake tests and measurements of any machinery, apparatus, appliances and other equipment as the SCC may consider necessary.

Section 41 makes it an offence for any person to:

- obstruct, impede or assault an officer of the SCC or any other person duly authorised by the SCC to act on its behalf while that person is exercising the powers of the SCC
- fail or refuse to comply with a requirement from the SCC provided for by the SCC Act
- alter, suppress or destroy any books, documents or records which the person concerned has been required to produce, or may reasonably expect to be required to produce by the SCC
- impersonate an officer of the SCC or a person authorised by the SCC to act on behalf of the SCC.

The penalty for the above actions, on conviction, is a fine, imprisonment or both.

Section 42 provides that, without prejudice to any other provisions of the SCC Act or any other law which the SCC is entitled to enforce, the SCC may take the following measures in respect of the contravention of either the SCC Act, any other laws the SCC administers, or any contravention of a decision made by the SCC:

- the imposition of an administrative fine
- the withdrawal or suspension of any licence where the contraventions are very significant or committed repeatedly.

Before proceeding with any of the measures provided for by section 42, the SCC must give the licensee concerned 30 days written notice of the alleged contravention and provide details of the measures being contemplated against them, as well as the amount of the fine being considered, if any. The SCC must allow the licensee the opportunity to rectify the contravention or to make submissions giving valid reasons for the contravention in a time set by the SCC in the notice. Should the licensee fail to rectify the contravention, or not give any valid reasons to justify the contravention, the SCC shall proceed with the measures and fines the SCC feels is appropriate for the contravention.

In cases where the SCC has *prima facie* evidence that the contravention represents an immediate and serious threat to public safety, security or health, or creates, or may create, serious economic or operational problems for other licensees or other persons in the market, or for end-users, the SCC may take urgent interim measures to remedy the situation before reaching a final decision, including the imposition of administrative fines, or may shorten the period of the notice referred to above. The person against whom the urgent measures are being contemplated must be given reasonable opportunity to respond to the SCC and propose any remedies.

3.4.12 Is the SCC an independent regulator?

The SCC can in no way be said to be independent. Interestingly, section 3(2) of the

SCC Act specifically limits the independence of the SCC in accordance with the SCC Act or any other written law.

The SCC's independence is compromised in several important ways:

- all members of the SCC board are appointed by the minister responsible for communications in consultation with the standing committee; however there is no public nominations process
- The minister responsible for communications is responsible for making broadcasting regulations, albeit in consultation with the SCC board.

The effect of these serious deficiencies is that the SCC does not meet international best practice standards regarding the appointment requirements for independent bodies as well as institutional independence.

3.4.13 Amending the legislation to strengthen the broadcast media generally

There are several problems with the legislative framework for the regulation of broadcasting generally:

- the overriding problem is that the SCC is not an independent body
- the SCC Act ought to be amended to deal with the following issues:
  - public officers, party political office bearers and all members of the government ought to be barred from serving on the SCC's board
  - members of the SCC's board ought to be appointed by the king, acting on the advice of parliament, after parliament has drawn up a list of recommended appointees. As part of this process, the House of Assembly should call for public nominations and should conduct public interviews
  - the SCC should be empowered to make its own regulations
  - regulations specifically relating to broadcasting should be promulgated.

3.5 Legislation that regulates the state broadcast media

The eSwatini Television Authority Act, 1983 (STA Act), established the eSwatini Television Authority (STA) in terms of section 3. Section 4 of the STA Act regulates the functions of the STA as the provider of the state television service.

Section 5(1) provides that the board of the STA consists of nine people:

- a chairperson appointed by the minister responsible for television broadcasting
- four people representing the ministries responsible for:
  - television and broadcasting
  - education

- finance
- commerce, industry, mines and tourism

- three persons, who are not public officers, appointed by the minister based on their relevant qualifications, knowledge or experience
- the general manager (who is appointed by the board of directors and who is responsible for the day-to-day activities of the STA, subject to the direction of the board (section 8) as an *ex officio* member.

Note that the minister appoints one member of the board to act as the deputy chairman. Section 5(2) provides that the term of office of members of the board is three years, and members are eligible for reappointment.

In terms of section 8 of the STA Act, it is the responsibility of the general manager to select the programming to be broadcast on the STA. Section 25 provides that the general manager has full editorial freedom for programming broadcast on the STA.

3.5.1 STA: Public or state broadcaster?

It is clear that the STA is not a public broadcaster as the regulatory framework does not:

- provide that the STA is an independent body acting in the public interest
- contain any objects that deal with public broadcasting aims, such as providing the people of eSwatini with programming that is educational, informative and entertaining.

There ought to be a separate Act of parliament dealing with public broadcasting. Such an Act should provide that:

- public broadcasting is to be carried out in the public interest and, more specifically, that public broadcasting is required to provide programming that is educational, informative, entertaining and available in local languages
- the public mandate of the public broadcaster is set out in detail
- public broadcasting is operated by a legal entity that is independent of the executive or any political party, and that it be governed by a board or similar body whose mandate is to act in the public interest. In this regard, such public broadcasting legislation ought to provide:
  - for objective criteria for membership to the board (or similar body) and membership ought to be based on experience, expertise and qualifications
  - public officers, party political office bearers and all members of the government should be barred from serving on the board (or similar body) of the public broadcaster

- members of the board of the public broadcaster should be appointed by the king acting on the advice of parliament after it has drawn up a list of recommended appointees. As part of this process, the House of Assembly should call for public nominations and should conduct public interviews.

3.6 Legislation that undermines a journalist's duty to protect his or her sources

A journalist's sources are the lifeblood of his or her profession. Without trusted sources, a journalist cannot obtain information that is not already in the public domain. However, sources will often be prepared to provide critical information only if they are confident that their identities will remain confidential and will be respected and protected by a journalist. This is particularly true of so-called whistleblowers, inside sources who can provide journalists with information regarding illegal activities, whether by company or government personnel. Consequently, democratic countries often provide special protection for journalists' sources. It is recognised that, without such protection, information that the public needs to know would not be given to journalists.

3.6.1 Magistrates Courts Act, Act 66 of 1939

Section 34 of the Magistrates Courts Act contains provisions that might be used to compel a journalist to reveal confidential sources. It provides that any person who has been subpoenaed to give evidence or to produce any documents and who fails to attend, or to give evidence, or to produce such documents may be sentenced by the court to a fine, and, if the fine is not paid, to imprisonment. The court can also issue a warrant for the person's arrest so that he or she may be brought to court to give evidence.

3.6.2 Parliamentary Privileges Act, 1968

Although this Act relates to the activities of parliament under the old 1968 constitution, it is important to note that the Act has not been repealed and is still in force. Section 18 of the Parliamentary Privileges Act empowers parliament, or any of its committees, to order any person to attend parliament and produce any book or document under his or her control. Section 11 makes it an offence not to comply, and the penalty is a fine or imprisonment or such lesser penalty as may be provided for in parliament's Standing Orders.

3.6.3 Public Accounts Committee Order, 1973

Although this order related to the activities of the Public Accounts Committee under the old 1968 constitution, it is important to note that it has not been repealed and so continues to be in force. In terms of section 3(2), the duty of the Public Accounts Committee is to report to the legislature on accounts of the eSwatini Government presented by the auditor-general.

Section 4(1) of the Public Accounts Committee Order empowers the committee to conduct enquiries, and it may summon any person to give evidence at an enquiry

or to produce any relevant book or other documents. Failure to appear before the committee, to answer any question or to produce the required book or document is an offence in terms of section 5, and the penalty is a fine, imprisonment or both. Note, however, that section 22 allows parliament to excuse a person from producing any book or document on the grounds that it is private and does not affect the subject of the parliamentary enquiry.

3.6.4 Official Secrets Act, Act 30 of 1968

Section 10 empowers the commissioner of police, whenever he is satisfied that an offence under the Official Secrets Act has been committed and a person can furnish information about it, to require such person to provide the necessary information. If the person fails to do so, he or she shall be guilty of an offence, and the penalty, on conviction, is a fine, imprisonment or both.

3.6.5 Control of Supplies Order, 1973

The Control of Supplies Order empowers the Minister for Commerce to 'regulate in such manner as he may think necessary in the interests of the public' the supply of any goods mentioned in a Government Gazette notice. Section 5 empowers the principal secretary for the Ministry of Commerce, or anyone authorised by him, without prior notice, to enter any premises, make an examination and take samples of any goods found there to obtain any information or ascertain the correctness of any information. Theoretically, this could be used to seize journalists' computers or notebooks, thereby compromising the journalists' sources.

3.6.6 Aviation Act, 1968

Section 10 of the Aviation Act empowers any accident enquiry board established by the minister responsible for aviation to investigate any air accident, to summon and examine witnesses, and to call for the production of any books and other documents. The section also provides that the laws and rules governing magistrates' courts of eSwatini apply to procure the attendance of witnesses and the production of, among other things, books and documents (see above).

Clearly, these provisions might well conflict with a journalist's ethical obligation to protect his or her sources. However, it is important to note that, whether or not requiring a journalist to reveal a source, is an unconstitutional violation of the right to freedom of expression depends on the particular circumstances in each case, particularly on whether or not the information is available from any other source. Consequently, it is extremely difficult to state that these provisions are, by themselves, a violation of the right to freedom of expression under the constitution.

3.7 Legislation that prohibits the publication of certain kinds of information

Several statutes contain provisions which, looked at closely, undermine the public's right to receive information and the media's right to publish information.

These statutes are targeted and prohibit the publication of certain kinds of information, including:

- prohibition on the publication of state security-related information
- prohibition on the publication of information that constitutes intimidation
- prohibition on the publication of information from the SCC without authorisation
- prohibition on the publication of information obtained from public officers and which relates to corrupt practices
- prohibition on the publication of information that is obscene or contrary to public morals
- prohibition on the publication of information that is likely to offend religious convictions
- prohibition on the publication of information relating to voting
- prohibition on the publication of information provided in response to statistical questionnaires
- prohibition on the publication of information relating to identity documentation
- prohibition on the publication of information that constitutes offensive impersonation of the king
- prohibition on the publication of information that is offensive in its portrayal of executions, murders and the like
- prohibition on the publication of information which constitutes contempt or ridicule
- prohibition on the publication of information that is prejudicial or potentially prejudicial to public health
- prohibition on the publication of information that induces a boycott
- prohibition on the publication of information that constitutes advertisements relating to medicines and medical treatments
- prohibition on the publication of pictures that the minister declares to be objectionable.

3.7.1 Prohibition on the publication of state security-related information

Proscribed Publications Act, Act 17 of 1968

Section 3 of the Proscribed Publications Act empowers the Minister for Public Service and Information to declare in the Government Gazette any publication or

series of publications (the definition of which, in section 2, includes any newspaper, book, periodical, photograph or record) to be 'proscribed' if the publication is prejudicial or potentially prejudicial to the interests of, among other things, defence, public safety and public order. See the case-law below for a discussion of an important High Court case involving the Proscribed Publications Act.

Any person who distributes, prints, publishes or possesses a proscribed publication without the necessary licence given under the authority of the minister is guilty of an offence, in terms of section 4 of the Proscribed Publications Act. The penalty for such an offence is a fine, imprisonment or both.

Cinematograph Act, Act 31 of 1920

The Cinematograph Act was enacted close on a century ago, and many of its provisions are not in keeping with international norms regarding freedom of expression. Section 6, is headed Objectionable Pictures, and section 6(1) entitle the Minister for Public Service and Information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable if he is satisfied that, among other grounds, the picture represents in an objectionable manner:

- crime or violence;
- scenes that are in any way prejudicial to the peace, order or good government of eSwatini.

Notice of the declaration of a picture being objectionable must be given in writing, to the proprietor of any theatre which exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or imprisonment.

Sedition and Subversive Activities Act, Act 46 of 1938

This pre-World War II-era statute is still in force.

In terms of section 4 of the Sedition and Subversion Act, any person who prints, publishes, sells or distributes any seditious publication (or even possesses one without lawful excuse) is guilty of an offence and liable to a fine or imprisonment and forfeiture of the publication. Section 3(1) of the Sedition and Subversion Act sets out a long list of seditious intentions concerning publications. These include:

- bringing the king or the government into hatred or contempt or to excite disaffection against them
- exciting the inhabitants of eSwatini to procure changes in eSwatini other than by lawful means
- bringing the administration of justice into hatred or contempt or to excite disaffection against it
- raising discontent or disaffection

- promoting feelings of ill-will and hostility between different classes of the population.

It is important to note, however, that section 3(2) specifically excludes those publications that:

- show that the king has been misled or is mistaken
- point out errors in the government or eSwatini Constitution
- advocate lawful change
- point out any matters producing ill-will and enmity between different classes of the population with a view to their removal.

Official Secrets Act, Act 30 of 1968

The Official Secrets Act contains numerous provisions which inhibit the publication of types of information:

- Section 3 makes it an offence to:
  - be in, or in the neighbourhood of, a prohibited place (defined as including works of defence, places relating to munitions of war and any place declared by the minister to be a prohibited place)
  - make a sketch (defined as including a photographic representation) that is likely to be even indirectly useful to an enemy
  - publish a secret official code, password, sketch or any other information that is likely to be even indirectly useful to an enemy.

  The penalty for such an offence is imprisonment.
- Section 4(2) makes it an offence to publish or even communicate any information that relates to munitions of war or any other military or police matter in any manner or for a purpose prejudicial to the safety or interests of eSwatini. The penalty is a fine, imprisonment or both.
- Importantly, section 9 deals with presumptions concerning charges under the Act. For example, although the wording is legalistic, section 9(b) states that, if a person is charged with publishing or communicating information for a purpose prejudicial to the safety or interests of eSwatini, and that person was not acting under lawful authority, then there is a presumption that the purpose was prejudicial to the safety or interests of eSwatini. This greatly hinders the media because it sets up a presumption of guilt on the part of unauthorised persons, such as journalists and media houses, when publishing such information.

Public Order Act, Act 17 of 1963

Section 6 of the Public Order Act deems a person to have committed the offence

of incitement to public violence if, among other things, he or she published words where the natural consequence of them would be the commission of public violence by members of the public generally or by persons to whom the publication was addressed.

Protected Places and Areas Act, Act 13 of 1966

While the Protected Places Act does not directly prohibit the publication of information, section 4 of the Act makes it an offence for any unauthorised person (for example, a journalist) to be in a protected place (defined as a place which has been declared a protected place by the relevant minister) without a permit.

The penalty is a fine, imprisonment or both. Furthermore, the person can be ejected from the place. This provision clearly has implications for media personnel, making it more difficult to perform their reporting functions.

3.7.2 Prohibition on the publication of information that constitutes intimidation

Section 12 of the Public Order Act, Act 17 of 1963, makes it an offence to intimidate another person, and the penalty is imprisonment. The intimidation can include threatening to cause unlawful injury to a person or to his reputation or property.

3.7.3 Prohibition on the publication of information from the SCC without authorisation

Section 4(1) and 4(2) of the Schedule to the SCC Act, makes it an offence to publish, or cause to be published, any information obtained during the performance ones duties for the SCC board without written consent from the SCC board. The penalty is a fine, imprisonment or both.

It should be noted that section 4(3) of the Schedule provides that any person who is in receipt of any information disclosed to them, and that person is aware the information was disclosed to them without the written authorisation of the SCC board, and that person causes the information to be published, commits an offence the penalty for which is a fine, imprisonment or both. This is important as it means that a journalist commits an offence if he or she publishes information he or she has received knowing that it was provided without the authorisation of the SCC board.

Section 30 of the SCC Act makes it an offence for any person to knowingly disclose information obtained by a person in the performance of his or her duties for the SCC to any unauthorised person, unless that person has been authorised to do so, the penalty for disclosure is a fine, imprisonment or both.

3.7.4 Prohibition on the publication of information obtained from public officers and which relates to corrupt practices

Section 17(3) of the Prevention of Corruption Order No 19 of 1993, makes it an offence to publish or disclose any document or information that is in one's

possession and which one has reason to believe has been disclosed by an officer of the Anti-Corruption Commission, without the written permission of the Minister of Justice. The penalty is a fine, imprisonment or both.

3.7.5 Prohibition on the publication of information that is obscene or contrary to public morals

Obscene Publications Act, Act 20 of 1927

The Obscene Publications Act regulates the sale and exhibition of obscene publications, books, pictures and the like. Sections 3 and 4 of the Act make it an offence to import, produce, sell or distribute any indecent or obscene (note that these terms are not defined) publication (the definition of which includes a newspaper and a magazine). The penalty is a fine or, failing payment thereof, imprisonment.

Proscribed Publications Act, Act 17 of 1968

Section 3 of the Proscribed Publications Act empowers the Minister for Public Service and Information to give notice in the Government Gazette declaring any publication or series of publications (the definition of which in section 2 includes any newspaper, book, periodical, photograph or record) to be a proscribed publication if the publication is prejudicial or potentially prejudicial to the interests of, among other things, public morality.

Any person who, among other things, distributes, prints, publishes or even possesses a proscribed publication without the necessary licence given under the authority of the minister, is guilty of an offence in terms of section 4 of the Proscribed Publications Act. The penalty for such an offence is a fine, imprisonment or both.

Cinematograph Act, Act 31 of 1920

The Cinematograph Act was enacted close on a century ago, and many of its provisions are not in keeping with international norms regarding freedom of expression.

Section 6(1) entitles the Minister for Public Service and Information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable if he is satisfied that, among other grounds, the picture represents, in an objectionable manner, scenes:

- suggestive of immorality or indecency
- of debauchery, drunkenness, brawling, or any other habit of life not following good morals and decency.

Notice of the declaration of a picture being objectionable must be given in writing to the proprietor of any theatre that exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or imprisonment.

3.7.6 Prohibition on the publication of expression that is likely to offend religious convictions

Section 6(1)(d) of the Cinematograph Act, Act 31 of 1920, entitles the Minister for Public Service and Information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable if he is satisfied that, among other grounds, the picture represents in an objectionable manner 'scenes calculated to affect the religious convictions or feelings of any section of the public'.

Notice of the declaration of a picture being objectionable must be given in writing, by telegraph or by radio to the proprietor of any theatre that exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or imprisonment.

3.7.7 Prohibition on the publication of information relating to voting

Section 86(2) of the Electoral Act, Act 4 of 1971, affects the media's ability to conduct political polls during an election to report on voting trends:

- Section 86(2)(a) makes it an offence to obtain information as to which candidate a voter intends to vote for or has voted for.
- Section 86(2)(d) makes it an offence to disclose any information that one may have obtained regarding a candidate for whom a voter intends to or has voted.

The penalty for either of these offences is a fine, imprisonment or both.

3.7.8 Prohibition on the publication of information provided in response to statistical questionnaires

Section 8 of the Statistics Act, Act 14 of 1967, prohibits the publication of any:

- individual return made in terms of the Statistics Act;
- answer given to a question put in terms of the Statistics Act;
- report or other document containing particulars comprising such returns or answers, which enable the identification of such particulars with any person or business,

unless the person making the return or answering the question has previously consented to the publication in writing. The penalty is a fine or imprisonment, in terms of section 12(4) of the Statistics Act.

3.7.9 Prohibition on the publication of information relating to identity documentation

The Identification Order, Kings Order in Council No 4 of 1998, deals with eSwatini's population registry and the issuing of identity documents. Section 15(1) of the

Identification Order prohibits any person from publishing any information which he knows has been communicated to him in contravention of the provisions of section 15. This means that should a journalist be given information by a civil servant employed to implement the Identification Order regarding information or the contents of documents about another person which the employee is under a secrecy obligation not to have disclosed; the journalist is prohibited from publishing the information. In terms of section 16(1)(h), such publication is an offence, and in terms of section 16(2), the penalty is a fine or imprisonment.

3.7.10 Prohibition on the publication of information that constitutes offensive impersonation of the king

Section 6(1)(a) of the Cinematograph Act, Act 31 of 1920, entitles the Minister for Public Service and Information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable if he is satisfied that, among other grounds, the picture represents in an objectionable manner 'impersonation of the King'. Notice of the declaration of a picture being objectionable must be given in writing, by telegraph or by radio to the proprietor of any theatre that exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or imprisonment.

3.7.11 Prohibition on the publication of information that is offensive in its portrayal of executions, murders and the like

Section 6(1)(e) of the Cinematograph Act, Act 31 of 1920, entitles the Minister for Public Service and Information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable if he is satisfied that, among other grounds, the picture represents in an objectionable manner 'executions, murders or other revolting scenes'. Notice of the declaration of a picture being objectionable must be given in writing, by telegraph or by radio to the proprietor of any theatre that exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or imprisonment.

3.7.12 Prohibition on the publication of information which constitutes contempt or ridicule

Sections 6(1)(b) and (c) of the Cinematograph Act, Act 31 of 1920, entitle the Minister for Public Service and Information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable if he is satisfied that, among other grounds, the picture represents, in an objectionable manner, scenes:

- holding up to ridicule or contempt any member of His Majesty's naval, military or air forces
- tending to disparage public characters.

Notice of the declaration of a picture being objectionable must be given in writing, by telegraph or by radio to the proprietor of any theatre that exhibits cinematograph

films. The exhibition of any prohibited picture is an offence punishable by a fine or imprisonment.

3.7.13 Prohibition on the publication of information that is prejudicial or potentially prejudicial to public health

Any person, who, among other things, distributes, prints, publishes or even possesses a proscribed publication without the necessary licence from the Minister for Public Service and Information is guilty of an offence in terms of section 4 of the Proscribed Publications Act, Act 17 of 1968. The penalty for such an offence is a fine, imprisonment or both.

3.7.14 Prohibition on the publication of information that induces a boycott

Section 13(3) of the Public Order Act, Act 17 of 1963, makes it an offence to, among other things, attempt to persuade any person to take any action which has been specified concerning a boycott designated as such by the minister. The penalty is imprisonment.

3.7.15 Prohibition on the publication of information that constitutes advertisements relating to medicines and medical treatments

There are several sections in the Regulation of Advertisements Act, Act 62 of 1953, which prohibit certain advertisements:

- Section 3 of the Advertisements Act makes it an offence to publish any 'prohibited advertisement' without a lawful defence. The definition of a prohibited advertisements deals with advertisements that claim to be effective in curing a range of conditions, including venereal diseases, cancer, tuberculosis, epilepsy, paralysis, pneumonia, blindness and sterility. The lawful defences include that the advertisement appeared only in a technical publication intended for circulation among duly registered medical practitioners, chemists and hospital managers, or that publication was required as part of an application for a patent.
- Section 4 of the Advertisements Act makes it an offence to publish advertisements relating to abortions.

Any publication in contravention of sections 3 or 4 of the Advertisements Act carries the penalty of a fine or, failing payment thereof, imprisonment, in terms of section 5 of the Act.

3.7.16 Prohibition on the publication of pictures that the minister declares to be objectionable

Section 6(2) of the Cinematograph Act, Act 31 of 1920, extraordinarily entitles the Minister for Public Service and Information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable. There are no grounds listed in this section, which means that

the minister has unfettered discretion to determine whether or not a picture is objectionable.

Notice of the declaration of a picture being objectionable must be given in writing, by telegraph or by radio to the proprietor of any theatre which exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or imprisonment.

3.8 Legislation that hinders the press in performing its reporting functions on the Senate

Although the Standing Orders of the Senate Relating to Public Business, 1968, relate to the Senate under the old 1968 constitution, it is important to note that these orders have not been repealed and so continue to regulate the procedures for the Senate. There are several provisions that are relevant to the media and which can be used to hinder it in reporting on matters arising before the Senate:

- Section 133 of the Senate Standing Orders prohibit strangers from being present during deliberations of select committees.
- Furthermore, while section 208 of the Senate Standing Orders envisages that strangers may be present in the Senate chamber, section 210 empowers the chairman of any proceedings to order the withdrawal of strangers 'whenever he thinks fit'.

Public access, including by the media, to legislative proceedings, such as those conducted by the Senate, is critically important to foster transparency and good governance. Consequently, it is disappointing that the Senate Standing Orders do not entrench the rights of the media specifically to cover the operations of the Senate and its committees. While there will always be grounds for holding certain hearings *in camera*, the general principle of open government ought to be clearly provided for.

4 Regulations affecting the media

In this section, you will learn:

- ▷ definition of regulations
- ▷ broadcasting-related regulations

4.1 Definition of regulations

Regulations are types of subordinate legislation. They are legal rules that are made in terms of a statute. In eSwatini, broadcasting regulations are legal mechanisms that allow the minister responsible for communications or the SCC to make legally binding rules governing the broadcasting sector, without needing parliament to pass a specific statute.

4.2 Broadcasting-related regulations

One of the greatest problems facing the media in eSwatini is the lack of legislation that concerns broadcasting. This includes legislation relating to broadcasting licences. The SCC Act empowers the minister responsible for communications to make regulations concerning the licencing of broadcasting; however, no regulation has yet been passed in the House of Assembly. The lack of regulations concerning broadcasting licences has effectively halted any possibility for private broadcasting in eSwatini as, without the regulations, potential broadcasters are unable to get licences to operate, this means that the state broadcaster maintains a monopoly on broadcasting in eSwatini.

The eSwatini Broadcasting Bill, No 19, 2013 that would have addressed issues relating to broadcasting has not been passed in the House of Assembly.

5 Media self-regulation

One of the greatest problems facing the media in eSwatini is the lack of self-regulatory mechanisms for content dispute resolution.

The media has failed to develop industry-wide associations capable of developing and enforcing self-regulatory provisions for attaining appropriate professional standards for the media. This lack of self-regulation has led to disputes involving the media having to be settled in the courts or by the SCC.

6 Case law and the media

In this section, you will learn:

- the definition of common law
- defamation
- judicial review:
  - the difference between a review and an appeal
  - the various grounds for judicial review
  - prohibition of publications
- contempt of court

6.1 Definition of common law

The common law is judge-made law. It is made up of judgments handed down in cases adjudicating on disputes brought by people, whether natural (individuals) or juristic (for example, companies). In common law legal systems such as that of eSwatini, judges are bound by the decisions of higher courts and also by the rules of precedent. This requires that rules laid down by the court in previous cases be followed unless they were clearly wrongly decided. Legal rules and principles are, therefore, decided on an incremental, case-by-case basis.

6.2 Defamation

6.2.1 Defamation and the defences to an action for defamation

Defamation is part of the common law of eSwatini. Like many southern African countries, eSwatini is influenced by South African law and the law of defamation is no exception.

In brief, defamation is the unlawful publication of a statement about a person, which lowers his or her standing in the mind of an ordinary, reasonable and sensible person. There is sometimes uncertainty about whether defamation has even happened; the mere fact that a person is aggrieved at something published about them does not mean that defamation has taken place. In *Metetwa vs Dlamini and Others* (Civ Case No 1717/1998), a defamation case heard by the eSwatini High Court, the court found that there had not been defamation. The case involved a headline: 'T.V. Mtetwa is dismissed from Tisuka'; however, the High Court held that regard must be had to the content of the article as a whole, which clearly stated

that the reason for the dismissal was that Mr Mtetwa had reached retirement age.

Consequently, the court held that 'No one who reads the article in its entirety could reasonably be induced to think ill of the Plaintiff. The article ascribes no misconduct to him. There is not the slightest hint of impropriety on his part' and that 'reading the article as a whole I cannot find that the Plaintiff has been defamed'. The action for damages was therefore dismissed with costs.

Once it is proved that a defamatory statement has been published, two legal presumptions arise, namely that the:

- publication was unlawful. This is an objective test which determines the lawfulness of a harmful act based on considerations of fairness, morality, policy and by the court's perception of the legal convictions of the community
- person publishing same had the intention to defame.

The person looking to defend a claim of defamation must then raise a defence against the claim.

6.2.2 Defences to an action for defamation

There are several defences to a claim based on defamation, namely:

- truth in the public interest
- absolute privilege, for example, a member of the House of Assembly speaking in parliament
- statements made in the discharge of a duty, for example, the duty to provide information in connection with the investigation of a crime, enquiries as to the creditworthiness of a person, and so on
- statements made in judicial or quasi-judicial proceedings
- reporting on proceedings of a court, parliament or certain public bodies
- fair comment on facts and which are matters of public interest
- self-defence (to defend one's character, reputation or conduct)
- consent.

An important case concerning these defences for working journalists is *Dlamini v The Swazi Observer* (Civ Case 631/99), which was heard in the eSwatini High Court. In the course of his judgment, the judge pointed out that, while the media does enjoy a defence of privilege concerning the publication of matters heard in court, this is limited to statements made in open court. The reporter, in this case, had based his report (which was, in any event, erroneous) on documents filed in the registrar's office in a case that had yet to be heard. The court held:

> ***While litigants … may, subject to limitations, make defamatory allegations relating to the cause of action in their pleadings, the media may not repeat the defamatory matter until those proceedings enter the public domain when the matter is heard in open court.***

6.2.3 Remedies for defamation

There are three main remedies in respect of defamation in the absence of a defence:

- publication of a retraction and an apology by the media organisation concerned
- an action for damages
- an action for prior restraint.

An important case on damages for defamation is the eSwatini High Court case of *Mamba and Another v Ginindza and Others* (Civ Case No 1354/2000). This case involved the publication of highly defamatory and untrue allegations concerning an attorney (the plaintiff). It was alleged that the attorney and government lawyers had reached a settlement agreement in a case which had the effect of defrauding the government. In fact, the plaintiff did not know that government lawyers had acted illegally in entering into the settlement agreement. In deciding on the amount of damages to be awarded to the plaintiff, the court took account of the following factors.

- *Character, status and regard of the plaintiff:* The court found that the plaintiff was an attorney and a partner at a law firm and that he had an untarnished reputation with no fraudulent, unethical or unprofessional behaviour having been ascribed to him. He had high standing in the legal profession and was well-regarded by the High Court itself.
- *Nature and extent of the publication:* The court found that prominently headlined articles repeating the defamatory allegations were published on three occasions in newspapers that are widely distributed and read.
- *Nature of the imputation (serious or not):* The court found that the articles implied that the plaintiff was dishonest, unethical, unprofessional, incompetent and inclined to mislead the court and that these imputations could ruin his career.
- *Probable consequences of the imputation:* The court found that the consequences could be disastrous for the plaintiff's career. His professional reputation could be destroyed, and this could have a serious impact on his personal life. He could lose credibility and the respect of his colleagues and the bench (of judges) and could ultimately face financial ruin.
- *Partial justification:* The court found that, while the public did have an interest in knowing that government officials had acted irregularly, this had nothing to do with the plaintiff as nothing indicated that he was even aware of any

irregularity concerning the signing of the settlement agreement.

- *Retraction or apology:* The court noted that the defendants offered to publish an apology only a year after the initial publications.
- *Comparable awards and the declining value of money:* The court took into account other damages awards as well as the effect of inflation.

6.3 Judicial review

6.3.1 The difference between a review and an appeal

When a court hears an application for judicial review of an administrative decision, this is not the same as hearing an appeal from a lower court. In an appeal, the court considers the facts and the law and essentially asks if the lower court came to the correct decision. In an application for judicial review, the court considers the facts and the law, but it asks a different question, namely, whether the process by which the decision-maker arrived at the decision being reviewed was flawed or not.

6.3.2 Grounds for judicial review

There is no absolute, closed list of grounds for reviewing and setting aside an administrative decision. Some grounds for judicial review include:

- where a decision is *ultra vires*, that is, where the decision-maker goes beyond his, her or its legal authority or mandate to act when making a decision
- where a decision was taken in a manner that did not observe the principles of natural justice (that is, a duty to act fairly). In most common law jurisdictions this is distilled into at least two duties, namely, to:
  - ensure that the decision-maker is not biased
  - give persons affected by a decision a hearing
- errors that undermine the process
- unreasonable decisions
- ulterior purpose, where a decision is taken ostensibly for one reason but is taken for another, illegitimate, reason
- failure to apply the mind, this is a broad ground of review that is usually evidenced by one or more of the following instances of failure to apply mind:
  - *Taking direction.* This is a where a decision-maker who is empowered to act does so, but at the instruction of a person or authority who or which is not empowered to take the decision
  - *Taking irrelevant considerations into account.* This is where a decision-maker takes account of considerations which he or she is not empowered or required to take into account

- *Failing to take relevant considerations into account.* This is where a decision-maker does not take account of considerations which he or she is empowered and required to take account of.

6.3.3 Prohibited publications

In an important High Court of eSwatini decision, *Swaziland Independent Publishers (Pty) Ltd T/A The Nation Magazine v the Minister of Public Service and Information* (Case 1155/01), the court was asked to review and set aside a 2001 notice issued by the Minister of Public Service and Information in terms of the Proscribed Publications Act, 1968 (the provisions of which are dealt with in some detail elsewhere in this chapter), which declared both the Guardian newspaper and The Nation magazine to be proscribed publications.

The case involved an application to the High Court to review and set aside the notice. The case turned on the fact that section 3 of the Proscribed Publications Act empowers the minister to proscribe a publication if the publication is prejudicial or potentially prejudicial to the interests of defence, public safety, public order, public morality or public health. However, the minister did not give any reasons for declaring the publications to be proscribed, either in the notice or in the various affidavits filed in the court pleadings (court papers). The court held that these jurisdictional facts, that is, that the publications were, or were potentially, prejudicial to the interests of defence, public safety, public order, public morality or public health, had to exist before the minister was entitled to act, in terms of section 3 of the Proscribed Publications Act. The court found that by not stating in the notice that such jurisdictional facts exist and what they are, and by refusing to disclose his reasons in his affidavits, the minister had 'precluded him from establishing the jurisdictional facts which are the essential basis for the Ministerial act'. This means that the minister acted beyond the powers given to him by the statute. Consequently, the court declared the notice 'invalid and of no force and effect'.

6.4 Contempt of court

In an important Supreme Court of eSwatini decision, *Thulani Maseko, The Nation Magazine, Bheki Makhubu and Swaziland Independent Publishers vs Rex* (Case SZSC 03) the court was asked to review and set aside the 2014 judgment by the High Court for contempt of Court for unlawfully and intentionally violating and undermining the dignity, repute and authority of the High Court of eSwatini due to the publication of malicious and contemptuous statements about a pending case.

In the appeal against the High Court judgment, the Supreme Court was asked to consider:

- if the publication had the potential of influencing the outcome of the pending trial about which the comments were written
- if The Nation Magazine was a legal person with a right to freedom of expression

- if the sentence was too harsh to discourage critical and vibrant journalism in the country
- if the trial court judge was entitled to take judicial notice of his peculiar private knowledge as Judicial Officer
- why the trial judge failed to recuse himself as a potential witness
- if the trial judge displayed of hostility towards the defence and partiality in favour of prosecution
- if the trial judge simply rejected the evidence and misconstrued submissions
- if sentence and whether the was motivated by anger and emotion.

The Crown conceded material irregularities in the trial and did not support the conviction and sentence. After considering the above, the judge found sufficient reason to uphold the appeal and as the appeal was successful. The court did not find it necessary to analyse and decide each of the grounds of appeal.

The court did find that the judgment by the High Court was a travesty of justice and the need to balance freedom of expression of the press with the protection of fair hearing and authority of the courts was not properly handled. In the judgment, the judge stated that the importance of freedom of expression in promoting democracy and good governance could not be overemphasized and it is equally important to strengthen and promote the independence and accountability of the judiciary. The judge said it was for these reasons that the Supreme Court allowed the appeal and set aside the convictions and sentences against the appellants. The judge ordered the immediate release of the appellants in prison, and the refund of any fines paid.

Notes

1 The new name is used throughout even with reference to times prior to the name change

2 The name change was announced by the king on 19 April 2018 and the legal change was brought about by the Declaration of Change of Swaziland Name Notice, 2018 Legal Notice No 80 of 2018 published on 11 May 2018 and it deemed that the name change came into force on 19 April 2018.

3 Richard Rooney, the new Swaziland Constitution and its impact on media freedom, Global Media Journal Africa Edition, 2(1), 2008. Available at http://globalmedia.journals.ac.za/ pub/article/view/34/0 [Last accessed 17 June 2020].

4 Ibid.

5 Ibid.

6 https://www.worldometers.info/world-population/swaziland-population/ Last accessed on 7 June 2020]

7 https://tradingeconomics.com/swaziland/access-to-electricity-percent-of-population-wb-data.html [Last accessed on 7 June 2020]

8 https://www.internetworldstats.com/africa.htm#sz [Last accessed on 7 June 2020]

7

Lesotho

1 Introduction

The Kingdom of Lesotho has been an independent country since 1966; however, it has had limited experience of being a democracy since its independence from the United Kingdom. Lesotho became a formal constitutional democracy in 1993, but undemocratic political upheavals continue to haunt the country. In 1998, an army mutiny resulted in SADC troops (from South Africa and Botswana) being asked by the government to assist in protecting it and putting down a would-be military coup.

The political uncertainty has continued into 2020 with Prime Minister Thomas Thabane's resignation from office amidst a scandal surrounding the murder of his ex-wife in 2017, two days before Thabane was sworn in as Prime Minister. While Thabane cited health and age as the reasons for his stepping down in May 2020, it is evident that the investigation into his ex-wife's murder influenced his decision as his current wife was charged with the murder in February 2020. Thabane himself appeared in court in February 2020 for 'acting in common purpose', but, at the time of writing, has not been formally charged concerning the murder.[1]

Lesotho is a small landlocked country surrounded by the Republic of South Africa. Lesotho has a sparse population of 2.1 million people[2] and is mostly underdeveloped, with only 31.5% of the people living in an urban environment and 33.73% having access to electricity.[3] The internet is available to approximately 31.9% of the population, and 20.8% have a Facebook account.[4] As for television infrastructure in Lesotho, the country has completed the conversion from analogue to digital terrestrial television, having opted for the DVB-T2 signal standard. The analogue switch-off date was the 17th of June 2015.[5] Television penetration remains low in Lesotho with only 29.47% of households having access to a television and 52.78% having access to a radio.[6]

There is little doubt that the media environment in Lesotho is not in step with international standards for democratic media regulation. There is an old-style state broadcaster operating under the Ministry for Communications, Science and Technology which, despite numerous promises, has yet to be transformed into a public broadcaster.

The broadcasting regulator, the Lesotho Communications Authority, has never been a particularly independent body. Amendments to governing legislation over the past five years have deprived it of much of the functional independence it once had and have given a significant number of powers to the minister for communications, science and technology. Nevertheless, there is a level of media diversity in both broadcasting and print media, and the people of Lesotho do have access to a broader range of news, information and general viewpoints than was the case previously.

This chapter introduces working journalists and other media practitioners to the legal environment governing media operations in Lesotho. The chapter is divided into five sections:

- Media and the constitution,
- Media-related legislation,
- Media-related regulations,
- Media self-regulation and
- Media-related case law

This chapter aims to equip the reader with an understanding of the primary laws governing the media in Lesotho. Crucial weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Lesotho, to enable the media to fulfil its role of providing the public with relevant news and information better, and to serve as a vehicle for government-citizen debate and discussion.

2 The media and the constitution

In this section, you will learn:

- ▷ definition of a constitution
- ▷ definition of constitutional supremacy
- ▷ definition of a limitations clause
- ▷ constitutional provisions that protect the media
- ▷ constitutional provisions that might require caution from the media or might conflict with media interests
- ▷ key institutions relevant to the media established under the Constitution of Lesotho
- ▷ enforcing rights under the constitution
- ▷ the three branches of government and separation of powers
- ▷ weaknesses in the Constitution of Lesotho that ought to be strengthened to protect the media

2.1 Definition of a constitution

A constitution is a set of rules that are foundational to the country, institution or organisation to which they relate. For example, you can have a constitution for a soccer club or a professional association, such as a press council. Such constitutions set out the rules by which members of the organisation agree to operate. However, constitutions can also govern much larger entities and entire nations.

The Lesotho Constitution, for example, sets out the basic rules of the Kingdom of Lesotho. These are the rules on which the entire country operates. A vital constitutional provision in this regard is section 1(1), which states that: 'Lesotho shall be a sovereign democratic Kingdom.'

2.2 Definition of constitutional supremacy

Constitutional supremacy means that the constitution takes precedence over all other law in a particular country, for example, legislation or case law. It is essential to ensure that a constitution has legal supremacy: if a government passed a law that violated the constitution (was not in accordance with or conflicted with a constitutional provision), such legislation could be challenged in a court of law and could be overturned on the ground that it is unconstitutional.

The Constitution of Lesotho makes provision for constitutional supremacy. Section 2 specifically states: 'This Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.'

2.3 Definition of a limitations clause

It is obvious that rights are not absolute as society would not be able to function. For example, if the right to freedom of movement were absolute, society would not be able to imprison convicted criminals. Similarly, if the right to freedom of expression were absolute, the state would not be able to protect its citizens from hate speech or false, defamatory statements made with reckless disregard for the truth. Obviously, governments require the ability to limit rights to serve important societal interests; however, owing to the supremacy of the constitution, this can only be done in accordance with the constitution.

The Constitution of Lesotho makes provision for legal limitations on the exercise and protection of rights contained in Chapter II of the Constitution of Lesotho, which is headed Protection of Fundamental Human Rights and Freedoms. Section 4(1) provides explicitly that the various rights provided for in Chapter II are 'subject to such limitations … designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest'.

It is therefore clear that the rights contained in Chapter II of the Constitution of Lesotho are subject to the limitations contained in the provisions of the right itself.

The limitations in respect of each right are dealt with below.

2.4 Constitutional rights that protect the media

The Constitution of Lesotho contains several important provisions in Chapter II, Protection of Fundamental Human Rights and Freedoms, which directly protect the media, including publishers, broadcasters, journalists, editors and producers.

It is important to note that section 4(2) specifies that the provisions of Chapter II apply to 'persons acting in a private capacity' as well to 'the Government of Lesotho'. The effect of this provision is to require ordinary people, as well as governmental officials, to comply with the protection of fundamental human rights and freedoms provisions as set out in Chapter II. Thus, ordinary people are, for example, required not to deny freedom of expression rights to anyone else.

2.4.1 Freedom of expression

The most important provision that protects the media is section 14(1), Freedom of Expression, which states:

> ***Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of freedom of expression, including freedom to hold opinions without interference, freedom to communicate ideas and information without interference, freedom to receive ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.***

This provision needs some explanation.

- The freedom applies to everyone and not just to certain people, for example, citizens. Hence everybody enjoys this fundamental right.
- The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many examples of this, including physical expression (such as mime or dance), photography or art.
- Section 14(1) specifies that the right to freedom of expression includes the 'freedom to hold opinions without interference', thereby protecting the media's right to write opinion pieces and commentary on important issues of the day.
- Section 14(1) specifies that the right to freedom of expression includes the: 'freedom to receive information and ideas without interference'. This freedom to receive information is a fundamental aspect of freedom of expression, and this subsection effectively enshrines the right to this free flow of information. Thus, the information rights of audiences, for example, as well as the expression rights of the media are protected. This right is important because it also protects organisations that foster media development. These organisations facilitate public access to different sources and types of information,

particularly in rural areas which traditionally have little access to the media.

- Section 14(1) specifies that the right to freedom of expression includes the 'freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons)'. This is an important provision because it protects the right to communicate information and ideas to the public, a critically important role of the press and the media more generally. Therefore, although the Constitution of Lesotho does not specifically mention the press or the media, the freedom to perform that role, namely to communicate information to the public, is protected.

- Section 14(1) specifies that the right to freedom of expression includes the 'freedom from interference with his correspondence'. This protection of correspondence (which would presumably include letters, emails and telefaxes) is a critical right for working journalists.

An important adjunct to the right of freedom of expression is section 14(4), which specifically grants 'any person who feels aggrieved by statements or ideas disseminated to the public … has the right to reply or to require a correction to be made, under such conditions as the law may establish'. This provision requires some comment as it is obvious that the constitution envisages that a right of reply is an important way of mediating disputes arising from the right to freedom of expression. Note, however, that this right of reply is also not limitless and must be exercised in accordance with the law.

As has been discussed, constitutional rights are never absolute. Sections 14(2) and (3) outline the basis on which the right to freedom of expression set out in section 14(1) may be limited. Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits the right to freedom of expression will not violate section 14(1) of the constitution provided that it:

- is in the interests of defence, public safety, public order, public morality or public health

- protects the reputations and rights of others or the private lives of people involved in legal proceedings

- prevents the disclosure of confidential information

- maintains the authority and independence of the courts

- regulates the technical administration or operation of matters such as telephony and broadcasting

- imposes restrictions on public officers

- is practically necessary in a democratic society.

2.4.2 Freedom from arbitrary search or entry

A second right that protects the media is contained in section 10(1) of the Lesotho Constitution. This right grants everyone the entitlement to 'freedom from arbitrary search or entry, that is to say, he shall not (except with his own consent) be subjected to the search of his person or his property or the entry by others on his premises'. Being free from arbitrary searches and seizure of notebooks, computer flash disks, rolls or disks of film and other tools of a journalist's trade is an important right, but it can be limited.

As discussed, constitutional rights are never absolute. Sections 10(2) and (3) set out the basis on which the right to freedom from arbitrary search or entry outlined in section 10(1) may be limited. Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits the freedom from arbitrary search or entry will not violate section 10(1) of the constitution provided that it:

- is in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development or utilisation of mineral resources or any other property to promote the public benefit. This list of interests is much wider than the allowable interests for limiting freedom of expression
- protects the rights of others
- authorises any public authority to conduct entries and searches for tax purposes or concerning government property
- is done in terms of a court order
- is practically necessary in a democratic society.

2.4.3 Freedom of conscience

Section 13(1) of the Lesotho Constitution guarantees every person the right to 'freedom of conscience, including freedom of thought'. Freedom of thought is important for the media as it provides additional protection for commentary on public issues of importance. As discussed, constitutional rights are never absolute. Sections 13(5) and (6) set out the basis on which the right to freedom of conscience detailed in section 13(1) may be limited. Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits freedom of conscience will not violate section 13(1) of the constitution provided that it:

- is in the interests of defence, public safety, public order, public morality or public health
- protects the rights of others
- is practically necessary in a democratic society.

2.4.4 Freedom of association

A fourth protection is provided for in section 16(1) of the Lesotho Constitution, which grants every person the 'freedom to associate freely with other persons for ideological, religious, political, economic, labour, social, cultural, recreational and similar purposes', thereby guaranteeing the rights of the press to form press associations but also to form media houses and to conduct media operations.

Constitutional rights are never absolute. Sections 16(2) and (3) set out the basis on which the right to freedom of association detailed in section 16(1) may be limited. Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits freedom of association will not violate section 16(1) of the constitution provided that it:

- is in the interests of defence, public safety, public order, public morality or public health
- protects the rights of others
- imposes restrictions on public officers
- is practically necessary in a democratic society.

2.4.5 Right to a fair trial

A fifth protection is provided in section 12(9) of the Lesotho Constitution which states, as a general rule, that 'all proceedings of every court … including the announcement of the decision of the court … shall be held in public'. This right to so-called open justice is important because it allows the media to be present during court proceedings. Note that this section also applies to other adjudicative bodies that determine rights issues. It seems, therefore, that the Ombudsman's proceedings, for example, would similarly be public.

Constitutional rights are never absolute. Sections 12(10) provides that the above general right to open court hearings shall not prevent a court (or similar body) from limiting public access to the extent as may be empowered by law and which may be:

- 'reasonably necessary in the circumstances where publicity would prejudice the interests of justice … or in the interests of public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons involved in the proceedings,' section 12(10)(a)
- 'in the interests of defence, public safety or public order', section 12(10)(b).

2.5 Constitutional provisions that might require caution from the media or might conflict with media interests

Just as some certain rights or freedoms protect the media, other rights or freedoms

can protect individuals and institutions from the media. It is essential for journalists to understand which provisions in the constitution can be used against the media. Several of these exist.

2.5.1 Right to respect for private and family life

Section 11(1) of the Lesotho Constitution provides that 'Every person shall be entitled to respect for his private and family life and home'. This privacy right is often raised in litigation involving the media, with subjects of press attention asserting their rights not to be photographed, written about or followed in public. The media does have to be careful in this regard and should be aware that there are always boundaries in respect of privacy which need to be respected and which are dependent on the particular circumstances, including whether or not the person is a public figure or holds public office, as well as the nature of the issue being dealt with by the media.

2.5.2 States of emergency and derogations from fundamental human rights and freedoms provisions

It is also important to note the provisions of sections 21 and 23 of Chapter II in the Constitution of Lesotho, which deal with derogations of fundamental human rights and freedoms and states of emergency. In terms of section 23, a state of emergency may be proclaimed by the prime minister acting in accordance with the Council of State for 14 days. If each house of parliament approves the declaration, then it will remain in force for six months (although this can be extended for up to six months at a time) in 'a time of war or other public emergency which threatens the life of the nation'. Importantly, section 21 specifically allows for states of emergency legislation to provide for the derogation of certain rights laid down in Chapter II of the Lesotho Constitution. However, none of the rights which are important to the media and which have been summarised above are included in the list.

2.6 Key institutions relevant to the media established under the Constitution of Lesotho

There are several important institutions concerning the media that are established under the Constitution of Lesotho, namely, the judiciary, the Judicial Service Commission (JSC) and the Ombudsman.

2.6.1 The judiciary

In terms of section 118(1) of the Constitution of Lesotho, judicial power is vested in the courts of Lesotho. These are the Court of Appeal (the apex court), the High Court, subordinate courts and courts-martial, and any other tribunal exercising a judicial function as may be established by parliament.

The judiciary is an essential institution for the media because the two rely on each other to support and strengthen democratic practices in a country. The judiciary

needs the media to inform the public about its judgments and its role as one of the branches of government, and the media is essential to building public trust and respect for the judiciary, which is the foundation of the rule of law in society. The media needs the judiciary because of the courts' ability to protect the media from unlawful action by the state and from unfair damages claims by litigants.

Section 118(2) specifically provides that the courts shall be 'independent and free from interference and subject only to this Constitution and to any other law'. In terms of sections 120 and 124 of the Lesotho Constitution, the key judicial appointment procedures are as follows:

- The Chief Justice of the High Court and the President of the Appeal Court are appointed by the king, acting in accordance with advice from the prime minister.
- The other High Court judges (called 'puisne' judges in the constitution) are essentially appointed by the king, acting in accordance with the advice of the JSC. Note that the direct meaning of puisne is 'of lower rank'.
- Justices of Appeal are essentially appointed by the king, acting in accordance with the advice of the JSC and after consultation with the President of the Appeal Court.

In terms of sections 121 and 125 of the Lesotho Constitution, the Chief Justice, the puisne judges and the judges of the Court of Appeal may be removed from office 'only for inability to perform the functions of his office … or for misbehaviour'.

The removal of any of these judges by the king requires a prior finding by a tribunal recommending removal.

2.6.2 The Judicial Service Commission

The JSC is a constitutional body that is established to:

- participate in the appointment of puisne and Appeal Court judges
- be responsible for exercising disciplinary control over registrars, magistrates and members of subordinate courts.

The JSC is relevant to the media because of its critical role in the judiciary, the proper functioning and independence of which are essential for democracy. In terms of section 132(1), the JSC is made up of the Chief Justice, the attorney-general, the chairperson of the Public Service Commission, and an appointee of the king recommended by the Chief Justice who is appointed for a five-year term.

2.6.3 The Ombudsman

The Ombudsman is an important office for the media because it, too, is aimed at holding public power accountable. In terms of section 134(1) of the Lesotho Constitution, the Ombudsman is appointed by the king, acting following the advice

of the prime minister. The main power of the Ombudsman is to investigate action taken by an officer in any government department, local government authority or statutory corporation, which has resulted in an alleged injustice in terms of section 135 of the constitution.

2.6.4 The Human Rights Commission

Section 133A of the Constitution of Lesotho establishes the Human Rights Commission as an independent organisation free from interference and subject only to the constitution and any other law. While the HRC is not exclusively relevant to the media, the functions of the HRC, as provided for in section 133F of the constitution, include monitoring the state of human rights in Lesotho which rights the media relies on to function.

2.7 Enforcing rights under the constitution

A right is only as effective as its enforcement. All too often rights are enshrined in documents such as a constitution or a bill of rights, and yet remain empty of substance because they cannot be enforced.

While rights are generally enforceable by the courts, the Constitution of Lesotho also envisages the right of people, including the media, to approach a body such as the Ombudsman or the HRC to assist in the enforcement of rights.

Perhaps one of the most effective ways in which rights are protected under the Constitution of Lesotho is by the provisions of the constitution which entrench most of the provisions of Chapter II, headed Protection of Fundamental Human Rights and Freedoms.

Section 85(3) of the constitution requires that a constitutional amendment to Chapter II needs to have the support of a majority vote of the entire electorate, in addition to having been passed by parliament, before it can be sent to the king for his assent. Effectively, this requires a national referendum on any such constitutional amendment.

2.8 The three branches of government and separation of powers

All too often, politicians, commentators and journalists use political terms such as 'branches of government' and 'separation of powers', yet working journalists may not have a clear idea what these terms mean.

2.8.1 Branches of government

It is generally recognised that governmental power is exercised by three branches of government, the executive, the legislature and the judiciary.

The executive

In terms of section 86 of the Constitution of Lesotho, executive power in Lesotho is vested in the king. In terms of section 44(1), the King of Lesotho is a constitutional monarch and head of state. The College of Chiefs may, in accordance with the customary law of Lesotho, designate the person (or persons, in order of prior right) who is entitled to succeed to the Office of King upon the death (or other vacancy) of the king, in terms of section 45(1) of the Lesotho Constitution. The College of Chiefs consists of the 22 principal chiefs of Lesotho, which are set out in Schedule 2 to the constitution, in terms of sections 104(1) and 103(1) of the Lesotho Constitution.

Section 86 of the Lesotho Constitution provides that executive power in Lesotho is exercised by the king via the officers or authorities of the government of Lesotho.

Section 88 of the Constitution of Lesotho provides for a Cabinet of ministers comprising the prime minister and the other ministers. This Cabinet is responsible to the two houses of parliament for all things done by any minister. Section 87(1) of the Constitution of Lesotho stipulates that the prime minister is appointed by the king acting on the advice of the Council of State. Note that section 87(2) requires that the prime minister so appointed must be the leader of the majority party or coalition in the National Assembly, that is, the person who appears to the Council of State to command the support of the majority of members in the National Assembly.

The Council of State is established in terms of section 95 of the constitution. Its role is to assist the king in the discharge of his functions and to exercise certain constitutional functions. The Council of State consists of the following members, all of whom must be citizens of Lesotho, the prime minister, the speaker of the National Assembly, two judges (or former judges) of the High Court or Court of Appeal appointed by the king on the advice of the Chief Justice, the attorney-general, the commander of the defence force, the commissioner of police, a principal chief nominated by the College of Chiefs, two members of the National Assembly (namely, the leaders of the two largest opposition parties) appointed by the speaker; three persons appointed by the king on the advice of the prime minister by virtue of their special expertise, skills or experience and a member of the legal profession in private practice nominated by the Law Society.

In terms of section 87(3) of the constitution, the other offices of minister (and there must be at least seven of these, including the office of the deputy prime minister) are established by parliament or, subject to what is done by parliament, by the king acting in accordance with the advice of the prime minister.

The king appoints the other ministers on the advice of the prime minister, from among the members of the National Assembly or from among the senators, in terms of section 87(4) of the Constitution of Lesotho. In terms of section 89 of the constitution, the king, acting in accordance with the written advice of the prime minister, assigns to the prime minister or any other minister responsibility for any business of the government of Lesotho.

The king, acting on the advice of the prime minister, also appoints assistant ministers from among the ranks of members of the National Assembly and the Senate, in terms of section 93 of the Lesotho Constitution. Note that these assistant ministers are not members of Cabinet.

The legislature

In terms of section 70(1) of the Constitution of Lesotho, legislative or law-making power in Lesotho is vested in parliament.

In terms of section 54 of the Constitution of Lesotho, parliament consists of the king, a Senate and a National Assembly.

In terms of sections 56 and 57, the National Assembly consists of 80 members elected in terms of a constituency system by the electorate, made up of all adult citizens of Lesotho who meet the prescribed residency requirements.

In terms of section 55, the Senate consists of the 22 principal chiefs (or their designated representatives) and 11 other senators nominated by the king, acting in accordance with the advice of the Council of State. Consequently, the Senate is not an elected body.

The judiciary

Judicial power, as previously discussed, is vested in the courts. The role of the judiciary is to interpret the law and to adjudicate legal disputes in accordance with the law.

2.8.2 Separation of powers

It is important in a functioning democracy to divide government power between different organs of the state to guard against the centralisation of power, which may lead to abuses of power. This is known as the separation of powers doctrine.

The aim, as the Lesotho Constitution has largely done, is to separate the functions of the three branches of government, the executive, the legislature and the judiciary, so that no single branch is able to operate alone, assume complete state control and amass centralised power. Each branch performs a number of different functions but also plays a watchdog role in respect to the others. This helps ensure that public power is exercised in a manner that is accountable to the general public and in accordance with the constitution.

2.9 Weaknesses in the Constitution of Lesotho that ought to be strengthened to protect the media

There are a number of weaknesses in the Constitution of Lesotho. If these provisions were strengthened, there would be specific benefits for the media in Lesotho.

2.9.1 Remove internal constitutional qualifiers to certain rights

As discussed above, the Constitution of Lesotho makes provision for certain rights to be subject to internal limitations; that is, the provision dealing with a right contains its own limitations clause, which sets out how government can limit the ambit of the right legitimately.

These internal limitations occur in a number of sections on rights, in Chapter II of the Lesotho Constitution. They deal specifically and only with the limitation or qualification of the particular right that is dealt with in that section. As outlined more fully above, the right to freedom of expression contains such an internal limitation. In other words, the section that contains the right also details the parameters or limitations allowable in respect of that right.

The rights contained in the provisions dealing with Fundamental Human Rights and Freedoms set out in Chapter II of the Constitution of Lesotho, would, however, be strengthened if the rights were subject to a single generally applicable limitations clause rather than each having their own limitations clause.

Such a general limitations clause would apply to all of the provisions of Chapter II of the Constitution of Lesotho, that is, to the fundamental rights and freedoms. It would allow a government to pass laws limiting rights generally, provided this is done by the provisions of a limitations clause that applies equally to all rights. It makes the ambit of the rights and the grounds for limitation much clearer for the public because there are no specific limitations provisions that apply to each right separately.

2.9.2 Strengthen procedural consultation provisions

On the face of it, the Constitution of Lesotho makes provisions for close consultation by various state players. For example, the king often is required to act on the advice of the prime minister or the Council of State. However, section 91 of the constitution deals with the exercise of the king's functions and subsection (5) specifically states that:

> ***where the King is required by this Constitution to act in accordance with the advice of any person or authority, the question whether he has received or acted in accordance with such advice shall not be enquired into by any court.***

A similar but more generally applicable provision is contained in section 155(8) of the constitution, which deals with situations 'where a person or authority is authorised or required to exercise any function after consultation with some other person or authority', and it provides that:

> ***the person or authority first referred to shall not be required to act in accordance with the advice of the other person or authority [which is clear from the plain wording in any event] and the question of whether such consultation was made shall not be enquired into in any court.***

The effect of these provisions is troubling. Essentially, it allows state actors not to comply with constitutionally mandated consultation requirements as no court of law has jurisdiction to enquire whether or not such procedurally important consultations, in fact, took place. These provisions should be amended or repealed altogether because they undermine the very notion of constitutional supremacy. If the constitution requires prior consultation by key state personnel, this should be done. If it is not done, the High Court should be able to enquire into this and set aside such state action for procedural non-compliance with constitutionally mandated consultation.

2.9.3 Bolster independence of the broadcasting regulator and of the public broadcaster

It is disappointing that the Constitution of Lesotho does not provide constitutional protection for an independent broadcasting regulator and for a public broadcaster, given how important both of these institutions are for ensuring access to news and information by the public.

3 The media and legislation

In this section, you will learn:

- what legislation is and how it comes into being
- legislation governing the operations of print media
- legislation governing the broadcasting media generally
- legislation governing the state broadcasting sector and the state news agency
- legislation governing broadcasting signal distribution
- legislation that threatens a journalist's duty to protect sources
- legislation that prohibits the publication of certain kinds of information
- legislation that specifically assists the media in performing its functions

3.1 Legislation: An introduction

3.1.1 What legislation is and how it comes into being

Legislation is a body of law consisting of acts properly passed by parliament, the legislative authority. As we know, legislative authority in Lesotho is vested in parliament, which, in terms of section 70 of the constitution, is made up of the king, the National Assembly and the Senate. Consequently, both houses of parliament and the king are ordinarily involved in passing legislation.

There are detailed rules in sections 78–80 and 85 of the constitution, which set out the different law-making processes that apply to different types of legislation. It is important for journalists and others in the media to be aware that the constitution requires different types of legislation to be passed in accordance with particular procedures.

The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the Constitution of Lesotho, there are three kinds of legislation, each of which has particular procedures, rules or both applicable to it. These are:

- legislation that amends the constitution, the procedures, applicable rules or both are set out in section 85 of the constitution
- ordinary legislation, the procedures, applicable rules or both are set out in sections 78 and 80 of the constitution
- legislation that deals with financial measures, the procedures, applicable rules or both are set out in section 79 of the constitution.

3.1.2 The difference between a bill and an act

A bill is a piece of draft legislation that is debated and usually amended by parliament during the law-making process. In terms of section 78(2) of the Lesotho Constitution, a bill may originate only in the National Assembly.

If a bill is passed by the parliament following the various applicable procedures required for different types of bills, as set out above, it becomes an act once it is assented to by the king, in terms of section 78(4) of the constitution. An act must be published in the gazette promptly and takes effect or comes into force when it is published or on a date specified in the act itself, in terms of section 78(6) of the constitution.

It is, however, important to note that some of the laws governing certain media-related aspects are proclamations or orders which came into force prior to the coming into effect of the 1993 Lesotho Constitution. As they were passed by the governing authority of the time and have yet to be repealed, they are still good law. In a number of instances, the relevant governing authority was not parliament.

3.2 Legislation governing the operations of print media

Unfortunately, there are a number of restraints on the ability to operate as a print media publication in Lesotho.

In particular, Lesotho requires the registration of newspapers, which is out of step with international best practice. These kinds of restrictions effectively impinge on the public's right to know by setting barriers to media operations.

Some key requirements are laid down by the Printing and Publishing Act, Act 10 of 1967, in respect of a newspaper, the definition of which includes a newspaper, magazine or periodical that is published at least monthly and which is intended for public sale or distribution:

- Section 7 of the Printing and Publishing Act prohibits a person from printing or publishing a newspaper without previously obtaining a certificate of registration from the registrar-general and paying the prescribed fee. If a person does print or publish a newspaper without a certificate of registration, this is an offence, and the person can be sentenced to a fine, imprisonment or both, under section 15 of the Printing and Publishing Act.

- Furthermore, section 8 of the Printing and Publishing Act requires that notice of any intention to print and publish a newspaper in Lesotho must be given to the registrar-general, including full details of the newspaper's name, the name and address of each proprietor, publisher, printer, manager and responsible editor. The provision of any false information is an offence and the person concerned can be sentenced to a fine, imprisonment or both under section 15 of the Printing and Publishing Act.

- Section 9 requires any changes in the above-registered information to be provided by the proprietor and the publisher to the registrar-general. Failure to do so is an offence and the person concerned can be sentenced to a fine, imprisonment or both under section 15 of the Printing and Publishing Act.

Besides the newspaper registration requirements set out above, section 6 of the Printing and Publishing Act also requires all printed matter (extremely broadly defined) to have the address at which the printed matter is published and the name and address of the proprietor, publisher and printer thereof printed legibly on its first or last sheet. Failure to do so is an offence and the person concerned can be sentenced to a fine, imprisonment or both under section 15 of the Printing and Publishing Act.

3.3 Legislation governing the broadcast media generally

3.3.1 Statutes that regulate broadcasting generally

Broadcasting in Lesotho is regulated in terms of the Communications Act, Act 4 of 2012 (Communications Act). The act is defined as 'an Act to provide for the regulation of the telecommunications, broadcasting and postal sectors'. In terms of

section 56 of the Communications Act, the Lesotho Communications Authority Act 2000, has been repealed.

Establishment of the Lesotho Communications Authority (LCA)

The Communication Act provides, in section 3 that the LCA, established as a body corporate by the Lesotho Communications Act 2000, remains in existence. Section 3(3) of the Communications Act states 'In the performance of its functions, the authority shall be independent and not subject to control by any person or authority.' This provision, therefore, envisages the LCA as an independent authority.

Main functions of the LCA

In terms of sections 4 and 5 of the Communications Act, the duties and powers of the LCA are to:

- implement the Communications Act and any regulations or rules made under it
- facilitate new entries into the communications market and the provision of new communications services
- allocate resources necessary for the provision of communications services
- promote and preserve competition in the communications market
- protect consumer interests
- facilitate cooperation between licensees
- facilitate cooperative deployment and use of infrastructure among licensees
- facilitate the resolution of disputes regarding communication services
- promote Lesotho's participation in the global information society
- consult with members of the communications industry and the public
- conduct competitive market analysis and regulatory impact assessments and impose pro-competitive remedies in any market that is found to lack effective competition
- grant licences for communication services
- prescribe licence fees for communication services
- allocate resources, including radio frequency spectrum
- establish technical standards for equipment used in the provision of communication services
- review, approve or reject consolidation of licensees

- monitor standards in the communication market
- resolve disputes
- investigate and adjudicate any contravention of the Communications Act
- facilitate and administer internet infrastructure and designate an entity to manage internet domain names
- suspend or revoke licences in the communications market.

Appointment of LCA Board Members

Section 6 of the Communications Act provides that the LCA operates with a board of seven members, which is responsible for the duties of the LCA and consists of a chairperson, five other members and the chief executive officer (CEO) who will be an ex-officio member of the board.

Section 6(4) empowers the minster responsible for communications to appoint all members of the LCA after issuing a public invitation for recommendations or expressions of interest for appointment to the LCA. Section 13(5) of the Communications Act empowers the minister to appoint the CEO of the LCA on the recommendation of the board, and only after the board has caused to be published, in a manner readily accessible, an invitation to submit expressions of interest for the position. However, the minister is empowered to reject the board's recommendation but must consult with the board on a suitable candidate thereafter.

Section 10 of the Communications Act empowers the minster to appoint or remove the chairperson of the LCA in the same manner as is provided for in section 8 that allows the minister to remove members of the LCA from office for misconduct or physical or mental incapacity.

In terms of section 14(a) of the Communications Act, the minister is empowered to remove the CEO of the LCA, only on a request by the LCA board in which it justifies the removal, or, in terms of section 14(b), if the CEO has breached the retention agreement established in consultation with the LCA board, between the CEO and the minister in terms of section 13(8).

Funding for the LCA

In terms of section 16(2) of the Communications Act, the LCA is funded from:

- money appropriated by parliament. In other words, funding for the LCA must be provided for in the national budget
- service, licence and administration fees
- fines imposed by the LCA
- grants, contributions or endowments
- funding that the LCA may raise or impose under the Communications Act.

In terms of section 16(1) of the Communications Act, the LCA is required to prepare an annual budget in which the anticipated revenues and expenditures of the LCA are specified.

The establishment of the Universal Service Fund

Section 33 of the Communications Act establishes the Universal Service Fund (USF) to promote the development of communication services in unserved and under-served areas of Lesotho. The USF will be managed by a body known as the Universal Service Fund Committee (USFC).

The establishment of the USFC

The USFC is established under section 35(1) of the Communications Act and in terms of section 35(2) consists of:

- a member of the ministry responsible communications (this person is the chairperson)
- a representative from the LCA (this person is the deputy-chairperson)
- a representative of the ministry responsible for local government
- a representative of the ministry responsible for finance
- a representative of the Lesotho Electricity Company.

In terms of section 35(3) of the Communications Act, the USFC will have an executive secretary appointed by the LCA on a contract basis for a period not longer than three years. In terms of 35(4) of the Communications Act, the executive secretary serves as both the committee secretary and a non-voting member of USFC. The executive secretary's responsibilities include:

- carrying out the decisions of the USFC
- transacting the day-to-day business of the USF
- exercising the powers delegated to him or her by the USFC.

Main functions of the USFC

In terms of section 36 of the Communications Act, the main functions of the USFC are to ensure that people throughout Lesotho have access to, among other things, a diverse range of radio and television broadcasting services as well as basic domestic and international telephony services and internet access.

Funding for the USF

The USF is funded in terms of section 34 of the Communications Act from:

- money appropriated by the government, pursuant to an appropriation made by parliament, or in any other lawful manner

- an initial contribution from the LCA
- an annual contribution from the LCA of not less than 25% of any annual surplus
- grants from donor agencies
- contributions from licensees not exceeding 2% of their net operating income from the provision of communication services in Lesotho.

The LCA may exempt or reduce the contribution of licensees to the USF in cases where the licensee operates as a non-profit organisation, does not provide a public communications service or is authorised to act pursuant to a class licence.

Establishment of the Broadcasting Disputes Resolution Panel

Section 39(1) of the Communications Act establishes the Broadcasting Disputes Resolution Panel (BDRP). Section 39(2) of the Communications Act provides that the BDRP shall consist of a chairperson and four other members. All the members of the BDRP are appointed for a period of three years and are eligible for re-appointment. In terms of section 39(3) of the Communications Act, the members of the BDRP are selected by the minister responsible for communications after soliciting nominations and recommendations from the public.

Funding the BDRP

In terms of section 39(9) of the Communications Act, the BDRP will receive its funding from fees imposed on broadcasting licensees by the LCA as well as money contributed by the LCA. The BDRP will also get funding from money appropriated for its use by the Lesotho Parliament.

Main functions of the BDRP

The BDRP effectively operates as an arm of the LCA. In terms of section 39(8) of the Communications Act, the main functions of the BDRP include:

- preparing a broadcasting code of conduct
- reviewing and seeking to resolve disputes regarding broadcasting content (unresolved disputes must be referred to the LCA with recommendations for resolution) developing a budget for the BDRP and submitting it to the minister responsible for communications, and the LCA. Should the LCA believe that a licensee has contravened the Communications Act, they must refer it to the BDRP in terms of section 41(1) of the Communications Act.

Concerning its dispute resolution role, section 41(2) of the Communications Act requires the BDRP to establish the written procedures for the resolution of disputes. The BDRP must ensure that the licensee against whom a complaint has been made, receives an opportunity to respond and that any recommendation made to the LCA is based solely on the record compiled by the BDRP. Should the BDRP be unable to resolve a dispute within 90 days of receipt of the complaint,

they must refer the matter to the LCA with all the relevant facts and provide recommendations for the resolution of the dispute in terms of section 41(4).

Section 41(5) of the Communications Act provides that on receipt of the BDRP's recommendation to initiate enforcement proceedings, in terms of section 46 of the Communications Act, the LCA is required to inform the licensee against whom the enforcement proceedings are due to convene, of the alleged contravention and provide a timeframe for the licensee to respond. The LCA is also required to provide a timeframe in which the enforcement proceedings will take place either by an adjudicatory hearing or a written plea filed by the licensee. Alternatively, the LCA may dismiss the complaint.

In terms of section 47 of the Communications Act, should the LCA determine that a licensee has contravened the Communications Act, or any rule, regulation, code, provision, or directive established under the Communications Act, or has violated a condition contained in its licence it may:

- issue a warning to the licensee
- direct the licensee to take actions necessary to remedy the violation
- impose a fine on the licensee
- require that the licensee make restitution to any person directly injured as a result of the contravention
- modify suspend or revoke the licensee's licence.

Making broadcasting regulations

Under the Communications Act, there are two kinds of subordinate legislation, namely regulations and rules. Section 55 of Communications Act, provides that the minister responsible for communications, in consultation with the LCA (which means that the LCA must agree) may, by notice published in the Government Gazette, make regulations for carrying into effect the provisions of the Communications Act. Effectively, this means that the minister (albeit with LCA consent) makes broadcasting regulations.

Furthermore, the Communications Act, in terms of section 5, provides that the LCA shall issue administrative orders and rules as are necessary for the exercise of its power and performing its duties in the implementation of policies under the Communications Act.

Broadcasting Code

In terms of section 40(1) of the Communications Act, a Broadcasting Code developed by the BDRP must be submitted to the minister responsible for communications for approval. The Broadcasting Code must govern:

- obscene or offensive content and content that is likely to incite violence to persons or property

- fairness, accuracy and balance of news broadcasts
- protection of privacy
- carrying of political advertising
- advertising and sponsorships.

The minister is authorised by section 40(3) of the Communications Act, on receipt of the Broadcasting Code proposed by the BDRP, and following a public consultation process, to either reject or accept the Broadcasting Code. Section 40(4) of the Broadcasting Code provides that the minister is not allowed to reject the proposed Broadcasting Code unless it fundamentally fails to protect the legitimate interests of the state, the broadcasting industry or the public.

Should the minister reject the Broadcasting Code, section 40(5) of the Communications Act requires that the minster provide a written explanation of the changes necessary to the BDRP which will then have 60 days to propose revisions. Section 40(6) of the Communications Act states that the Broadcasting Code will only come into effect on publication in the Gazette. Section 40(7) of the Communications Act states that no modification to the Broadcasting Code shall be effective unless approved by the minister and published in the Gazette.

The applicable code is dealt with in the regulations section below and is the one developed initially under the now-repealed Lesotho Communications Authority Act.

Licensing regime for broadcasters in Lesotho

Broadcasting Licence Requirement

Section 44(1)(c) of the Communications Act prohibits any person from establishing or providing a communication service that requires a licence (which includes a broadcasting service) in Lesotho, without a licence issued pursuant to the Communications Act. The penalty for doing so is a fine, imprisonment or both.

Types and Categories of Broadcasting Licences

Section 19(3) of the Communications Act empowers the LCA to grant two different types of licences, namely individual or class licences. Although there are no provisions in the Communications Act that distinguish between these in detail, the LCA website[7] provides that class licences are granted on a first-come-first-served basis and have standard terms and conditions per category. Individual licences are applied for in response to an invitation to apply and have licensee-specific conditions imposed.

Section 38 of the Communications Act authorises the LCA to prescribe different categories of broadcasting services, including:

- *Public:* a broadcasting service with national coverage that services all sectors of society equitably and is funded by parliament

- *Private:* a non-profit broadcast service owned by an individual or entity
- *Commercial:* a for-profit broadcast service with select coverage areas
- *Community:* community-owned non-profit broadcasting services with a community-wide coverage area.

Section 38(2) of the Communications Act provides that audio, visual or any other content distributed via the internet may be licenced or regulated as broadcasting. This provision is overbroad as it purports to require all content provided over the internet to be licensed by the LCA. It is not clear how these provisions are, or could be, enforced, particularly concerning social media content.

Broadcasting Licensing Process

Section 5(1)(d) of the Communications Act empowers the LCA to grant licences for the provision of communications services and to prescribe licensing fees. Further, section 19(1) empowers the LCA to authorise the provision of a communications service, including a broadcasting service.

The actual legal provisions regarding the licensing process are dealt with in the regulations section below.

It is critical to note that notwithstanding the LCA's powers in respect of granting licences, both the LCA and the minister are empowered to suspend broadcasting licensees.

The minister is empowered, in terms of section 20(1)(b) read with section 20(2) of the Communications Act, to unilaterally issue an emergency suspension order preventing a broadcasting licensee from providing a service, provided the minister has reasonable grounds to believe this is in the interests of national security or public order and there is no other way to forestall the threat.

The LCA is empowered in terms of section 20(1)(a) (albeit impliedly), to suspend or revoke a licence granted by it after an investigation in terms of section 45 by the BDRP as dealt with above.

Frequency spectrum licensing

Section 5(1)(e) of the Communications Act empowers the LCA to allocate resources for the provision of communications services; this includes radio frequency spectrum. Again, this is implemented by way of regulation.

Responsibilities of broadcasters under the Communications Act

Adherence to Licence Conditions

The Communications Act does not expressly empower the LCA to impose licence conditions. However, it is implied from several sections, including section 45 which enables the LCA to determine whether or not a licensee has contravened the

Communications Act, or any rule, regulation, code, provision, or directive, or has violated a condition contained in its licence.

Is the LCA an Independent Regulator?

The LCA cannot be said to have any real independence. The LCA operates as an arm of the minister responsible for communications in the following ways:

- All the board members are appointed by the minister (albeit after a public nomination process) and does not involve a multi-party body such as parliament. Therefore, the LCA, is, effectively, an arm of the executive branch of government and is not independent from the point of appointments.
- The minister appoints the CEO of the LCA on the recommendation of the LCA, but the minister may reject this recommendation.
- The minister is empowered to suspend or remove any member of the LCA from office.
- The minister may unilaterally issue an emergency suspension of a licensee's licence should he or she feel the continued operation of the licensee poses a direct threat to national security or public order. This does not require consultation with the LCA.
- The minister is responsible for making communications regulations, albeit in consultation with the LCA.

Is the BDRP an independent regulator?

The BDRP cannot be said to be independent as the minister has immense power over the operation of the BDRP in the following ways:

- The members of the BDRP are appointed by the minister (albeit after a public nomination process) and does not involve a multi-party body such as parliament. Therefore this body which is critical to the functioning of the LCA, is, effectively, an arm of the executive branch of government.
- The BDRP is responsible for the development of the Broadcasting Code. However, the minister can reject any proposed Broadcasting Code and any changes made to the Broadcasting Code must be approved by the minister.

It is fair to say that the Communications Act does not comply with the agreed international best practice for broadcasting regulation.

Amending the legislation to strengthen the broadcast media generally

There are two broad problems with the legislative framework for the regulation of broadcasting generally in Lesotho:

- First, Lesotho ought to introduce legislation to establish a genuinely independent communications regulatory authority to act in the public interest, free

from executive interference. The mandate of such an independent authority should be to ensure, among other things, that the citizens of Lesotho have access to a diverse range of high-quality public, commercial and community broadcasting services, as well as to ensure that freedom of expression is appropriately protected from commercial and governmental interference.

- The board of the LCA ought to be appointed by a process that includes the recommendations of a multi-party body such as parliament and, ideally, the appointments ought to be formally made by the president and not a minister.
- Further, the LCA ought to be solely responsible for licensing decisions, and no minister should have the authority to suspend a communications service, including a broadcasting service.
- The LCA ought to be solely responsible for regulating communications in the public interest. Although there may be a requirement to consult with the relevant ministry, the minister ought not to have the power to make regulations, irrespective of whether or not this is done in consultation with the LCA.

3.4 Legislation governing the state broadcast media and the state news agency

3.4.1 State broadcast media

Lesotho has still not passed legislation to create a public broadcaster. The Lesotho National Broadcasting Service (LNBS) is a part of the Ministry of Communications, Science and Technology, and according to the 2009 Lesotho Media Policy, the LNBS continues to operate 'as an arm of the Government'. The LNBS consists of:

- Television Lesotho, which provides free-to-air television in Lesotho. It is important to note that terrestrial infrastructure is limited, which means that Television Lesotho, which is only accessible throughout the entire country via satellite.
- Radio Lesotho, which provides two sound broadcasting channels or services that are available free-to-air throughout the entire country.

A Lesotho Broadcasting Corporation Bill was published in 2004, which aimed to transform the state broadcaster (the LNBS) into a public broadcaster; however, the bill was never enacted.

In the 2008 Lesotho Communications Policy, the Ministry of Communications, Science and Technology promised that the Lesotho government would undertake several regulatory reforms, including transforming the LNBS from 'a state broadcaster into a public service broadcaster'. In terms of the 2008 Communications Policy, this would 'entail corporatizing the LNBS and making it accountable to an independent board with the goal of serving the public interest'. Furthermore, the 2008 Communications Policy promised that the public service broadcaster 'will

have editorial independence and any content restrictions or requirements will be contained in its charter, along with a clear source of funding for operations and expansion'. To date, this has not happened.

In 2009 the government adopted another policy, the Lesotho Media Policy, which also dealt with transforming the LNBS from a state broadcaster to a public broadcaster, to be known as the Lesotho Broadcasting Corporation of Lesotho. The 2009 Media Policy stated that the Lesotho Broadcasting Corporation of Lesotho would act 'independently of Government or commercial influence'. It said further that this transformation process would require the corporatisation of the public broadcaster and the establishment of an independent board of directors. However, the 2009 media policy still makes provision for the minister to appoint the 'independent' board of directors of the public broadcaster, albeit after consultation with the National Assembly's portfolio committee responsible for communications.

It is important to note that such ministerial appointments would not be following internationally accepted standards for independent governance structures for public broadcasting services. In any event, and disappointingly, Lesotho has yet to pass legislation transforming the LNBS from a state to a public broadcasting service.

3.4.2 State news agency

The Lesotho News Agency (LENA) is a state news agency which operates as a department in the Ministry of Communications, Science and Technology. In the 2009 media policy, the government undertook as a matter of policy to corporatise LENA and transform it into an autonomous news service. It further committed to ensure that LENA would be headed by 'an independent board, appointed by the Minister, representing a broad spectrum of experience and views'. An organisation whose entire board is appointed by the minister cannot be said to be independent of government. Lesotho has yet to pass legislation transforming LENA from a state to an independent news agency.

3.5 Legislation governing broadcasting signal distribution

The Communications Act is relevant to broadcasting signal distribution or transmission, which is the technical process of ensuring that the content-carrying signal of a broadcaster is distributed so that it can be heard, viewed or both, by its intended audience. The Communications Act makes it clear that broadcasting signal distribution or transmission is a form of communications network service which would need to be licensed under the Communications Act and would need to comply with all relevant statutory provisions, including tariffs and other matters. The LNBS, the state broadcaster, operates terrestrial broadcasting transmission infrastructure in Lesotho, which is used by its competitors as well.

3.6 Legislation that undermines a journalist's duty to protect his or her sources

A journalist's sources are the lifeblood of their profession. Without trusted sources, a journalist cannot obtain information that is not already in the public domain. However, sources will often be prepared to provide critical information only if they are certain that their identities will remain confidential and will be respected and protected by a journalist. This is particularly true of so-called whistleblowers, inside sources that are able to provide journalists with information regarding illegal activities, whether by company or government personnel. Consequently, democratic countries often provide special protection for journalists' sources. It is recognised that, without such protection, information that the public needs to know would not be given to journalists.

3.6.1 Criminal Procedure and Evidence Act, 1981

Preparatory examinations

In terms of section 65 of the Criminal Procedure and Evidence Act (CPEA), a public prosecutor, an accused or a magistrate may compel the attendance of any person at a preparatory examination to give evidence or to produce a book or other document by requiring the clerk of the court to issue the necessary subpoena.

In terms of section 66 of the CPEA, any person who fails to appear at proceedings in compliance with a subpoena issued under section 65, without a 'just excuse' for such failure, can be sentenced to a fine and imprisonment.

Furthermore, in terms of section 68 of the CPEA, any person who attends a preparatory examination in response to a subpoena but then refuses to answer questions or to produce any required document, without offering a 'just excuse' for such refusal, can be sentenced to successive periods of imprisonment for eight days at a time 'until the person consents to do what is required of him', see section 68(2) of the CPEA.

Criminal trial proceedings

In terms of sections 199 and 202 of the CPEA, a prosecutor, an accused or the court may compel the attendance of any person at a criminal trial to give evidence or to produce a book or other document.

In terms of sections 203 and 207 of the CPEA, any person who attends a criminal trial in response to a subpoena but then refuses to answer questions or to produce any required document, without offering a 'just excuse' for such refusal, can be sentenced to successive periods of imprisonment for eight days at a time 'until the person consents to do what is required of him'.

3.6.2 Internal Security (General) Act, 1984

Section 9(1) of the Internal Security (General) Act makes it an offence to fail to disclose any information that might be of material assistance in preventing 'subversive

activity' or in securing the apprehension, prosecution or conviction of a person for an offence involving subversive activity to a member of the police force. Anyone found guilty is liable to a fine or imprisonment in terms of section 12 of the Internal Security (General) Act. This provision might well conflict with a journalist's ethical obligation to protect his or her sources.

However, it is important to note that whether or not requiring a journalist to reveal a source is an unconstitutional violation of the right to freedom of expression will depend on the particular circumstances in each case, particularly whether or not the information is available from any other source. It is complicated to state that these provisions are, by themselves, a violation of the right to freedom of expression under the constitution.

Importantly, the 2009 Media Policy states that the Lesotho Law Commission would be tasked with proposing new legislation to ensure that media practitioners will not be required to reveal confidential sources of information, except where a court, after a hearing, determines that disclosure is necessary:

- to prevent serious injury to persons or property
- for the investigation or prosecution of a serious crime
- for the defence of a person accused of a criminal offence.

To date, however, no such legislation has been enacted.

3.7 Legislation that prohibits the publication of certain kinds of information

Several statutes contain provisions which, looked at closely, undermine the public's right to receive information and the media's right to publish information.

These statutes are targeted and prohibit the publication of certain kinds of information, including:

- prohibition on the publication of a minor's identity in legal proceedings
- prohibition on the publication of certain kinds of information relating to legal proceedings
- prohibition on the publication of state security-related information regarding defence, security, prisons, the administration of justice, public safety and public order and sedition
- prohibition on information that is obscene
- prohibition on information that violates fundamental rights;
- prohibition on information which denigrates on immutable grounds such as race;

- prohibition on information relating to financial institutions.

It is often difficult for journalists to find out how laws that would seem to have no direct relevance to the media can impact on their work. The key provisions of such laws are, therefore, set out below.

It is important to note that some of the laws outlined below constitute subordinate pieces of legislation, that is, they are regulations or orders (which are dealt with more specifically in section 4 of this chapter). They are included in this section.

3.7.1 Prohibition on the publication of a minor's identity in legal proceedings

Section 7(2) of the Subordinate Courts Order, 1988, provides that the trial of any person who less than 18 years of age may be held *in camera*, that is, without the public (including the media) being able to attend the court proceedings.

This is a departure from the general rule providing for court proceedings to take place in open court.

3.7.2 Prohibition on the publication of certain kinds of information relating to legal proceedings

Sexual Offences Act, 2003

Section 23(1) of the Sexual Offences Act specifically provides that in criminal proceedings under this Act (that is, criminal proceedings relating to sexual offences), a court shall direct that any person whose presence is not necessary at the proceedings, not be present, unless the complainant (the person who laid the charges) and the accused request otherwise. Where the complainant and the accused disagree on the above, the court must decide as it thinks fit, in terms of section 23(2). Furthermore, section 23(3) specifically requires the court to act in the best interests of the complainant when the complainant is a child in making these decisions.

Importantly, section 25 of the Sexual Offences Act provides as follows:

- Where a court has directed, in terms of section 23, that a person or class of persons not be present during sexual offences proceedings, no person may publish any information 'which may reveal the identity of a complainant or accused in the proceedings'.
- Section 25(2), however, allows a court to authorise the publication of information about proceedings (where a court has directed that a person or class of persons not be present), where publication is just and equitable, and where the complainant or the accused is 18 years or older.
- Section 25(3) prohibits the publication of any information which may reveal the identity of a complainant in the case of a sexual offence until the accused has pleaded to the charge.

- Section 25(4) makes it an offence to publish any information in contravention of section 25 and, on conviction, a person may be sentenced to a fine, imprisonment of not less than three months, or both a fine and imprisonment.

Criminal Procedure and Evidence Act, 1981

The Criminal Procedure and Evidence Act, at section 70(5), provides that if a preparatory examination is held on charges relating to:

- indecent assault; or
- extortion,

no person shall, at any time, publish (by radio, in a document or by any other means), any information relating to the preparatory examination, or any information disclosed at the preparatory examination, unless the magistrate has consented in writing to the publication after having consulted with the person against whom the offence is alleged to have been committed.

Failure to comply with section 70(5) of the Criminal Procedure and Evidence Act is an offence and, on conviction, a person can be sentenced to a fine and imprisonment.

3.7.3 Prohibition on the publication of state security–related information regarding defence, security, prisons, the administration of justice, sedition and public safety and order

Printing and Publishing Act, 1967

The Printing and Publishing Act, at section 10(1), makes it an offence to import, print, publish, sell, offer for sale, distribute or reproduce a statement (broadly defined as 'anything in a visible form capable of communicating, expressing or suggesting a meaning, information, or an idea') which is a 'clear and present danger' to, among others 'public safety and public order'. Section 10(2) makes it an offence even to possess such material. Section 10(3) provides that such printed matter and any apparatus used to print it is liable to forfeiture to the state. The offences carry punishments of a fine, imprisonment or both in terms of section 15.

Official Secrets Act, 1967

Although not directed at the media itself, certain provisions of the Official Secrets Act are particularly draconian and could hamper the media's ability to report on important issues of the day.

Section 4 of the Official Secrets Act, for example, makes it an offence for any person to communicate any information regarding a prohibited place or that is otherwise in contravention of the Official Secrets Act. If found guilty, such a person is liable to imprisonment or to a fine in the case of a juristic person, such as a company.

Internal Security (General) Act, 1984

Section 38 of the Internal Security (General) Act makes it an offence for a person to be in an area that has been declared a protected area by the minister. The offence is punishable by a fine, imprisonment or both. Reporting by the media on any activity in a protected area is therefore made difficult by this kind of prohibition.

Section 34 of the Internal Security Act makes it an offence to, among other things, publish words that might reasonably be expected to result in the commission of public violence and the offence is punishable by a fine, imprisonment or both.

Police Service Act, 1998

Although not directed at the media itself, it is essential for journalists to be aware that section 27 of the Police Service Act prohibits a police officer from disclosing any information acquired by him in the course of his duties, except as part of the performance of his duties or when lawfully required to do so by a competent court.

Prisons Proclamation of 1957

Although not directed at the media itself, journalists need to be aware that section 156 of the Prisons Proclamation declares the following conduct, among others, on the part of a prison officer, to be an offence against discipline:

- divulging any matter which it is his duty to keep secret
- communicating directly or indirectly with the press on any matter which may have become known to him in the course of his public duties
- publishing any matter or making any public pronouncement relating to prisons, prisoners or the administration of the prison services.

Sedition Proclamation 44 of 1938

The Sedition Proclamation makes it an offence to print, publish, sell, distribute or import any seditious publication. The offence is punishable by a fine, imprisonment or both for a first offence and imprisonment for subsequent offences.

One of the most problematic aspects of this proclamation is the very broad definition of sedition, which includes not only inciting 'disaffection' against the government but also promoting 'feelings of ill-will and hostility' between different classes of the population.

These terms are so broad that they could be used to hinder reporting.

Penal Code, Act 6 2010

Section 76 of the Penal Code makes it an offence to utter seditious words, print, publish, sell, offer for sale, distribute or reproduce a seditious publication. It is also an offence to import any seditious publication knowingly. The penalty, on conviction, is imprisonment, section 109 read with the Schedule to the Penal Code.

Section 85 of the Penal Code makes it an offence for any person to act or conduct him or herself in such a manner or speak or publish such words from which there is a real likelihood that the natural and probable consequence of his or her act, conduct or speech or publication will under the circumstances lead to the commission of public violence by members of the public generally, or by persons in whose presence the act or conduct takes place or to whom the speech or publication is addressed. The penalty, on conviction, is to be determined as the presiding officer sees fit in terms of section 109 of the Penal Code.

National Security Regulations, 2000

These regulations are not aimed at the media directly, but it is important to be aware that they impose a duty of secrecy on all employees in the National Security Service, which includes an obligation not to disclose classified information.

3.7.4 Prohibition on information that is obscene

The Printing and Publishing Act, 1967, at section 10(1), makes it an offence to import, print, publish, sell, offer for sale, distribute, or reproduce a statement (broadly defined as 'anything in a visible form capable of communicating, expressing or suggesting a meaning, information, or an idea') that is a 'clear and present danger' to, among others, 'public morality'.

Section 10(2) makes it an offence even to possess such material. Section 10(3) provides that such printed matter and any apparatus used to print such matter is liable to forfeiture to the state. The offences carry punishments of a fine, imprisonment or both, in terms of section 15.

3.7.5 Prohibition on information that violates fundamental rights

The Printing and Publishing Act, 1967, at section 10(1), makes it an offence to import, print, publish, sell, offer for sale, distribute, or reproduce a statement (broadly defined as 'anything in visible form capable of communicating, expressing or suggesting a meaning, information, or an idea') that is a 'clear and present danger' to, among others, 'fundamental rights and freedoms'.

Section 10(2) makes it an offence even to possess such material. Section 10(3) provides that such printed matter and any apparatus used to print such matter is liable to forfeiture to the state. The offences carry punishments of a fine, imprisonment or both, in terms of section 15.

3.7.6 Prohibition of information which denigrates on immutable grounds such as race

Section 79 of the Penal Code makes it an offence for a person to utter words or publish writing that expresses hatred, ridicule, or contempt of any person or group of persons, wholly or mainly, because of race, ethnic affiliations, gender, disability or colour. The penalty, on conviction, is to be determined as the presiding officer sees fit in terms of section 109 of the Penal Code.

3.7.7 Prohibition on information relating to financial institutions

The Financial Institutions Act, 1999, regulates financial institutions in Lesotho. Although none of its provisions relates directly to the media, it is essential to note that many secrecy-related provisions may indirectly affect the media, in particular, the following:

- Section 26 imposes a secrecy obligation on anyone working at the Central Bank of Lesotho, prohibiting them from disclosing any information of a non-public nature relating to their positions.
- Section 27 does allow the Central Bank of Lesotho to disclose basic licensing- related information in respect of institutions licensed under the Financial Institutions Act.

3.8 Legislation that specifically assists the media in performing its functions

In countries that are committed to democracy, governments pass legislation which specifically promotes accountability and transparency of both public and private institutions. Such statutes, while not specifically designed for use by the media, can be, and often are, used by the media to uncover and publicise information in the public interest.

Unfortunately, Lesotho has yet to enact access to information or whistleblower protection legislation. However, concerning three important aspects of public life: the conduct of elections and the operations of parliament and the courts, Lesotho has passed several important laws either in the form of legislation or subordinate legislation, such as regulations or orders.

3.8.1 Local Government Elections Act, 1998

The 2004 amendment to the Local Government Elections Act, 1998, introduced an Electoral Code of Conduct, which contains several provisions to protect the media so that it can fulfil its functions during election periods. Section 8 of the Electoral Code, headed Role of the Media, provides that:

> Every registered party and candidate shall —
>
> (a) respect the role of the media before, during and after an election conducted in terms of this Act;
>
> (b) not prevent access by members of the media to public political meetings, marches, demonstrations and rallies; and
>
> (c) take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or supporters.

3.8.2 National Assembly Election Order (No 10) 1992

The National Assembly Election Order governs elections to the National Assembly. The order contains several provisions regarding the conduct of elections, and campaigning therefor, which are important for the media:

- Section 47F, protects freedom of expression and information generally by providing that every political party and every representative member or supporter shall enjoy complete and unhindered freedom of expression and information in the exercise of the right to campaign and that no person shall be prosecuted for any statement made, an opinion held or campaign material produced, published or possessed while campaigning in the election.
- Section 47K, deals specifically with news broadcasts and reports. We focus on those provisions which set out the obligations of the state broadcaster concerning party political broadcasting. Section 47K provides that:
  - Although every party has the right to have the substance of its campaign covered in the news:
    - the content of the news must be professional and determined by the media
    - the media must maintain neutrality in its reporting and commentary
    - the Independent Electoral Commission must monitor news broadcasts to ensure coverage of all political parties
  - Time must be allocated on radio and television during which political parties are allowed to campaign, as determined by the Independent Electoral Commission.
  - No political party may broadcast commercial advertisements for its campaign on state-owned media.

3.8.3 Parliamentary Powers and Privileges Act, 1994

The Parliamentary Powers and Privileges Act makes provision for certain privileges and immunities given to parliament. Some of these are important for the media and assist it in performing its function of providing the public with news and information:

- Section 3 provides that no civil or criminal proceedings may be instituted against a senator or member (of the National Assembly) for words spoken before, or written in a report to, the Senate or National Assembly or to a committee thereof. However, this only applies to words that are:
  - relevant and reasonably appropriate to the proceedings
  - not spoken or written maliciously or with the object of exposing another person to hatred, contempt or undue ridicule.
- Section 23 provides that in any proceedings instituted for publishing a report

or summary or extract or abstract of anything done in the Senate or National Assembly, the defence is that this was done in good faith and without malice. Although this provision is somewhat unclear, it allows the media to report (in good faith) on the activities of the Senate or National Assembly without the fear of litigation as a result.

3.8.4 National Assembly Standing Orders, 2008

The National Assembly Standing Orders have been adopted by the National Assembly to govern its operations, according to section 81(1) of the constitution. The National Assembly Standing Orders contain several provisions that will assist the media as it performs its task of keeping the public informed about political matters, including:

- Section 76(b) of the National Assembly Standing Orders, which obliges the National Assembly to 'facilitate public participation in its legislative and other processes through implementing the following … Conducting public hearings as and when necessary';
- Section 77, which provides that 'committee proceedings shall be open to the public'. There are certain exceptions to this, namely:
  - the speaker can regulate public and media access to the National Assembly and can order the refusal of entry to, or the removal of, the media 'where appropriate';
  - the chairperson of any committee can regulate public and media access to the committee and can order the refusal of entry to, or the removal of, the media 'where appropriate'.

3.8.5 High Court Act, 1978

The High Court Act contains provisions that are useful for the media, namely section 13, which provides that the pleadings (the documents that cases are based on such as notices of motion, summons, affidavits, heads of argument, and so on) and proceedings (the actual trial or motion proceedings taking place before a judge) of the High Court 'shall be carried on and the sentences, decrees, judgments and orders thereof, pronounced and declared in open court'.

This is important because it guarantees the media (like every other person) the right to be present in court during important hearings and to have access to the court documents. This is subject, as is normal, to the judge having the right to clear the court or otherwise remove anyone from the court if the judge sees fit at any time during the proceedings.

3.8.6 Subordinate Courts Order, 1988

Like the High Court Act, the Subordinate Courts Order provides at section 7 that subordinate court proceedings (in both civil and criminal cases) shall be carried on in open court, subject to certain exceptions, which are dealt with elsewhere in this

chapter. Furthermore, section 8 of the Subordinate Courts Order provides that the records and proceedings of the court shall be accessible to the public in all cases.

4 Regulations affecting the media

In this section, you will learn:

- ▷ definition of regulations
- ▷ regulations governing broadcasting licences
- ▷ regulations governing broadcasting content
- ▷ other aspects of broadcasting-related regulations

4.1 Definition of regulations

Regulations and rules are types of subordinate legislation. They are legal rules that are made in terms of a statute. In Lesotho, broadcasting regulations and rules are legal mechanisms that allow the minister responsible for communications or the LCA to make legally binding rules governing the broadcasting sector, without requiring parliament to pass a specific statute thereon. As is more fully set out elsewhere in this chapter, the empowering statute (in this case, the Communications Act, 2012) empowers:

- the minister to make regulations (in consultation with the LCA) to bring into effect the provisions of the Communications Act in terms of section 55;
- the LCA to make administrative orders and rules for exercising its powers and performing its duties in the implementation of policy under the Communications Act in terms of section 5(1)(c).

4.2 Regulations governing broadcasting licences

Broadcasting Classification Regulations 2007

The Broadcasting Classification Regulations are contained in Notice 19 published in the Lesotho Extraordinary Government Gazette No 10 (Vol. LII) dated 14 February 2007. These regulations, made by the minister for communications, specify four categories of broadcasting services:

- A public broadcaster shall:
  - provide coverage for the whole country at all times

- provide services that realise the aspirations of the nation as regards democracy, development and nation-building
- serve all sectors of society equally
- be accessible to all political parties and independent candidates on a fair and non-discriminatory basis, particularly during election campaigns
- contribute to bridging the digital divide by providing transmission access to other broadcasters where possible
- be a platform for voter education
- be funded by parliament and additional funds raised in the course of its business.

- A private broadcaster shall:
  - be owned and controlled by any individual or organisation so permitted by law
  - operate on a non-profit basis
  - have a right to provide coverage as they deem desirable provided there is available spectrum.
- A commercial broadcaster shall:
  - be owned and controlled by an individual or organisation
  - operate to generate a profit
  - have a right to provide coverage as they deem desirable, provided there is available spectrum.
- A community broadcaster shall:
  - be owned and controlled by a specific community
  - transmit programmes that are determined by and realise the aspirations of that community
  - operate on a non-profit basis
  - provide coverage to enable access by members of the community.

Lesotho Communications Authority (Classification and Fees) Rules, 2018

Application fees for licences as well as the initial, renewal and annual fees for broadcasting licensees are set out in the Second Schedule of the Lesotho Communications Authority (Classification and Fees) Rules, 2018 (the Fees Rules) published in Volume 63 of the Government Gazette No 22 dated 23 March 2018.

It must be noted that in terms of section 14 of the Third Schedule of the Fees Rules, radio frequency spectrum licences are issued following the Lesotho national frequency allocation plan. Section 14(f) provides that holders of individual

broadcasting licensees have to apply for radio frequency spectrum separately as this is not included in their broadcasting licences.

Lesotho Communications Authority (Administrative) Rules, 2016

The LCA is empowered by section 5(1)(c) of the Communications Act to make their own administrative rules for the implementation of the provisions of the Communications Act. These rules are contained in the Lesotho Communications Authority (Administrative) Rules published in Vol 61, Gazette No 36 dated 24 June 2016 (the Administrative Rules). In brief, these provide as follows:

Part II of the administrative rules outlines the procedure required to be followed by the LCA, persons wishing to apply for a communications licence and licensees, in matters relating to communications licences.

- Applications for a licence — section 3
  - The LCA is empowered to prescribe application requirements for classes of licences and shall make them readily available to prospective applicants.
  - An applicant shall submit an application with payment of the relevant application fees (individual licences shall be applied for on an invitational basis).
  - Within 90 days of receipt of an application, the LCA shall approve or reject the application, on condition that no additional information is required from the applicant.
  - Where the LCA requires additional information from the applicant, it shall inform the applicant accordingly, and the 90 days shall be adjusted to commence after submission the additional information.
  - Where the applicant fails to provide the required additional information within 90 days, the application shall automatically expire, the applicant may submit a new application.
  - The LCA shall, before issuance of a licence to an applicant, satisfy itself that the applicant has the financial and technical capability to construct, own or make available a network, or provide the services associated with the licence.
  - Where the LCA determines, during the consideration of an application, that there has been misinformation relating to a material aspect of the application, or that the applicant has withheld material information, it may reject the application.
  - The LCA shall hold public consultations in respect of a licence application for public comment.
  - On completion of the evaluation of an application, where an application has been rejected, the LCA shall inform the applicant of the rejection and the reasons thereof.

- On completion of the evaluation of an application, where an application has been approved, the applicant shall be issued with a licence on payment of applicable fees.
- Following the issuance of a licence, a licensee shall commence operations within one year for broadcasting licensees.
- Where a licensee fails to commence operations within the specified period, the licence shall automatically expire. The LCA may extend the period on request by the applicant, but the extension shall not exceed six months for broadcasting licensees.

- Licence Conditions — section 4
  - The LCA may include conditions in a licence which outline the rights and obligations of a licensee. These licensing conditions, which are technology-neutral, and in the absence of compelling justification, shall not require a licensee to use, or prohibit a licensee from using, any specific technology to provide a particular communications service, provided that licensees use technologies that comply with standards set by the LCA.
  - The LCA may not prescribe licence conditions that prohibit a licensee from providing multiple services over the same infrastructure.

- Amendment of a licence — section 5
  - The LCA may, of its own volition, or at the request of a licensee, amend any condition in a licence which it has granted. Prior to making any licence amendment of its own volition, the LCA must provide the licensee with a written notice which outlines:
    - the terms of the proposed amendment
    - the reasons for the proposed amendment
    - the timeframe and procedures for the licensee to make representations to the LCA on the proposed amendment.
  - The LCA shall give due consideration to any representations made by the licensee.
  - A licensee may request to have their licence amended, clearly stating the requested amendment and giving reasons for the request. The request shall not be unreasonably denied.
  - Where the LCA denies a licensee's request for amendment, it shall give reasons for its decision, taking into account the reasons advanced in support of the request.
  - The LCA may hold a public consultation before deciding on any licence amendment.

- Renewal of a licence — section 6
  - The LCA may renew a licence on application by a licensee.

- In the case of an individual licence, the licensee shall submit a renewal application to the LCA not less than two years before the expiry of the term of their current licence justifying the renewal. The justification shall include:
  - performance under the current licence
  - compliance with licence terms, laws and regulatory directives
  - contribution to Lesotho's socio-economic development
  - corporate social investment
  - future business projections
  - any other information the licensee may deem appropriate.
- The LCA shall approve a renewal application if it concludes that the licensee has met all requirements of the expiring licence and it is in the public interest to renew such a licence.
- The LCA may request additional information it may need to decide on the renewal of a licence.
- In the case of a class licence, renewal shall be automatic on payment of prescribed fees unless there is a compelling reason for non-renewal.

- Transfer or assignment of a licence — section 7
  - Without prior approval of the LCA, a licensee shall not:
    - transfer its right and obligations under a licence
    - transfer control over the licensee's operation to another person
    - assign a licence to another person, regardless of whether there is any payment in exchange.
  - The LCA shall not reject any request to transfer or assign a licence unless the LCA determines that:
    - the proposed transferee or assignee does not meet the established qualifications for the licence
    - the transfer or assignment would substantially restrict competition in any communications market in Lesotho.

- Licence suspension and revocation — section 8
  - The LCA may suspend or revoke a licence if it concludes that the licensee
    - is in breach of regulatory obligations, including licence conditions, the act or rules or any subsidiary legislation
    - is not able to comply with regulatory requirements
    - has failed to comply with the directives of the LCA

- › is engaged in anti-competitive practices
- › has lost the ability to provide licensed services
- › has failed to pay applicable fees as prescribed by the rules
- › threatens national security and public safety.

- The LCA shall give a licensee 30 days' notice of its intention to suspend or revoke a licence during which the licensee may make representations to the LCA.
- After due consideration of any representations by the licensee, the LCA may:
  - › prescribe a time during which the licensee is required to remedy the offending act or conduct
  - › impose a financial penalty on the licensee payable within a stipulated period.
- Where the licensee fails to comply with a required remedy or pay the penalty imposed by the LCA, or the representations are found not compelling to warrant a different determination, the LCA may:
  - › suspend the licence for a specified period
  - › revoke the licence.
- Where a licence is suspended or revoked, the fees paid in respect of the licence shall be forfeited.

Part III of the administrative rules provide the procedures to be followed by the LCA in the assignment of radio frequency spectrum.

- Application for radio frequency spectrum — section 9
  - Requirements for a radio frequency spectrum assignment application can be obtained at the office of the LCA. A person who wants spectrum assignment must apply to the LCA and provide such information as the LCA requires.
  - The LCA shall assign radio frequency spectrum within 30 days where an applicant is eligible and meets all requirements.
- Radio frequency spectrum assignment — section 10
  - The LCA may assign radio frequency spectrum required to provide licensed services or for experimentation.
  - The LCA may not refuse to assign radio frequency spectrum unless there are compelling reasons founded on technical demand, national security, public safety or other reasonable justifications which shall be communicated to the applicant.
  - The LCA shall assign available radio frequency spectrum:

- in accordance with the national frequency allocation plan on a first-come-first-served basis
- on condition that harmful interference is not caused
- considering all the technical data of the equipment of the applicant.

- The LCA may revoke the assignment of any spectrum if it determines that such spectrum is:
  - not used efficiently or at all
  - being utilised for purposes other than those for which it was assigned
  - held to distort or prevent competition
  - needed for reassignment based on technological development and international agreements.
- The LCA shall stipulate conditions of use in respect of both licensed and licence-exempt spectrum.
- Assigned spectrum shall be used on payment of applicable fees as prescribed by the LCA.
- An assignee shall not transfer control over the assigned spectrum, either by sale or lease.
- An assignee may relinquish spectrum.

4.3 Regulations governing broadcasting content

Broadcasting Rules 2004

The Broadcasting Rules were made by the Lesotho Telecommunications Authority (the forerunner to the LCA) and are contained in Notice No 7 published in the Lesotho Extraordinary Government Gazette No 38 (Vol XLIX) dated 14 April 2004. This is the critical set of rules governing broadcasting content in Lesotho. The Broadcasting Rules pre-date the Communications Act and were established pursuant to section 16(2) of the now-repealed Lesotho Telecommunications Act, 2000. They are however still in effect pursuant to section 5(1)(c) of the Communications Act. We focus on the main aspects of the Broadcasting Rules.

Code of Practice (Broadcasting Code)

Part III of the Broadcasting Rules contains a Code of Practice with which all broadcasters are required to comply. The Broadcasting Code lays down content restrictions on broadcasters in accordance with section 39(8) of the Communications Act which empowers the BDRP to establish the Broadcasting Code. Critical aspects of the Broadcasting Code include the following:

- *Community standards — section 6:* A licensee shall not broadcast content which, measured by contemporary community standards:

- offends against good taste and decency
- contains the gratuitous use of offensive language, including blasphemy
- presents sexual matters in a gratuitous, explicit and offensive manner
- glorifies violence
- is likely to incite crime or lead to disorder
- is likely to incite or perpetuate hatred or gratuitous vilification of a person or section of the community on account of race, ethnicity, nationality, gender, marital status, sexual preference, age, disability, religion or culture.

- *Protection of children — section 7:* When broadcasting programmes where a large number of children may be expected to be listening (taking account of available audience research as well as the time of broadcast), a licensee shall exercise due care in avoiding content which may disturb or be harmful to children including:
  - offensive language
  - explicit sexual or violent materials, including music with violent or sexually explicit lyrics.

- *Fairness, accuracy and impartiality in news and information programming — section 8:*
  - Licensees shall report news and information accurately, fairly and impartially.
  - News and information shall be presented in the correct context and in a balanced manner without intentional or negligent departure from the facts, including by:
    - › distortion, exaggeration or misinterpretation
    - › material omissions
    - › summarising or editing.
  - A licensee may present as fact only matters which may reasonably be true, having regard to the source of the information.
  - Opinions must be clearly presented as such.
  - Where there is reason to doubt the correctness of a report, it shall be verified, and where this is not practical, this fact must be mentioned in the report.
  - Corrections of factual errors must be broadcast as soon as reasonably possible, and the degree of prominence and timing must be appropriate and fair and shall include an apology where appropriate.

- *News and information programmes on controversial issues — section 9:*
  - When reporting on controversial political, industrial or public importance

issues, an appropriate range of views must be reported, either within a single programme or a series of programmes. Similarly, phone-in programmes on these issues must allow for a wide range of opinions to be represented.

- Any person or organisation whose views have been criticised in a programme on a controversial issue of public importance is entitled to a reasonable opportunity to reply.

- *Conduct of interviews — section 10:*
  - Persons who are to be interviewed by a licensee must be given prior notice of the subject of the interview and whether or not it is to be recorded or broadcast live.
  - Written parental permission must be obtained before interviewing children.
  - Due sensitivity must be exercised when interviewing bereaved persons or witnesses of traumatic incidents.

- *Comment — section 11:*

  Comment must be indicated and must be an expression of opinion based on fact.

- *Privacy — section 12:*
  - A licensee shall not present material which invades a person's privacy and family life unless there are identifiable public interest reasons for doing so.
  - A licensee shall not use information acquired without a person's consent unless:
    - the information is essential to establish the credibility and authority of a source
    - the programme for which the information is acquired is clearly of important public interest.
  - The protection of confidential sources shall be respected, subject to the laws of Lesotho.
  - The identity of a victim of a sexual offence must not be broadcast without his or her written consent, and the identities of child victims of sexual offences may not be broadcast under any circumstances.
  - A licensee shall avoid gratuitous and repetitive detail in covering sexual offences.

- *Payment for information obtained from criminals — section 13:*
  - A licensee shall not pay criminals for information unless there is a compelling public interest in doing so.

- *Party political broadcasts and advertisements — section 14:*
  - A licensee is not required to broadcast party-political advertising. However, if it elects to do so, it must afford all political parties the same opportunity on a non-discriminatory, non-preferential and non- prejudicial basis.
  - A licensee may accept party-political advertising only from duly authorised party representatives.
  - A party-political advertisement shall be wholly under the editorial control of the political party placing the advertisement.
  - In relation to programming dealing with political parties:
    - The licensee must provide reasonable opportunities for the discussion of conflicting views and must treat all political parties equitably.
    - Political parties must be given a reasonable opportunity to reply to criticism.

Advertisement and Sponsorship Code

Part IV of the Broadcasting Rules contains the Advertising and Sponsorship Code applicable to all broadcasters. The Advertising and Sponsorship Code lays down advertising and sponsorship restrictions on broadcasters.

Key aspects of the Advertising and Sponsorship Code include the following:

- *Community standards, accuracy and fairness in advertising — section 15:*
  - A licensee shall ensure that broadcast advertisements are decent and conform to the principles of fair competition in business.
  - A licensee shall ensure that advertisements do not contain any misleading descriptions or claims.
  - A licensee must be satisfied that the advertiser has substantiated all descriptions or claims prior to accepting the advertisement.
  - A licensee must ensure that advertisements do not attack or discredit other products or advertisements unfairly.
  - A licensee shall not discriminate unreasonably against or in favour of any particular advertiser.
- *Scheduling of advertisements — section 16:*
  - Advertisements must be clearly distinguishable from programming.
  - A licensee must exercise reasonable judgment in the scheduling of advertisements that may be unsuitable for children when children may be expected to be listening.
  - Indirect broadcasting is not permitted during live or phone-in programmes.
  - Presenters shall refrain from commenting on advertisements.

- *Sponsorship — section 17:*
  - A licensee may accept sponsorship for news bulletins, weather, financial or traffic reports and any other programme provided it retains editorial control of the sponsored programmes.
  - Sponsorship must not compromise the impartiality and accuracy of the programme.
  - Sponsors must not be allowed to advertise or endorse their goods and services within the editorial content of the sponsored programme.
  - Sponsorships must be acknowledged before and after the sponsored programme, and any link between the programme's subject matter and the sponsor's commercial activities must be clear.
  - A licensee must not discriminate unreasonably against or in favour of any particular sponsor.

Record-keeping obligations

- In terms of Part II of the Broadcasting Rules, licensees are required to keep a range of records and produce these on request by the LCA. Such records include:
  - company incorporation documents and shareholder agreements
  - audited financial statements
  - board resolutions
  - employee records
  - weekly programme schedules
  - daily programme logs showing categories of programming and timing thereof
  - advertising and sponsorship logs
  - music records detailing percentages of Sotho and African music played
  - complaints received and responses thereto
  - retaining original recordings of all programmes broadcast for a period of three months.

Compliance Issues

The LCA may impose a fine or direct the licensee to broadcast a correction or an apology or both, for failure to comply with the Broadcasting Rules, in terms of section 26 of the Broadcast Rules.

4.4 Other broadcasting-related regulations

Broadcasting Rules 2004

Complaints and Investigations

Part V of the Broadcasting Rules provides the regulations for the handling of complaints and investigations procedures that must be followed by the LCA. Part V also provides for the rights of licensees and complainants.

In terms of section 18 of the Broadcasting Rules, licensees are required to advise complainants that they have the right to refer the complaint to the LCA if they are dissatisfied with the licensee's response to the complaint.

In terms of section 19 of the Broadcasting Rules, any person who has reason to believe that he or she has been unfairly treated in any programme may request a copy of the relevant programme. Licensees may not unreasonably turn down such requests.

In terms of section 20 of the Broadcasting Rules, licensees must abide by, and cooperate with, all such complaints, monitoring and investigation procedures initiated by the LCA from time to time by:

- submitting, on request, any recordings or documentation required by the LCA
- responding to queries from the LCA relating to allegations of non-compliance with licence conditions, rules, regulations or the Communications Act
- appearing, when requested, before the LCA during any adjudication of a complaint or investigation inquiry into alleged non-compliance with licence conditions, rules, regulations or the Communications Act.

In terms of section 21 of the Broadcasting Rules, when the LCA intends to hold an investigation into a suspected breach of a licence condition, or investigate any dispute relating to a licensee's failure, or refusal, to deal with any complaint, or the unsatisfactory handling of any complaint by a member of the public, the LCA shall invite the licensee to make a written or oral representation within a period specified by the LCA.

In terms of section 22 of the Broadcasting Rules, should a licensee fail to comply with, or breach a licence condition, the LCA may impose a fine or penalty and make such directives as it deems necessary.

The Administrative Rules, 2016

In terms of section 46 of the Administrative Rules, the LCA may impose penalties as set out in section 47 of the Communications Act, where there is a contravention of any provision of the Communications Act, the Administrative Rules or licences, as the case may be.

5 Media self-regulation

One of the greatest problems facing the media in Lesotho is the lack of self-regulatory mechanisms for dispute resolution.

The media has failed to develop industry-wide associations capable of developing and enforcing self-regulatory provisions for attaining appropriate professional standards for the media. This lack of self-regulation has led to disputes involving the media having to be settled in the courts.

6 Case law and the media

In this section, you will learn about:

- common law
- civil defamation
- criminal defamation
- invasion of privacy
- contempt of court
- scandalising the court
- sedition

6.1 Definition of common law

The common law is judge-made law. It is made up of judgments handed down in cases adjudicating on disputes brought by people, whether natural (individuals) or juristic (for example, companies).

In common law legal systems such as Lesotho's, judges are bound by the decisions of higher courts and also by the rules of precedent, which require rules laid down by the court in previous cases to be followed, unless they were clearly wrongly decided. Legal rules and principles are, therefore decided on an incremental, case-by-case basis.

Elsewhere in this chapter, we have already examined two cases dealing with

seditious publications. This section focuses on three areas of common law of particular relevance to the media, namely defamation, privacy and contempt of court.

6.2 Civil Defamation

6.2.1 Definition of defamation

Lesotho's common law is primarily influenced by South African law and, like South African law, defamation is part of the common law of Lesotho. As is the case in South Africa, defamation is essentially the unlawful publication of a statement about a person, which lowers his or her standing in the mind of an ordinary, reasonable and sensible person. An action for defamation 'seeks to protect one of the personal rights to which every person is entitled, that is, the right to a good name, unimpaired reputation and esteem by others'.

Once it is proved that a defamatory statement has been published, two legal presumptions arise.

- That the publication was unlawful: this is an objective test which determines the lawfulness of a harmful act based on considerations of fairness, morality, policy and by the court's perception of the legal convictions of the community.
- That the person publishing same had the intention to defame.

The person looking to defend against a claim of defamation must then raise a defence against the claim.

6.2.2 Defences to an action for defamation

There are several defences to a claim based on defamation:[8]

- truth in the public interest
- absolute privilege — for example, a member of the National Assembly speaking in parliament
- statements made in the discharge of a duty, for example, the duty to provide information in connection with the investigation of a crime, enquiries as to the creditworthiness of a person and soon
- statements made in judicial or quasi-judicial proceedings
- reporting on proceedings of a court, parliament or certain public bodies
- fair comment on true facts and which are matters of public interest
- self-defence (to defend one's character, reputation or conduct)
- consent.

The most relevant here is the defence of truth in the public interest. Truth in the

public interest is where an action for damages is defended by asserting that the defamatory statement was true and, furthermore, that it is in the public interest to publicise the information.

It is important to note that public interest does not mean what is interesting to the public, but rather what contributes to the greater public good. Therefore, it may be in the public interest to publish true, albeit defamatory, material about public representatives. This is due to the importance of the public having accurate information to engage effectively in democratic practices such as voting.

Before South Africa transitioned to democracy and a new constitutional order, the media (publishers, printers, editors, newspaper owners, broadcasting companies) were strictly liable for the publication of defamatory material. This meant that in the absence of one of the recognised defences set out above (for example, truth in the public interest), the media was not entitled to raise a lack of intention or absence of negligence argument.

In other words, the courts were not required to find fault on the part of the media in the publication of a defamatory statement.3 In the ground-breaking case of *National Media Ltd and Others v Bogoshi* [1998] 4 All SA 347 (A), the Appellate Division (as it was then called) overruled its earlier *Pakendorf*[9] decision as being clearly wrong and adopted the approach taken in England, Australia and the Netherlands.

The new legal principle is stated at page 361- 62 of the *Bogoshi* judgment:

> ***The publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time. In considering the reasonableness of the publication, account must obviously be taken of the nature, extent and tone of the allegations. We know that greater latitude is usually allowed in respect of political discussion … and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper.***

The effect of the *Bogoshi* judgment is to make it possible for the media to escape liability for publication of false, defamatory statements if the media acted reasonably in the publication of the false statements. As is stated in the judgment, key factors in determining whether the media's conduct is reasonable will include the:

- nature and tone of the allegations

- nature of the information on which the allegations were based, for example, if the information related to an important political issue or not
- reliability of the source of the allegations
- steps taken to verify the allegations
- general standard of care adopted by the media in the particular circumstances.

It is important to note that in a 2000 judgment *Ramainoane v Sello* LAC (2000-2004) 165, the Lesotho Appeal Court upheld a High Court finding of defamation. The appeal was dismissed on a technical issue; however, the Appeal Court made some observations about defamation that are important for those working in the media to be aware of.

The facts of the case involved a newspaper that published excerpts from a book, which alleged that a senior named politician had misappropriated party funds, dealt illicitly in diamonds and engaged in bribery or attempted bribery. The High Court found that there was no truth to the allegations, and this was not contradicted by the defendant. The editor, however, appealed and argued that the publication was nevertheless reasonable.

In its judgment, the Court of Appeal made some important comments on the reasonableness of the newspaper editor's conduct. It seems the editor had not read the book in question but had been referred to it by another senior politician and 'for that reason no further enquiry was necessary'. The court was, correctly, scathing in its criticism of such conduct. The court found that, at the very least, the journalist (and the editor if necessary) was required to check on the veracity of the highly defamatory allegations before proceeding to publish same.

6.2.3 Remedies for defamation

There are three main remedies in respect of defamation in the absence of a defence:

- *The publication of a retraction and an apology by the media organisation concerned:* Where it has published a false, defamatory statement, a newspaper or broadcaster will often publish a retraction of a story or allegation in a story, together with an apology. Whether or not this satisfies the person who has been defamed will depend on many factors including the seriousness of the defamation, how quickly the retraction and apology are published and the prominence that is given to the retraction and apology (this is a combination of the size of the retraction, but also its positioning in the newspaper).
- *An action for damages:* This is when a person who has been defamed sues for monetary compensation. This takes place after publication has occurred. Damages (money) are paid to compensate for the reputational damage caused by the defamation in circumstances where there are no defences to defamation. The amount to be paid in compensation will depend on several factors, including whether or not an apology or retraction was published, as well as the

standing or position in society of the person being defamed.

- *An action for prior restraint:* This is where the alleged defamatory material is prevented from being published in the first place. Where a person is aware that defamatory material is going to be published, he or she may go to court to, for example, obtain an interdict prohibiting the publication, thereby preventing the defamation from occurring. Prior restraints are dangerous because they deny the public (such as readers of a publication or audiences of a broadcaster) the right to receive the information that would have been publicised had it not been for the interdict. Prior restraints are seen as a last resort mechanism. The legal systems of countries that protect the right to freedom of expression usually prefer to allow publication and to deal with the matter via damages claims, in other words, using 'after publication' remedies.

6.3 Criminal Defamation

Criminal defamation, unlike civil defamation, is where the state charges a person with the crime of defamation. Defamation has been decriminalised in many countries worldwide by statutory means, in other words, the crime of defamation has been repealed, that is, removed from the statute books by the parliament or other legislative authority. However, another way of effectively repealing these crimes is when courts declare them unconstitutional. This has happened in Lesotho in an important case which removed all references to criminal defamation from the Penal Code, Act 6 of 2012.

In the Constitutional Court of Lesotho, case No 11/2016, in the matter between *Basildon Peta* (Applicant) *v The Minister of Law, Constitutional Affairs and Human Rights, the Attorney General and the Director of Public Prosecutions*, the court struck down all of the sections of the Penal Code dealing with criminal defamation, namely sections 101-104, on the basis of deleterious effects of criminal defamation in these sections, as the means used to achieve the purpose of protecting reputation interests are overbroad and vague in relation to the freedom of expression guaranteed in section 14 of the constitution. Furthermore, having concluded that criminal defamation laws have chilling effects on freedom of expression and that civil remedies for reputational encroachment are more suited to redressing such reputational harm, the court concluded that the extent of encroachment on the freedom of expression in this section was 'not reasonable and demonstrably justified in a free and democratic society.'

In terms of section 22(1)(6) of the constitution, the court 'may make such orders, issue such process and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 4 to 21 (inclusive) of this Constitution'. The Constitutional Court relied on this provision to strike down these sections saying that the crime of defamation has no place in the current constitutional dispensation of Lesotho.

6.4 Privacy

In 2003, the Lesotho Appeal Court in *Makakole v Vodacom Lesotho (Pty) Ltd* LAC (2000-2004) 831 held that Lesotho's law recognises 'a personality interest, of which privacy is a component' [at 830D]. The personality interest is the concept of *dignitas*, which: 'embraces privacy' [At 830E].

The facts of this case involved an action for damages arising from the release of certain cell phone records. The action was not successful, but the court elaborated on what must be proved in an action for damages arising out of an alleged invasion of privacy, namely, that 'a plaintiff must prove both a wrongful and intentional infringement of another's right to privacy' [At 830F].

6.5 Contempt of Court

In general terms, the common law crime of contempt of court is made up of two distinct types of contempt, namely the *sub judice* rule and the rule against scandalising the court.

6.5.1 The *sub judice* rule

The *sub judice* rule guards against people trying to influence the outcome of court proceedings while legal actions are underway.

In *MoAfrica Newspaper Re: RULE NISI (R v Mokhantso and Others)* 2003 (5) BCLR 534 (LesH), the High Court of Lesotho held that the:

> ***main purpose of the common law sub judice rule is to protect the fair administration of justice against any statement that has the substantial effect of prejudicing the impartiality, dignity, or authority of the court which is seized with pending court proceedings*** [at paragraph 9].

The facts of this case were as follows. During the course of a criminal trial in the High Court in which certain persons were charged with having murdered one Selometsi Baholo, a caption appeared in a newspaper that read: 'Ntsu Mokhele and PB Mosisile, who assassinated SM Baholo, 434 weeks ago, on April 14 1994? The assassins of Selometsi Baholo have not yet been arrested and charged.' This implied that the wrong people had been arrested and charged and that the true culprits (by implication the late former Prime Minister Mokhele and the then-current Prime Minister Mosisili) were still at large.

The court found that while the caption 'looks or sounds unfortunate or mischievous, there is no real likelihood that it may prejudice the fairness in these proceedings' [at paragraph 25].

Importantly, Judge Peete stressed that the *sub judice* rule 'is an important and useful process whereby the proper administration of justice is protected against … statements [made outside of court] which have a substantial risk of prejudicing or

interfering with pending court proceedings' [at paragraph 28]. Judge Peete went on to elaborate on the respective responsibilities of courts and the media in this regard:

> ***Modern courts today should interpret cases where this limitation is on the freedom of expression somewhat restrictively save in cases where real and substantial risk exists. When publishing critical comments over pending proceedings, the media should do so advisedly and with a full sense of responsibility without creating any risk or prejudice to those pending court proceedings [at paragraph 28].***

6.5.2 Scandalising the court

Scandalising the court is criminalised to protect the institution of the judiciary. The point is to prevent the public undermining the dignity of the courts.

Again, there is a distinction between fair criticism and scandalising the court. In *MoAfrica Newspaper Re: RULE NISI (R v Mokhantso and Others)* 2003 (5) BCLR 534 (LesH) the High Court of Lesotho (per Justice Peete) made some important statements about the relationship between the freedom of expression provisions in the Lesotho Constitution and the judiciary:

> ***I am a firm holder of the view … that the freedom of press as a guaranteed right under our Constitution must be held in high regard and esteem more so by the courts of law themselves. This will serve to show that the courts do not exist in 'an ivory tower' and are not unassailable or their decisions unimpugnable and above criticism.***

6.5.3 Sedition

Two recent cases have dealt with sedition, and the courts, therefore, had no need to enquire more deeply into whether or not the definitions are overbroad in a constitutional democracy. In *R v Thakalekoala* (unreported), a Lesotho radio journalist was found guilty by the High Court of sedition under the Sedition Proclamation for claiming on air that the prime minister was not a Lesotho citizen and calling on the commissioner of police and the commander of the Lesotho Defence Force to arrest him.

In *Monyau v R*, the Lesotho Appeal Court dismissed an appeal against conviction on a charge of sedition by a priest who assisted disaffected members of the Lesotho Defence Force in the 1998 Lesotho uprising.

Notes

1 https://www.bbc.com/news/world-africa-52707752 [Last accessed on 01 June 2020]

2 https://www.worldometers.info/world-population/lesotho-population/[Last accessed on 13 April 2020]

3 https://tradingeconomics.com/lesotho/access-to-electricity-percent-of-population-wb-data.html[Last Accessed on 13 April 2020]

4 https://www.internetworldstats.com/africa.htm#ls[Last Accessed on 13 April 2020]

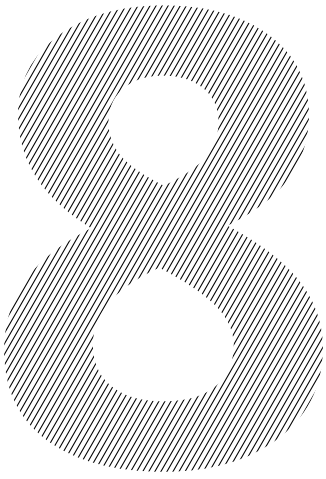
5 https://www.itu.int/en/ITU-D/Spectrum-Broadcasting/DSO/Pages/dataminer.aspx[Last accessed on 13 April 2020]

6 The state of ICT in Lesotho, commissioned by the Lesotho Communications Authority and The International Telecommunication Union, Published by the Lesotho Communications Authority, March 2017

7 https://www.lca.org.ls/frequently-asked-questions/ [Last accessed on 1 June 2020]

8 Ibid, paras 245ff.

9 See *Pakendorf en Andere v De Flamingh* 1982 (3) SA 146 (A)



Malawi

1 Introduction

The Republic of Malawi is a densely populated country of approximately 19 million people.[1] The country was a British protectorate from 1891–1964 when it gained full independence from the United Kingdom. Malawi became a republic with a one-party system of government in 1966 when a range of constitutional changes was made. The then-president, Dr Hastings Kamuzu Banda, remained in power until the early 1990s when, bowing to intense local and international pressure, a national referendum was held in which nearly two-thirds voted for a multiparty system. A new constitution was enacted in 1994, and it includes a chapter on human rights, essentially a bill of rights.

The mid-1990s also heralded a new era of press freedom in Malawi, with independent newspapers and radio broadcasters flourishing in the urban centres. There have been significant changes in the regulation of the national broadcaster and, more broadly, by the establishment of the Malawi Communications Regulatory Authority. It is, however, true that several acts of parliament, as well as certain judicial rulings and regulations, continue to limit the ability of the press to inform the public about matters of the day. This is despite the Malawi Growth and Development Strategy, which ostensibly sees human rights 'as a critical element of governance' [2] and obliges the Malawian government to protect both media freedom and freedom of expression. There is little doubt that, in certain respects, the media environment in Malawi is not in accordance with international standards for democratic media regulation.

Malawi is one of the world's least developed countries[3] with 50.7%[4] of the population living below the poverty line and 25% [5] of the population living in extreme poverty. Only 12.7% [6] of the population has access to electricity, and a paltry 13%[7] has access to the internet. But Malawi is one of only four Southern African Development Community (SADC) countries that have transitioned from analogue terrestrial television to digital terrestrial television (DTT).[8] It was able to do this because the country had only eight transmitters which covered 80% of the population and so it was relatively easy, given the small number of transmitters, to transition to DTT.[9]

Political instability in Malawi has been highlighted recently with the country's Supreme Court of Appeal upholding a lower court annulment of the May 2019 presidential election, won by the incumbent, Peter Mutharika. The court upheld the annulment saying that evidence of rigging was so widespread and blatant that 'the integrity of the result was severely compromised'.[10] The court ordered that Malawi hold a fresh presidential election in May 2020. The period immediately following the court order was characterised by further political instability which created difficult working conditions for journalists with reports of attacks on journalists by opposition protesters and by police.[11]

The presidential election rerun was held in June 2020 and the leader of the opposition alliance, Lazarus Chakwera, was declared the winner.[12]

In this chapter, working journalists and other media practitioners will be introduced to the legal environment governing media operations in Malawi. The chapter is divided into five sections:

- Media and the constitution
- Media-related legislation
- Media-related regulations
- Media self-regulation
- Media-related case law

This chapter aims to equip the reader with an understanding of the main laws governing the media in Malawi. The hope is to encourage media law reform in Malawi, to enable the media better to fulfil its role of providing the public with relevant news and information better, and to serve as a vehicle for government-citizen debate and discussion.

2 The media and the constitution

In this section, you will learn:

- ▷ the definition of a constitution
- ▷ what is meant by constitutional supremacy
- ▷ how a limitations clause operates
- ▷ which constitutional provisions protect the media
- ▷ which constitutional provisions might require caution from the media or might conflict with media interests
- ▷ what key institutions relevant to the media are established under the Malawian Constitution
- ▷ how rights are enforced under the constitution
- ▷ what is meant by the 'three branches of government' and 'separation of powers'

Endnotes

1 https://www.bbc.com/news/world-africa-51369191 [Last accessed 24 February 2020]

- whether any obvious weaknesses in the Malawian Constitution ought to be amended to protect the media

2.1 Definition of a constitution

A constitution is a set of rules that are fundamental to the country, institution or organisation to which they relate. For example, you can have a constitution for a soccer club or a professional association, such as a press council. Such constitutions set out the rules by which members of the organisation agree to operate. However, constitutions can also govern much larger entities, indeed, entire nations.

The Malawian Constitution was published in 1994 and came into force permanently in 1995; the Malawian Constitution has been amended several times since its adoption, most recently in 2010.[13] The constitution sets out the basic rules for Malawi. These are the rules on which the entire country operates. The constitution contains the underlying principles, values and laws of Malawi. A key constitutional provision in this regard is section 12, which sets out the underlying values on which the Malawian Constitution is founded. In brief, these are the following

> *(a) The authority of the state derives from the people of Malawi, and state authority is exercised only to serve and protect their interests.*
>
> *(b) The authority of the state is conditional on the sustained trust of the people of Malawi, which trust can be maintained only through open, accountable and transparent government and informed democratic choice.*
>
> *(c) The inherent dignity and worth of all human beings require the state to recognise and protect fundamental human rights.*
>
> *(d) The only justifiable limitations on lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society. All institutions and persons shall observe and uphold the constitution and the rule of law, and no institution or person shall stand above the law.*
>
> *(e) Every individual has duties to, among other things, other individuals, his or her family and society and the state. This includes the duty to respect others without discrimination, to exercise individual rights and freedoms with due regard to the rights of others, collective security, morality and the common interest.*

Importantly, section 13 of the Malawian Constitution also sets out principles of national policy that the state is to implement through legislation and other means. These are a statement of aspirational goals in areas including gender equality, nutrition, health, the environment, rural life, education, persons with disabilities, children, the family, the elderly, international relations, peaceful settlement of

disputes, the administration of justice, economic management, public trust and good governance.

2.2 Definition of constitutional supremacy

Constitutional supremacy means that the constitution takes precedence over all other law in a particular country, for example, legislation or case law. It is important to ensure that a constitution has legal supremacy. If a government passed a law that violated the constitution (was not in accordance, or conflicted, with a constitutional provision) such law could be challenged in court and could be overturned because it is 'unconstitutional'.

The Malawian Constitution makes provision for constitutional supremacy. Section 5 specifically states that 'any act of government or any law that is inconsistent with the provisions of this constitution shall, to the extent of such inconsistency, be invalid'.

2.3 Definition of a limitations clause

2.3.1 State of emergency derogations

Section 45(3) of the Malawian Constitution specifically provides for the derogation of human rights contained in Chapter IV during a state of emergency, except for a list of non-derogable rights set out in section 45(2). It is important to note that freedom of expression and access to information rights are not listed as non-derogable.

Section 45(3) specifically provides that the rights to, among others, freedom of expression and information may be derogated from during a declared state of emergency, provided this is not inconsistent with Malawi's obligations under international law and is strictly required:

- to prevent the lives of defensive combatants and civilians as well as legitimate military objectives from being placed in direct jeopardy in war or threat of war
- for the protection and relief of people in a widespread natural disaster.

2.3.2 General limitations

The second type of limitation is a general limitations provision. General limitations provisions apply to the provisions of a bill of rights or other statement setting out the fundamental rights. These types of clauses allow a government to pass laws limiting rights generally, provided this is done in accordance with the constitution.

The general limitations clause applicable to the chapter on human rights is found in section 44 of the constitution, Limitations on Rights. Section 44(1) provides that:

> ***No restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this constitution, other than those prescribed by law, which are reasonable, recognised by international***

> ***human rights standards and necessary in an open and democratic society.***

The constitution also specifically states in section 44(2) that a limitation of human rights, such as the right to freedom of expression 'shall not negate the essential content of the right or freedom in question'.

2.4 Constitutional rights that protect the media

The Malawian Constitution contains several important provisions in Chapter IV, Human Rights, which directly protect the media, including publishers, broadcasters, journalists, editors and producers. There are other provisions elsewhere in the constitution that assist the media as it goes about its work of reporting on issues in the public interest. These are also included in this section.

2.4.1 Freedom of expression

The most important basic provision that protects the media is Section 35, which states that: 'every person shall have the right to freedom of expression'. This provision needs some explanation.

- This freedom applies to every person and not just to certain people, such as citizens. Hence, everybody enjoys this fundamental right.
- The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many different examples of this, including physical expression (such as mime or dance), photography or art.

2.4.2 Freedom of the press

Linked to the right to freedom of expression but of more explicit importance for the media is Section 36, which provides that 'the press shall have the right to report and publish freely, within Malawi and abroad, and be accorded the fullest possible facilities for access to public information'.

This provision is very important because:

- it specifically and explicitly protects both the reporting and publishing rights of the press
- these reporting and publishing rights extend, not only to national media but also to the international media reporting on Malawi, both inside and outside the country
- the political role of the press in providing information to the public is recognised in the injunction that the press is to be provided with access to public information.

2.4.3 Access to information

Another critically important provision that protects the media is Section 37, which enshrines the right of access to information:

> *Every person shall have the right of access to information held by the State or any of its organs at any level of government in so far as such information is required for the exercise of his or her rights.*

This right requires some explanation.

- The right of access is about state-held information and does not apply to information held by private individuals or corporations.
- The right exists only where the information is required for the exercise of another right. Consequently, there is no standalone right of access to state-held information. A person (or a member of the press) does not have an inherent right of access to state-held information and would have to show that the information is required for the exercise of some other right before being entitled to that information.

In an information age, where states wield enormous power, particularly concerning the distribution of resources, the right of access to information is one of the most important rights in ensuring transparency and holding public power — that is, government — accountable. If one considers that the media plays an enormous role in ensuring transparency and government accountability by providing the public with information, having this right of access to information is critical to enable the media to perform its functions properly. Unfortunately, the right of access to information in the Malawi Constitution is limited in the respects set out above, but it must be said that these limitations are not uncommon.

2.4.4 Right to administrative justice

Another important provision that protects the media is section 43, Administrative Justice. Section 43(a) provides that 'every person shall have the right to lawful and procedurally fair administrative action, which is justifiable concerning reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened'. Section 43(b) provides that: 'every person shall have the right to be furnished with reasons, in writing, for administrative action where his or her rights, freedoms, legitimate expectations or interest are affected'.

This right requires explanation. The reason why this provision is important for journalists and the media is that it protects them (as it does all people) from administrative officials who act unfairly and unreasonably and who do not comply with legal requirements. It also entitles them to written reasons when administrative action affects their rights or interests.

An administrative body is not necessarily a state body. These bodies are often private or quasi-private institutions. These constitutional requirements would, therefore, apply to non-state bodies too.

Many decisions taken by such bodies are administrative. This requirement of administrative justice is a powerful one, which prevents or corrects unfair and unreasonable conduct on the part of administrative officials. Furthermore, having a constitutional right to written reasons is a powerful tool in ensuring rational and reasonable behaviour on the part of administrative bodies, and aids in ensuring transparency and, ultimately, accountability.

2.4.5 Privacy

A fifth protection is contained in Section 21 of the constitution, Privacy. Section 21 specifies that every person has the right to personal privacy, which includes the right not to be subject to:

- searches of his or her person, home or property
- the seizure of private possessions
- interference with private communications, including mail and all forms of telecommunications.

In particular, the protection against seizure (of notebooks and cameras, for example) and the protection of communications (including letters, emails, telefaxes and telephone conversations) is an important right for working journalists.

2.4.6 Freedom of opinion

A sixth protection is contained in Section 34, which guarantees every person the right to freedom of opinion, including the right to hold, receive and impart opinions without interference. This freedom to hold and impart opinions is critical for the media as it protects commentary on public issues of importance. Importantly, the right also protects the public's right to receive opinions held by others, including the media.

2.4.7 Freedom of association

A seventh protection is provided for in Section 32, which grants every person the right to freedom of association, including the right to form associations.

This right, therefore, guarantees the rights of the press to form press associations, but also to form media houses and operations.

2.5 Other constitutional provisions that assist the media

There are provisions in the Malawi Constitution, apart from the human rights provisions, that assist the media in performing its functions.

2.5.1 Provisions regarding the functioning of parliament

Several provisions in the constitution regarding the functioning of parliament are important for the media. These include the following:

- Section 56(5), which specifically provides that the National Assembly shall give access to the press and members of the public, except where a motion is passed with reasons prohibiting public access in the national interest.
- Section 60(1), which specifically protects the speaker, any deputy speaker and every member of the National Assembly. Effectively, they cannot be sued civilly or criminally in respect of any utterance that forms part of the proceedings of the National Assembly.
- Section 60(2), which specifically gives privileged status to all official reports and publications or proceedings of parliament and any of its committees.

These provisions assist the media in two critical ways: First, they ensure that the media has a great deal of access to the workings of parliament — that is, the media is physically able to be in parliament. Second, they protect parliamentarians. The provisions allow members of parliament (MPs) and other people participating in parliamentary proceedings to speak freely during parliamentary proceedings, in front of the media, without facing arrest or civil proceedings for what they say.

2.5.2 Provisions regarding national policy on transparency and accountability

One of the important principles of national policy is Section 13(o) of the constitution, which requires the state 'to introduce measures which will guarantee accountability, transparency, personal integrity and financial probity and which by virtue of their effectiveness and visibility will strengthen confidence in public institutions'.

There can be little doubt that the media plays a crucial role in assisting in making governmental action accountable and transparent, as well as in educating the population to participate meaningfully in a democracy. These provisions could, therefore, be interpreted as requiring media-friendly policies on the part of the state.

2.6 Constitutional provisions that might require caution from the media or might conflict with media interests

Just as there are certain rights or freedoms that protect the media, other rights or freedoms can protect individuals and institutions from the media. Journalists need to understand which provisions in the constitution can be used against the media. There are a number of these in the Malawi Constitution.

2.6.1 Right to dignity

The right to human dignity is provided for in section 19(1), which states that 'the dignity of all persons shall be inviolable'. Dignity is a right that is often raised in defamation cases because defamation, by definition, undermines the dignity of the person being defamed. This right is one that is often set up against the right to freedom of the press, requiring a balancing of constitutional rights.

2.6.2 Right to privacy

Similarly, the right to privacy provided for in section 21 (discussed above), is often raised in litigation involving the media, with subjects of press attention asserting their rights not to be photographed, written about, followed in public, and so on. The media does have to be careful in this regard and should be aware that there are always boundaries in respect of privacy that need to be respected and which are dependent on the particular circumstances, including whether the person is a public figure or holds public office, as well as the nature of the issue being dealt with by the media.

2.6.3 States of emergency provisions

It is also vital to note the provisions of section 45 of the Malawi Constitution, which deals with derogations and public emergencies, and which have already been dealt with above under the discussion on limitations.

2.7 Key institutions relevant to the media established under the Constitution of Malawi

Several important institutions concerning the media are established under the constitution, namely, the judiciary, the Judicial Service Commission (JSC), the Ombudsman and the Human Rights Commission.

2.7.1 The judiciary

In terms of section 103(2) of the Malawi Constitution, the judiciary shall have jurisdiction over all issues of judicial nature. It shall have exclusive authority to decide whether an issue is within its competence.

Chapter IX of the constitution sets out the hierarchy of courts in the country. In brief, these are:

- the Supreme Court of Appeal (the apex court), section 104
- the High Court, section 108
- the magistrates' courts and any other court established in terms of an act of parliament, section 110.

The judiciary is an important institution for the media as the two rely on each other to support and strengthen democratic practices in a country. The judiciary needs the media to inform the public about its judgments and its role as one of the branches of government, and the media is essential for building public trust and respect for the judiciary, which is the foundation of the rule of law in society. The media needs the judiciary because of the courts' ability to protect the media from unlawful action by the state and unfair damages claims by litigants.

Section 103(1) specifically provides that: 'all courts and all persons presiding over

those courts shall exercise their powers, functions and duties independent of the influence and direction of any other person or authority'.

Judges are appointed by the president, acting on the recommendation of the JSC, section 111(2). However, the Chief Justice is appointed by the president and confirmed by the National Assembly by two-thirds majority vote, section 111(1).

The Chief Justice appoints magistrates on the recommendation of the JSC, section 111(3).

The president removes judges in consultation with the JSC and after a motion passed by a majority of the National Assembly calling for the judge to be removed on the grounds of incompetence or misbehaviour, section 119(3).

2.7.2 The Judicial Service Commission

The JSC is a constitutional body established to participate in the appointment and removal of judges. The JSC is relevant to the media because of its critical role in the judiciary, the proper functioning and independence of which are essential for democracy.

In terms of section 117 of the Malawi Constitution, the JSC is made up of the Chief Justice, the chairperson of the Civil Service Commission, a judge or judge of appeal designated by the president after consultation with the Chief Justice, and such legal practitioner or magistrate designated by the president after consultation with the Chief Justice. Unfortunately, the president (albeit after consultation with the Chief Justice) has an enormous amount of say as to who sits on the JSC. The JSC in Malawi is therefore not particularly independent of executive influence.

2.7.3 The Ombudsman

The Ombudsman is important for the media because it, too, is aimed at holding public power accountable. The Ombudsman is established in terms of Chapter X of the Malawi Constitution. The main function of the Ombudsman is to:

> *investigate any and all cases where it is alleged that a person has suffered injustice and it does not appear that there is any remedy reasonably available by way of proceedings in a court … or where there is no other practicable remedy — section 123(1).*

In terms of section 125(c) of the Malawi Constitution, the Ombudsman is entitled to similar protection and privileges as are enjoyed by members of parliament. In terms of section 122, an ombudsman is appointed by the Public Appointments Committee of the National Assembly, after a public nominations process.

2.7.4 The Human Rights Commission

The Human Rights Commission is an important organisation in respect of the media. It is established in terms of Chapter XI of the Malawi Constitution. In terms of section 129 of the constitution, its primary functions are 'the protection and

investigation of violations of the rights accorded by this constitution or any other law'.

Members of the Human Rights Commission are the Ombudsman, the law commissioner (also a constitutional office) and such persons nominated by organisations, which both the law commissioner and the Ombudsman believe to be reputable organisations representative of Malawian society, and which are concerned with human rights issues. The president officially appoints such persons after they have been referred to him by the law commission and the Ombudsman, section 131.

2.8 Enforcing rights under the constitution

A right is only as effective as its enforcement. All too often, rights are enshrined in documents such as a constitution or a bill of rights, and yet remain empty of substance because they cannot be enforced.

Section 15(1) of the Malawi Constitution provides that:

> ***The human rights and freedoms enshrined in this Chapter [being Chapter IV] shall be respected and upheld by the executive, legislature, judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Malawi and shall be enforceable in the manner prescribed in this Chapter.***

Section 15(2) provides that:

> ***Any person or group of persons with sufficient interest in the promotion, protection and enforcement of rights under this Chapter shall be entitled to the assistance of the courts, the Ombudsman, the Human Rights Commission and other organs of Government to ensure the promotion, protection and enforcement of those rights and the redress of grievance in respect of those rights.***

Section 15(1) of the constitution makes it clear that the chapter on human rights applies to all branches of government and all organs of government. Furthermore, it makes it clear that Chapter IV also binds a natural person (an individual) or juristic or legal person (such as a company) if a particular right is applicable in the circumstances.

While rights are generally enforceable through the courts, the constitution itself also envisages the right of people, including of the media, to approach a body such as the Ombudsman or the Human Rights Commission to assist in the enforcement of rights.

Perhaps one of the most effective ways in which rights are protected under the Malawi Constitution is by the provisions that entrench human rights. Section 196 of the constitution requires that a constitutional amendment to any of the provisions of Chapter IV either:

- be ratified by a majority vote in a referendum of the people of Malawi, as certified by the Electoral Commission; or
- be ratified by a two-thirds vote of the members of the National Assembly, where the speaker of the National Assembly has certified that the amendment would not affect the substance or effect of the constitution.

The effect of this is that amendments, for example, to clarify wording in Chapter IV could be passed by a two-thirds National Assembly vote. However, where parliament wanted to take away a right altogether or to diminish its protections, a national referendum supporting the proposed amendment would need to take place.

2.9 The three branches of government and separation of powers

It is generally recognised that governmental power is exercised by three branches of government, namely the executive, the legislature and the judiciary.

2.9.1 Branches of government

It is generally recognised that governmental power is exercised by three branches of government, namely the executive, the legislature and the judiciary.

The executive

In terms of section 88 of the Malawi Constitution, executive power vests in the president. Practically, the president exercises executive power with the Cabinet. In terms of section 92 of the constitution, the Cabinet consists of the president, the first and second vice-presidents and such ministers and deputy ministers as are appointed by the president.

Section 89 sets out the functions of the president as:

- assenting to and promulgating bills passed by parliament
- conferring honours
- making appointments
- granting pardons
- proclaiming referenda
- referring constitutional disputes to the high court
- answering questions in parliament
- generally exercising powers of his office.

Section 96 sets out the functions of the Cabinet as:

- advising the president
- directing, coordinating and supervising the activities of government departments
- directing, coordinating and supervising the activities of parastatal bodies
- initiating bills for submission to parliament
- preparing the state budget
- answering questions in parliament
- being responsible for the implementation and administration of laws.

Section 7 of the Malawi Constitution summarises the role of the executive as being 'responsible for the initiation of policies and legislation and for the implementation of all laws which embody the express wishes of the people of Malawi and which promote the principles of this constitution'.

The legislature

Legislative (that is, law-making) power in Malawi vests, in terms of section 48(1) of the Malawi Constitution, in parliament. In terms of section 49(1), parliament consists of the National Assembly, the Senate and the president.

It is important to note the provisions of section 8 of the Malawi Constitution, which specify that the legislature, when enacting laws, 'shall ensure that its deliberations reflect the interests of all the people of Malawi and that the values expressed or implied in this constitution are furthered by the laws enacted'.

In terms of section 48(2) of the Malawi Constitution, 'an act of parliament shall have primacy over other forms of law, but shall be subject to the constitution'.

In terms of section 62 of the Malawi Constitution, the National Assembly consists of such number of seats representing every constituency in Malawi, as determined by the Electoral Commission. Furthermore, each constituency freely elects a person to represent it as a member of the National Assembly.

In terms of section 68, the Senate is made up of 80 members, representing district councils, chiefs, and local community nominees. The Senate acts as a second chamber of parliament, and all bills are referred to it by the National Assembly for approval.

The judiciary

As already discussed in this chapter, judicial power in Malawi vests in the courts. Section 9 of the Malawi Constitution summarises the role of the judiciary as having the 'responsibility of interpreting, protecting and enforcing this constitution and all

laws in accordance with this constitution and independently and impartially with regard only to legally relevant facts and the prescriptions of the law'.

2.9.2 Separation of powers

It is important in a functioning democracy to divide governmental power between different organs of the state to guard against the centralisation of power, which may lead to abuses. This is known as the separation of powers doctrine.

The aim, as the Malawi Constitution has done, is to separate the functions of the three branches of government, the executive, the legislature and the judiciary, so that no single branch can operate alone, assume complete state control and amass centralised power. While each branch performs several different functions, each also plays a watchdog role in respect of the other. This helps to ensure that public power is exercised in a manner that is accountable to the general public and in accordance with the constitution.

2.10 Weaknesses in the constitution that ought to be strengthened to protect the media

There are two important respects in which the Malawi Constitution is weak. If these provisions were strengthened, there would be specific benefits for the media in Malawi.

It is disappointing that the constitution does not provide for an independent broadcasting regulator to ensure the regulation of public, commercial and community broadcasting in the public interest.

Similarly, it is disappointing that the constitution does not provide for an independent public broadcaster to ensure access to quality news, information and entertainment in the public interest by the people of Malawi.

3 The media and legislation

In this section, you will learn:

- what legislation is and how it comes into being
- legislation governing the operations of the print media
- legislation governing the making and exhibition of films
- legislation governing the broadcasting media generally
- legislation governing the state broadcasting media
- legislation governing signal distribution
- legislation governing online media
- legislation that undermines a journalist's duty to protect sources
- legislation that prohibits the publication of certain kinds of information
- legislation that specifically assists the media in performing its functions

3.1 Legislation: An introduction

3.1.1 What legislation is and how it comes into being

Legislation is a body of law consisting of acts properly passed by parliament, which is the legislative authority. As we know, legislative authority in Malawi is vested in parliament, which is made up of the National Assembly, the Senate and the president.

As a general rule, the National Assembly, the Senate and the president are ordinarily involved in passing legislation. There are detailed rules in sections 49, 57, 196 and 197 of the Malawi Constitution, which set out the different law-making processes that apply to different types of legislation. Journalists and others in the media need to be aware that the constitution requires different types of legislation

to be passed in accordance with particular procedures. The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the Malawi Constitution, there are three kinds of legislation, each of which has particular procedures or rules or both applicable to it. These are:

- legislation that amends the constitution; the procedures or applicable rules or both are set out in sections 196 and 197 of the constitution
- ordinary legislation; the procedures or applicable rules or both are set out in section 49 of the constitution
- legislation that deals with financial measures; the procedures or applicable rules or both are set out in section 57 of the constitution.

3.1.2 The difference between a bill and an act

A bill is a piece of draft legislation that is debated and usually amended by parliament during the law-making process.

In terms of section 73 of the Malawi Constitution, if a bill is passed by parliament in accordance with the various applicable procedures required for different types of bills as set out above, it becomes an act, once it is agreed to by the president. An act must be published in the Gazette and, in terms of section 74 of the Malawi Constitution, becomes law only when it has been so published.

3.2 Legislation governing the operations of the print media

The Printed Publications Act, Act 18 of 1947

The Printed Publications Act is a colonial-era statute that has not been repealed. There are several key requirements laid down by the Printed Publications Act in respect of books, the definition of which specifically includes newspapers and pamphlets:

- Section 5(1) prohibits any person from printing or publishing a newspaper (defined as any periodical published at least monthly and intended for public sale or dissemination) until there has been full registration thereof at the office of the Government Archivist. The registration includes the full names and addresses of the proprietor, editor, printer or publisher; and a description of the premises where the newspaper is to be printed. Note that every amendment to these registration details is also required to be registered. In terms of section 5(2), any failure to comply with the registration requirements is an offence that carries a fine as a penalty.
- Section 3(1) requires every book (the definition of a book specifically includes a newspaper) printed and published in Malawi to reflect the names and addresses of the printer and publisher thereof, as well as the year of publication. In terms of section 3(2), any failure to comply with the publication requirements is an offence that carries a fine as a penalty.

- Section 4(1) requires every book publisher to deliver, at his own expense, a copy of any book he or she has published in Malawi, within two months of publication, to the Government Archivist. In terms of section 4(3), any failure to comply with the delivery requirements is an offence that carries a fine as a penalty, and the court may also enforce compliance by requiring such delivery.

- Note that the relevant minister is empowered under the Printed Publications Act to make rules to exempt compliance from the requirements of sections 3 and 4 in particular circumstances.

3.3 Legislation governing the making and exhibition of films

3.3.1 Making of films

There are several constraints on the making of films in Malawi, something that affects the visual media, such as television. The key aspects of the main piece of legislation governing film, namely the Censorship and Control of Entertainments Act, Act 11 of 1968 (the Censorship Act), are as follows:

- In terms of section 19 of the Censorship Act, no person shall direct or even take part in the making of any cinematograph picture (defined as including any film) in Malawi (whether intended for exhibition or sale within or outside Malawi) unless a film permit has been issued by the board of censors authorising the making of the cinematograph picture. Any person contravening section 19 is guilty of an offence and is liable to a fine and imprisonment, in terms of section 32 of the Censorship Act. The board of censors is wholly appointed by the relevant minister in terms of section 3 and therefore operates as an extension of the executive branch of government.

- Section 20 of the Censorship Act requires an application for a film permit to be made in writing to the board of censors. It is to be accompanied by a full description of the scenes and the full text of the spoken parts (if any) of the entire film that is to be made. Should any part of the film be likely to endanger the safety of persons or animals, the applicant must state what precautions have been put in place. Should all, or part, of the film contain any written or spoken language other than English, an English translation, translated by a board of censors-approved interpreter, must accompany the application.

- Section 21 of the Censorship Act empowers the board of censors to issue a film permit subject to conditions, including that a bond is paid, the repayment of which is conditional upon the film being made in accordance with the conditions of the film permit. The board of censors may even order a person appointed by it to be present at the making of the film. Section 21(3) of the Censorship Act provides that any person appointed by the board of censors to be present at the making of a film has the authority to intervene and order the cessation of any scene which, in his opinion, is objectionable, endangers any person or property (other than the film producer's property) or is cruel to animals. In terms of section 21(1), the board of censors may refuse to issue a permit or may issue a permit subject to certain conditions, at its discretion.

3.3.2 Exhibition of films

The Censorship Act also regulates the exhibition of films (termed cinematograph exhibition in the Censorship Act).

- Section 9 makes it an offence for any person who uses or permits the use of any building, tent, or other erection or open space as a theatre (defined as including for the showing of films) unless a theatre licence has been obtained. The penalty for this offence is a fine and a term of imprisonment in terms of section 32.

- Section 9A(1) states that no person shall operate 'a premises' to let a film to the public on commercial terms unless a valid premises licence has been awarded by a licensing officer. Premises licences expire on the 31st of December following the issue of the licence; the licence can, however, with the approval of the board of censors be transferred to any other premises or can be amended by a licensing officer. Premises licence fees are paid annually. Any person who operates premises for the above purpose without a premises licence is guilty of an offence, the penalty for which is a fine or a term of imprisonment, Section 9A(2).

- Section 10 makes it an offence to exhibit a film unless the film has been issued with a certificate. The certificate is to be issued by a person authorised to do so by the board of censors, in terms of section 12 of the Censorship Act.

- Sections 11 and 12 set out requirements for an application for a film exhibition certificate, including that the application is in writing, set out full details of the film, the theatres it is to be exhibited at and be accompanied by the prescribed fee.

- Section 13 provides that the board of censors may authorise the issuing of a film exhibition certificate in accordance with various classifications and conditions including:

  U — suitable for exhibition to persons of any age

  A — suitable for exhibition to persons of any age, provided that persons under 14 are accompanied by a person aged 18 or older

  AA — suitable for exhibition to persons aged 14 or older

  X — suitable for exhibition to persons aged 18 or older.

- Section 27 also makes it an offence to display any poster of a film to be exhibited, unless that poster has been approved by the board of censors.

- Section 33 of the Censorship Act empowers the minister to grant exemptions from having to comply with the above provisions.

- Offences in terms of sections 10 and 27 carry a penalty of a fine and imprisonment, in terms of section 32 of the Censorship Act.

3.4 Legislation governing the broadcast media generally

3.4.1 Statutes that regulate broadcasting generally

Broadcasting in Malawi is regulated in terms of the Communications Act, Act 34 of 2016 (the Communications Act), which repealed and replaced the Communications Act, Act 41 of 1998. The Act established the Malawi Communications Regulatory Authority (Macra) and governs its functioning. The Communications Act also regulates the distribution and licensing of the broadcasting spectrum, general telecommunications, broadcasting/content services and postal services in Malawi.

3.4.2 Establishment of the Malawi Communications Regulatory Authority (Macra)

Section 4 of the Communications Act establishes Macra as a juristic person (the Communications Act refers to a body corporate) to perform the functions assigned to it under the Communications Act.

3.4.3 Main functions of Macra

In terms of section 6(1) of the Communications Act, Macra's general duty is to:

> ***regulate and monitor the provision of communications services and ensure that, as far as it is practicable, reliable and affordable communications services are provided throughout Malawi and are sufficient to meet the demand for such services in accordance with the principles of transparency, certainty, market orientation, efficiency and consumer satisfaction.***

Further, section 6(2) (a) gives Macra legal ownership of the broadcasting spectrum on behalf of the Republic of Malawi.

In terms of section 6(2), Macra's main broadcasting-related functions are:

- the granting of licences for the provision of communications services, the definition of which includes broadcasting
- advising the government on policy issues relating to the communications sector, including in respect of broadcasting
- the monitoring of activities of licensees to ensure compliance with the Act and the terms and conditions of their licences
- the receipt and investigation of complaints relating to communications services, including broadcasting.

3.4.4 Appointment of Macra members

Section 7 provides that Macra consists of nine members, three of whom are *ex officio* and six others appointed in accordance with section 8. In terms of section

11(11), the appointed members hold office for three years and are eligible for reappointment for one additional term. The *ex officio* members are:

- the secretary for Information or his or her representative
- the secretary to the Treasury or his or her representative
- the solicitor general or his or her representative.

Section 8(2) of the Communications Act provides that Macra's six appointed members must be Malawian citizens who possess qualifications, experience and expertise in the following fields, telecommunications technology, electronic communications, broadcasting, frequency planning, law, information communication technology, economics or finance. These members of Macra are appointed by the president, subject to confirmation by the Public Appointments Committee of parliament in terms of section 8(1). There is no public nominations process provided for in the Communications Act.

Section 9 of the Communications Act disqualifies members of parliament, ministers, deputy ministers or members of a political party from being an appointed member of Macra.

Section 10(1) of the Communications Act empowers the president to appoint one of the members of Macra as the chairperson, without the involvement of the Public Nominations Committee of parliament. Should the position of chairperson become vacant, it is the responsibility of the members of Macra to select, from amongst themselves, a member to exercise the power of chairperson until a new chairperson can be appointed by the president.

Section 15(1) of the Communications Act empowers Macra to establish committees and delegate any of its functions as it deems necessary to such committees. The chairperson of any committee must be an appointed member of Macra and shall not be an *ex officio* member, section 15(2). However, the chairperson may not also be a committee chairperson, section 15(3). Any committee member shall be paid through Macra funding, section 15(4).

In terms of section 19(1), Macra shall appoint a director-general who shall become chief executive officer and be responsible for day-to-day operations. The director-general shall be appointed for three years and is eligible to be reappointed for two additional terms in terms of section 20(1).

3.4.5 Funding for Macra

Section 28(1) of the Communications Act sets out the allowable sources of funding for Macra's operating and financial costs. These are:

- fees, levies and other monies payable to Macra under the Communications Act
- fines payable for breaches of licence conditions
- grants or donations

- monies appropriated by parliament, that is, monies specifically allocated to Macra in the national budget
- proceeds from the sale of assets or equipment.

3.4.6 Making broadcasting regulations

In terms of section 200 of the Communications Act, the minister, acting on the recommendation of Macra, makes regulations for better implementation of the provisions of the Communications Act. Effectively, this means that Macra has veto power in respect of the making of broadcasting-related regulations. In other words, the minister is unable to make regulations without Macra's recommendation.

However, it is also important to be aware of the provisions of section 5(1) of the Communications Act which empower Macra to 'seek the general direction of the minister as to how it should carry out its duties under the Communications Act, where necessary'. Any such directions are required to be published in the Gazette in terms of section 5(2).

This provision is important because it is not clear whether 'where necessary' is determined objectively or only in the subjective opinion of Macra. It is also not clear whether Macra has to comply with a ministerial direction once it has been published in the Gazette.

3.4.7 Licensing regime for broadcasters in Malawi

Broadcasting licence requirement

Section 99 of the Communications Act makes it an offence to provide a content service without a licence. The definition of content in section 1 is 'information in the form of sound, data, text or images, whether still or moving, except where transmitted in private communications', and it includes broadcasting. Similarly, section 187 of the Communications Act, makes it an offence to provide broadcasting services without a licence issued under the Communications Act. The penalty on conviction is a fine and imprisonment. The Communications Act appears to conflate a broadcasting service with a content service in numerous places although, in our view, a broadcasting service is narrower than a content service.

Categories of broadcasting licences and licensing process

Unfortunately, the Communications Act is extremely complex and confusing concerning licensing. It appears to have a bewildering array of different types of services with definitions that appear to either overlap or be contradictory. The overall licensing structure provided for in the Communications Act appears to be as follows:

- There are two types of licences provided for in the Communications Act:
  - Individual licences — these make use of scarce resources such as the radio frequency spectrum. All traditional broadcasting services (sound

and audio-visual) distributed making use of the radio frequency spectrum would, therefore, require an individual licence.

- Class licences — these do not make use of scarce resources such as the radio-frequency spectrum. Consequently, in this section, we focus on individual licences because all content licences are individual licences.

- Section 99 of the Communications Act sets out five types of content licences:
  - public content licence
  - commercial content licence
  - community content licence
  - subscription content management licence
  - any other licence type as Macra may determine from time to time.
- Section 6 of Schedule 1 to the Communications Act provides four categories of broadcasting services:
  - public broadcasting services
  - commercial broadcasting services
  - community broadcasting services
  - any other licence as determined by Macra.
- Confusingly, the Communications Act does not define these various terms and instead has definitions for the following which appear to be equivalent to, or overlap, various types or categories of broadcasting or content licences:
  - *public content service,* which is defined in section 1 as 'any content service provided by the Malawi Broadcasting Corporation, or any other public state-owned enterprise holding a broadcasting service licence'.
  - *commercial broadcasting service,* which is defined in section 1 as 'a broadcasting service operating for profit or as part of the profit entity, but excludes any public broadcasting service'. When considering an application for a commercial content or broadcasting service, Macra is required to take into account issues such as technical quality, experience and ethical business records of the applicant, section 101.
  - *community broadcasting service,* which is defined in section 1 as 'a content service that serves a particular community or is carried on for non-profitable purposes, is fully controlled by a non-profit-making entity.' When considering an application for a community content or broadcasting service, Macra is required to take into account issues such as the interests of the community and support by, and involvement in, programming of the community, section 102.
  - *subscription content service,* which is defined in section 1 as 'a content service provided under a subscription contract'. We assume that the

considerations for granting a commercial broadcasting licence would apply in respect of a subscription content or broadcasting service licence too.

We do not set out the confusing provisions in detail. Suffice it to say that section 32 of the Communications Act empowers Macra to 'make rules prescribing the types and categories of electronic communications licences.' This has been done and is dealt with in more detail in section 4 below, the regulations section.

Part XIII of the Communications Act relates to the regulation of content services. This includes the licence requirements for providing such a service. Section 98 states that no person may provide a content service without a content licence issued by Macra. To provide a broadcasting service without a licence is an offence, the penalty for which is a fine and a term of imprisonment in terms of section 187.

The detailed provisions of the Communications Act concerning licensing are found in Part III. Confusingly this is headed Regulation of Electronic Communications Services, and, while the definition of electronic communications expressly excludes broadcasting, we think it important to include the general requirements for licensing set out in that section as they do not appear anywhere else. We are of the view that it is likely that they apply to broadcast or content services as well.

In terms of sections 34 and 35 of the Communications Act, applicants wishing to apply for a licence under the Act must be registered under the relevant written laws of Malawi and maintain a local shareholding of at least 20%. The effect of these provisions is to make it impossible for individuals, as opposed to a juristic person or corporate entity registered in accordance with Malawi law, to obtain a licence under the Communications Act. Further, such a corporate entity must have at least 20% Malawian shareholding. Besides these generally-applicable ownership restrictions, section 104 of the Communications Act, which applies only to content services, provides that a person who is not a Malawian citizen may not exercise control over a content service or have a financial interest or voting rights or paid-up share capital exceeding 20% in a content service. The effect of this is to require effective control by Malawian citizens and an ownership stake of at least 80% in respect of content or broadcasting services. Further, section 103 of the Communications Act prohibits the granting of any content licence to a political party, movement, organisation or alliance that is political.

Macra is required to publish in the Gazette and any other media, rules relating to each type or category of licence that may be issued under the Act in terms of section 36. This has been done and is dealt with in more detail in section 4, the regulations section, below.

A person wishing to apply for an electronic communications service licence shall apply to Macra in the prescribed manner in terms of section 37(1). Macra may then request additional information within 30 days, section 37(2), and shall either grant or reject the application within 60 days in terms of section 37(3). In the case where an application is rejected, Macra must provide reasons in writing for the rejection in terms of section 37(4). Importantly, section 38 of the Communications Act

specifies that where the operation of the service in question requires the allocation of scarce resources, for example, the radio-frequency spectrum, the granting of the licence is required to be done through a restricted procedure. Thus, it appears that all applications for an individual licence will be via such a restricted procedure and the objective criteria for the granting of a licence to the successful applicant must be known to all applicants in advance in terms of section 38(2) of the Communications Act.

Successful applicants must comply with the provisions of the Communications Act. They must be financially and technically capable of meeting its obligations and the terms and conditions of the licence in terms of section 39 of the Communications Act.

Section 40(d) of the Communications Act requires Macra to publish a notice in the Government Gazette that a licence has been issued but note that there is no requirement that a public notice and comment procedure be followed before the issuing of the licence

Section 41 allows Macra to amend a licence should it be necessary for more efficient management of the communications sector, provided the amendment will not cause substantial prejudice to the licensee if it is in the public interest or the licensee agrees to the amendment.

Section 42 of the Communications Act prohibits the transfer of a licence, or any rights thereunder, within twelve months of being granted the licence and unless the licensee has rolled out its services. Thereafter, a licensee may transfer the licence or any rights thereunder with the prior written consent of Macra and in accordance with the prescribed application for approval of transfer processes.

Frequency spectrum licensing

This is an important aspect of broadcasting because all terrestrial and satellite broadcasting signals are distributed through radio waves and, consequently, make use of the radio frequency spectrum.

Section 31 of the Communications Act specifies that a frequency spectrum licence is required in addition to an electronic communications licence where the provision of the service entails the use of radio frequencies.

Section 83 of the Communications Act makes it an offence to make use of the radio frequency spectrum without a licence unless exempted from doing so. The penalty on conviction is a fine and imprisonment.

Section 83(5) determines that Macra may, in respect of any frequency spectrum licence, determine and impose certain terms and conditions, including the area for which the frequency spectrum licence is valid. Section 84 of the Communications Act prohibits a licensee from transferring the right to use any frequency to any third party, but we presume this is subject to the licence transfer approval process provided for in the section immediately above.

3.4.8 Responsibilities of broadcasters under the Communications Act

Adherence to the Act and the licence conditions

Section 43(1) of the Communications Act empowers Macra to suspend or revoke a licence if this is in the public interest and the licensee:

- has failed to comply with the Communications Act
- has failed to comply with the terms and conditions of their licence
- has contravened the provisions of any other written law relevant to the communications sector
- has failed to comply with any rules or lawful orders given by Macra
- enters into receivership or liquidation
- takes any action for its voluntary winding up of dissolution, enters into any scheme of arrangement, other than in any such case for reconstruction or amalgamation, on terms and within a period as may previously have been approved in writing by the Authority
- is the subject of any order made by a competent court or tribunal for its compulsory winding-up or dissolution
- has ceased, however briefly, to fulfil the eligibility requirements under the Communications Act.

Section 43 of the Communications Act provides that, before the suspension or revocation of a licence, Macra shall inform the licensee by written notice, as soon as practicable, of its intention to suspend or revoke the licence and the reasons therefore. The affected licensee shall be given a reasonable opportunity to make written submissions to Macra within a period specified in the notice which shall be at least 14 days. Macra is required to consider such submissions before deciding concerning the suspension or revocation of the licence, and the suspension or revocation shall take effect only on the expiry of 30 days after the notice is given to the licensee. Macra is required to publish notice of the suspension or revocation of a licence in at least one daily newspaper, but failure or a delay in doing so does not affect the validity of the suspension or revocation.

Adherence to ownership and control limitations

Notwithstanding section 35 of the Communications Act, section 104 requires all content services licensees to maintain a local shareholding of at least 80%, thus limiting foreign shareholders to a 20% stake.

Adherence to content regulations

Section 107(3) requires Macra to regulate content services concerning the matters set out in Schedule 2 of the Communications Act. Section 1 of the second schedule

of the Communications Act gives Macra the power to make rules and to control the content provided through content services. The main principles of content regulation are set out in section 2 of the second schedule; these include:

- to protect the public from offensive and harmful content
- to exclude material that encourages illegal acts
- to present accurate, impartial news
- to present religious material in a balanced, responsible manner
- to protect children.

Adherence to local content regulations

Macra is authorised to issue rules that determine:

- the percentage of local, independent and original content that must be broadcast by content service providers and when this content must be provided, section 3 of the second schedule
- amounts to be expended on local content by television content licensees, if any are so imposed, section 5 of the second schedule
- the amount of local music to be broadcast by sound broadcasting services, section 6 of the second schedule.

Adherence to advertising and sponsorship regulations

Macra must issue rules concerning advertising on broadcasting services, section 7 of the second schedule.

In terms of section 8 of the second schedule, these may include:

- prohibiting or restricting advertising of specified services or products and the methods of advertising and sponsorships that can be used by advertisers or sponsors
- regulating the timing and prominence of advertisements and sponsorships.

Section 9 of the second schedule requires Macra to issue rules for political advertising on broadcasting services (including those exempted from carrying political advertising) and these are required to comply with section 11 of the second schedule dealing with issues such as the maximum coverage that may be given to political advertisements, the primacy of the principle of treating all political parties equally and fairly and that all political advertising is to cease being broadcast at least 48 hours before the commencement of the polling period.

Adherence to educational content regulations

In terms of sections 12 to 14 of the second schedule, Macra is required to issue rules and impose content obligations on specified classes of content licensees to provide content of an educational nature (to be defined by Macra) as a proportion of their broadcasting content. The educational content must be of high quality and suitable to meet the needs of Malawian society. Note that this may pertain only to particular types of content licensees and may not be universally applicable.

Adherence to the right of reply

Sections 15 to 20 of the second schedule deal with the right of reply or, to use the terminology used in that schedule, to the broadcast of a counter version in cases of false facts having been broadcast. It is critical to note that there is a great deal of drafting ambiguity as to whether the initial broadcast has been false or is asserted to have been false by the person or entity concerned, that is, the person about whom the broadcast was made. These sections are detailed and include the timing, cost and manner of the broadcast of the counter version.

3.4.9 Restrictions on broadcasting content

Sections 22 to 34 of the second schedule contain several provisions resembling a code of conduct for broadcasting services licensees concerning content.

General obligations

In terms of section 22 of the second schedule, broadcasting licensees shall:

- not broadcast any material which is indecent, obscene or offensive to public morals, or offensive to the religious convictions of any section of the population, or likely to prejudice the safety of the republic or public order and tranquillity
- exercise due care and sensitivity in presenting materials which relate to acts of brutality, violence, atrocities, drug abuse or obscenity
- exercise due care and responsibility to the presentation of programming, where a large proportion of the audience is likely to be children.

News obligations

In terms of sections 23 to 26 of the second schedule, news obligations of broadcasting licensees include:

- report news truthfully, accurately and objectively
- present news in an appropriate context and a balanced manner, without intentional or negligent departure from the facts
- clearly indicate where a report is founded upon opinion, supposition, rumour or allegation

- immediately rectify news reports where it subsequently appears that a broadcast report was incorrect in a material respect.

Comment

In terms of sections 27 to 29 of the second schedule, the provisions regarding fair comment are as follows:

- licensees are entitled to comment on and criticise any actions or events of public importance
- comment must be clearly presented
- comment must be an honest expression of opinion.

Controversial issues of public importance

In presenting a programme in which controversial issues of public importance are discussed, a reasonable effort must be made to present differing points of view, either in the same or subsequent programme in terms of section 30 of the second schedule.

Additionally, a person whose views, deeds or character have been criticised in a programme on a controversial issue is entitled to a reasonable opportunity to reply in terms of section 31 of the second schedule.

Elections

During an election, broadcasting licensees must ensure equitable treatment of all political parties, election candidates and electoral issues in terms of section 32 of the second schedule.

Privacy

Licensees shall exercise exceptional care and consideration in matters involving the private lives and concerns of individuals; however, the right to privacy may be overridden by a legitimate public interest, section 33 of the second schedule.

Payment for information

A licensee shall not pay criminals for information unless there is a compelling public interest to do so, section 34 of the second schedule.

3.4.10 Is Macra an independent regulator?

In certain respects Macra does have attributes of an independent regulator in that appointments are required to be confirmed by the Public Appointments Committee of parliament which is a multi-party body in terms of section 8(a) of the constitution. Additionally, section 5(3) of the Communications Act does contain wording stating it 'shall be independent in the performance of its functions'.

However, Macra's independence is compromised in the following ways:

- all of its members are appointed without a public nomination process
- a third of the members are *ex officio* representatives of the executive, giving the government a significant voice in the regulator.
- Section 5 of the Communications Act might also compromise Macra's independence if it is interpreted as allowing the minister to impose directions on it. The concern about the impact on Macra's independence is amplified when one considers that the wording in section 5(3) regarding its independence is subject to limitations provided for under the Communications Act 'and any other law'.

This means that Macra does not meet international best-practice standards in appointment requirements for independent bodies and institutional independence.

3.4.11 Amending the legislation to strengthen the broadcast media generally

There are several problems with the legislative framework for the regulation of broadcasting generally in Malawi:

- The overriding problem is that Macra is not a truly independent body.
- The Communications Act ought to be amended to deal with the following issues:
  - Macra members ought to be appointed by the president acting on the advice of the National Assembly after the Public Appointments Committee has drawn up a list of recommended appointees. As part of this process, the Public Appointments Committee should call for public nominations and should conduct public interviews
  - Macra should have no members who are members of government departments. This is particularly so of *ex officio* members as they cannot be removed from office unlike other members
  - Macra should not be required to seek ministerial direction in the performance of its duties.
  - The Communications Act should be adjusted to ensure that it is entirely independent and not include stipulations limiting the independence of Macra in accordance with either the Communications Act or any other law.

3.5 Legislation that regulates the state broadcast media

Part XIV of the Communications Act deals with the Malawi Broadcasting Corporation (MBC). One of the definitions of a public content service in section 1 of the Communications Act is 'any content service provided by the MBC or any other

state-owned enterprise holding a broadcasting service licence'. It is therefore clear that, in terms of the Communications Act, the MBC is seen as a public broadcasting service provider.

3.5.1 Establishment of the MBC

The MBC was established under the now-repealed Malawi Broadcasting Corporation Act, and its existence is continued by section 108 of the Communications Act.

3.5.2 The mandate of the MBC

The MBC's national public broadcasting mandate is broadly set out in section 109 of the Communications Act. There are several aspects to its mandate, including:

- provide programmes which educate, entertain and inform
- encourage free and informed opinion on all matters of public interest
- function without any political bias and independently of any person or body of persons
- reflect the wide diversity of Malawi's cultural life
- respect human rights, the rule of law and the constitution
- support the democratic process
- refrain from expressing its opinion (or that of its board or management) on current affairs or matters of public policy, other than broadcasting matters
- provide balanced election coverage
- have regard for the public interest.

3.5.3 Appointment of the MBC Board

A board of directors controls the MBC. In terms of section 111 of the Communications Act, the MBC board is made up of five appointed members and four *ex officio* members. The *ex officio* members are:

- the secretary for information or his or her representative
- the secretary to the treasury or his or her representative
- the solicitor general or his or her representative
- the secretary for education or his or her representative.

The president is also empowered to appoint all five non-*ex officio* members of the MBC, but this must be done in consultation with parliament's Public Appointments Committee (a multi-party body in terms of section 56(8) of the constitution). It

should be noted that the public appointments committee does not require a public nominations process to make an appointment.

Section 112(2) of the Communications Act sets out the criteria for appointment to the MBC board namely, Malawian citizens who possess qualifications and expertise in a variety of relevant fields including broadcasting, education, engineering, law, information, communication technology, business, finance and public affairs. It is important to note that section 112(3) requires that the president take account of gender equality and the need for continuity of service when appointing board members for the MBC. Importantly, section 112(5) sets out people who are disqualified from being appointed as members of the MBC board. These include anyone who:

- holds a position in a political party
- has in the prior three years been convicted of a crime which is punishable by imprisonment without the option of a fine
- is an undischarged bankrupt
- is a minor
- is a member of parliament
- is a minister or a deputy minister.

The chairperson of the MBC is appointed by the president from among the members of the board, section 112(6). Section 113 of the Communications Act limits membership on the board of the MBC to three years and makes provision for reappointment for only one additional term.

In accordance with section 117 of the Communication Act, the board of the MBC shall appoint the director-general of the MBC who shall be responsible for the day-to-day running of the corporation. The director-general is appointed for three years and can be reappointed for an additional two terms.

3.5.4 Funding for the MBC

Section 118 sets out the allowable sources of funding for the MBC. These are:

- monies appropriated by parliament — that is, specifically allocated to the MBC in the national budget
- grants, donations, subsidies, bequests, gifts, subscriptions, rents, interests and royalties
- proceeds from the sale of MBC property
- proceeds from television licence fees payable by every person owning a television set
- commercial advertising or sponsorships

- investments subject to any directions of a general nature by the Minister of Finance
- loans.

3.5.5 The MBC: public or state broadcaster?

There are many aspects of the regulatory framework for the MBC, which suggests that it is a public as opposed to state broadcaster. Importantly, a multiparty body (in this case the National Assembly's Public Appointments Committee) has to agree with the president before a person can be appointed to the MBC.

However, the fact that four members of the executive branch of government sit as *ex officio* members of the board does indicate a level of governmental involvement in the board, which is not appropriate and not in accordance with international best-practice standards.

Furthermore, while the MBC board compiles an annual report, this is not made to the National Assembly but rather to the minister, section 120. Thus, its accountability appears to be to the executive rather than to the public's elected representatives in the National Assembly.

3.5.6 Weaknesses in the MBC provisions of the Communications Act which should be amended

Three important weaknesses ought to be addressed:

- There should be no *ex officio* members of the MBC board.
- All MBC board members should be appointed by the president, in consultation with the Public Appointments Committee, but following a public nominations process.
- The MBC's annual report should be made to the National Assembly rather than to the minister.

3.6 Legislation that governs signal distribution

The Communications Act defines an electronic communications network as a transmission system and equipment that 'permits the conveyance of signals by wire, radio, optical or other electronic means'. Consequently, this includes a broadcasting signal distribution network which is used to transmit broadcasting signals. In terms of section 31(1) of the Communications Act, providers of electronic communications services require a licence. Section 31(3) makes it an offence to operate without a licence. Section 32 empowers Macra to prescribe the types and categories of electronic communications licences. We deal with the relevant signal distribution licences below in section 4, dealing with regulations. Electronic communications services are required to be 20% locally owned in terms of section 35.

Electronic communications services are required, under section 31(2) of the Communications Act, to have a frequency spectrum licence for any service that makes use of the radio frequency spectrum in addition to any other electronic communications licence they require.

Broadcasters are required to enter into agreements with signal distributors in terms of section 7 of the first schedule to the Communications Act. The rules governing the conditions under which content services (broadcasters) enter into agreements with signal distributors are determined by Macra in terms of section 97(4).

3.7 Legislation governing online media

Online content is regulated in Malawi by the Electronic Transactions and Cybersecurity Act, Act 33 of 2016 (the ETA).

The ETA defines online public communication as meaning 'any transmission of digital data, signs, signals, texts, images, sounds or messages, of whatever nature, that are not private correspondence, by electronic communication means that enable a reciprocal exchange of information between an issuer and the receiver'. This obviously includes content such as web-pages, blogs, vlogs and social media communications such as are found on Twitter, Facebook, YouTube, Instagram, TikTok and the like, but it seems to exclude private communication such as direct messages on Twitter or Facebook, WhatsApp messages, emails and so on.

3.7.1 The regulatory framework for online content providers

The ETA regulates content providers which are defined in section 1 as 'a person or organisation who supplies information for use on a website or an electronic media platform'. This is massively overbroad and includes individuals uploading information such as photographs onto Facebook or Instagram, video material onto YouTube or TikTok and posting tweets on Twitter.

The broadness of the definitions makes many aspects of the ETA entirely unworkable. For example, section 95 of the ETA makes it an offence, punishable (on conviction) by a fine and imprisonment, for an online content provider not to provide the information required in terms of section 31(1) on their webpage. In the case of a natural person, this information includes the name, address, telephone number and email address of the editor. In the case of a legal entity, the corporate name, postal and physical address of the registered office, telephone number, email address, authorised share capital, and registration number of the editor, where applicable, the name of the corporate officer appointed as director of the publication and the editor-in-chief. Online content providers must also provide the name, title, corporate name, postal and physical address of the intermediary service provider which is the person responsible for the provision of access to communications networks, storage hosting or transmission of information by communications networks.

It is clear that many online media publications, including major Malawian media

houses, are not complying with the requirements of section 31 and do not include information such as the authorised share capital, the registration number of the editor or the details of their intermediary service providers on their websites at all, much less on every webpage as is required by the ETA.

What makes this provision additionally unworkable is that many platforms are operated by global entities which Malawi cannot regulate, for example, a Facebook page is not required, under the Facebook platform rules, to be operated under the actual legal name of an individual or corporate entity.

This kind of regulation of the internet is typical of authoritarian governments which hope to encourage self-censorship by creating an atmosphere that discourages freedom of expression.

While section 24(1) of the ETA expressly provides that 'there shall be no limitations to online public communication', section 24(2) goes on to detail a range of content that may be restricted, including child pornography, incitement of racial hatred, xenophobia or violence and justifications for crimes against humanity. It also details content that may be proactively required, including content to promote human dignity and pluralism in the expression of thoughts and opinions and content that protects public order and national security.

Although section 102 deals with the minister's powers to make regulations for all matters for the better carrying out of the provisions of the ETA, we are not aware of any such regulations having been made as yet.

In terms of section 25 of the ETA, intermediary service providers are not liable in any civil and criminal proceedings for any information contained in an electronic message for which they provide services, provided the intermediary service provider has not initiated the transmission of the message, has no actual knowledge of the message and no knowledge of any facts or circumstances from which the likelihood of civil or criminal liability ought to have been known.

Surprisingly, section 32 grants any person who can be identified, directly or indirectly, in an online public communication, the right of reply without prejudice to his right to request correction or deletion of the content. The request is to be made to the editor-in-chief or, where the person editing an online public communication is anonymous, to the intermediate service provider. Section 32 is entirely unclear as to how an intermediary service provider is expected to actualise the right of reply. The online editor is required to publish the reply within 24 hours of receiving it. The ETA makes no provision for a situation where the original communication was factual, fair and accurate. It appears that anyone has the right of reply to any content published online. This is unworkable in practice.

3.7.2 The regulatory framework for online advertisements

Sections 40 and 41 of the ETA provide the regulatory framework for online advertising, namely that advertising must be clearly identifiable as advertising, as must the person for whom the advertisement has been placed. In the case of lotteries,

games and sweepstakes, the terms and conditions must be easily accessible and indicated clearly. Misleading advertising is prohibited.

3.7.3 The regulatory framework for domain name management

A registrar is appointed by Macra to administer and manage the .mw domain and any other Malawian names used for domain names in terms of section 75 of the ETA.

In terms of section 77(1), Macra may make recommendations to the relevant minister concerning policy on any matter relating to Malawian domain names.

Section 78 makes it an offence for any person to manage, administer or operate a second-level domain name without authority, and the penalty is a fine and a term of imprisonment. Section 76(b)(ii) empowers the registrar to publish guidelines on the requirements and procedures on domain name registration. We have not been provided with any such guidelines, and it is unclear if any guidelines have been published to date.

3.8 Legislation that undermines a journalist's duty to protect his or her sources

A journalist's sources are the lifeblood of his or her profession. Without trusted sources, a journalist cannot obtain information that is not already in the public domain. However, sources will often be prepared to provide critical information only if they are certain that their identities will remain confidential and will be respected and protected by the journalist. This is particularly true of so-called whistleblowers, inside sources that can provide journalists with information regarding illegal activities, whether by company or government personnel. Consequently, democratic countries often provide special protection for journalists' sources. It is recognised that, without such protection, information that the public needs to know would not be given to journalists.

Courts Act, Act 1 of 1958

The Courts Act was enacted before Malawi's independence but has been amended numerous times since then. Provisions of the Courts Act might be used to compel a journalist to reveal confidential sources.

- Section 49 of the Courts Act empowers a subordinate court to secure the attendance of any person in court for any purposes and to meet any demand, in such manner as may be prescribed. The effect of this is that a subordinate court is empowered, for example, to require a journalist to attend court and answer questions or produce his or her notebooks in any proceedings taking place before the court.
- Section 50 of the Courts Act empowers a subordinate court to order the imprisonment of any person who fails to comply with an order to attend court.

Penal Code, Act 22 of 1929

The Penal Code was enacted before Malawi's independence but has been amended numerous times since then. Part II of the Penal Code sets out a list of crimes. Chapter XI of the Penal Code (which is found in Part II, Division II) is headed Offences Relating to the Administration of Justice. Section 113 of the Penal Code falls under that heading and deals with offences relating to judicial proceedings. In terms of section 113(1)(b), it is an offence to refuse to answer a question or produce a document, having been called upon to give evidence in a judicial proceeding. The penalty is imprisonment and a fine.

Official Secrets Act, Act 3 of 1913

Section 11 of the Official Secrets Act makes it a misdemeanour for any person to refuse to give information on demand about any offence or suspected offence under the Official Secrets Act to the police commissioner, a police superintendent or any member of the Malawian armed forces. The penalty is a fine and imprisonment.

Preservation of Public Security Act, 1960

Section 9 of the Public Security Act empowers a police officer (or other authorised officer, such as a person with a commission in the armed forces) to order the production of any information, article, book or document from any person if he or she considers it necessary for the preservation of public security. The penalty for failing to comply with such an order is imprisonment.

These provisions might well conflict with a journalist's ethical obligation to protect his or her sources. It is, however, important to note that whether or not requiring a journalist to reveal a source is an unconstitutional violation of the right to freedom of expression will depend on the particular circumstances in each case, particularly on whether the information is available from any other source. Consequently, it is extremely difficult to state that these provisions are, by themselves, a violation of the right to freedom of expression under the constitution.

3.9 Legislation that prohibits the publication of certain kinds of information

Several statutes contain provisions which, looked at closely, undermine the public's right to receive and the media's right to publish information. These statutes are targeted and prohibit the publication of certain kinds of information, including:

- information relating to legal proceedings
- information relating to state security
- information constituting intimidation
- information obtained from public officers relating to corrupt practices

- information insulting the president, the flag and protected emblems
- information which is obscene or contrary to public morals
- information constituting defamation or causing contempt or defamation of foreign princes
- information likely to offend religious convictions
- information harming relationships between sections of the public
- information constituting commercial advertising involving traditional music.

3.9.1 Prohibition of publication of information relating to foreign exchange Prohibition on the publication of information relating to legal proceedings

Censorship and Control of Entertainments Act, Act 11 of 1968

Part VII of the Censorship Act deals with publications, pictures, statutes and records. Section 23(1) of the Censorship Act makes it an offence to import, publish, distribute, sell or offer any publication (which is defined in section 2 as including any newspaper, book or periodical or other printed matter) which is considered 'undesirable'.

Section 23(2) of the Censorship Act contains provisions that deem publications undesirable. In brief, section 23(2)(c) provides that a publication will be deemed to be undesirable if it discloses the following kinds of information concerning any judicial proceedings:

- Any matter which is indecent or obscene, or is offensive or harmful to public morals, including any indecent or obscene medical, surgical or physiological details the disclosure of which is likely to be offensive or harmful to public morals.
- Any particulars relating to divorce proceedings or proceedings for the restitution of conjugal rights other than:
  - names and addresses and occupations of parties and witnesses
  - a concise statement of evidence given (except where this would disclose indecent or obscene matters)
  - submissions on points of law arising in the course of proceedings and the decision of the court thereon
  - the judgment and any observations made by the court in giving judgment.

The penalty for such an offence is a fine and imprisonment, in terms of section 32 of the Censorship Act.

Section 23(5) allows for the board of censors to, on such conditions it deems fit, in

writing exempt any person or institution from any provision of section 23 for any period determined by it and may, in writing, withdraw the exemption for any of the provisions granted under this subsection.

Children and Young Persons Act, Act 7 of 1969

Section 8 of the Children Act makes it an offence to reveal the name, address, school or other particulars which may lead to the identification of any juvenile concerned in the juvenile court proceedings when reporting on such proceedings. The offence carries the penalty of a fine.

The minister is empowered to permit disclosure of such information should he determine such a disclosure is in the public interest.

Mental Treatment Act, Act 14 of 1948

Section 65 of the Mental Treatment Act makes it a crime to publish the names of vulnerable persons involved in court proceedings. The offence carries the penalty of a fine.

Penal Code, Act 22 of 1929

Part II, Division II of the Penal Code contains 'offences against the administration of lawful authority', and Chapter XI, which forms part thereof, is headed 'Offences Relating to the Administration of Justice'. Chapter XI, section 113 of the Penal Code deals with offences relating to judicial proceedings. In terms of section 113(1)(e), it is an offence to publish a report of the evidence taken in any judicial proceeding which has been directed to be held in private. The penalty is imprisonment.

3.9.2 Prohibition on the publication of information relating to state security

Censorship and Control of Entertainments Act, Act 11 of 1968

Part VII, section 23(1) of the Censorship Act makes it an offence to import, publish, distribute, sell or offer any publication (defined in section 2 as including any newspaper, book or periodical or other printed matter) which is 'undesirable'.

Section 23(2) of the Censorship Act contains provisions that deem publications undesirable. In brief, section 23(2)(b)(iv) provides that a publication will be deemed undesirable if it is likely to be contrary to the interests of public safety or public order.

The penalty for such an offence is a fine and imprisonment, in terms of section 32 of the Censorship Act.

Preservation of Public Security Act, Act 11 of 1960

Section 3 of the Public Security Act empowers the minister to make regulations which, among other things, prohibit the publication and dissemination of any

matter that appears to him to be prejudicial to public security. See section 4 on regulations, below.

Penal Code, Act 22 of 1929

Part II, Division I of the Penal Code contains 'Offences against Public Order', which are divided into several parts, including Treason and other Offences against the Government's Authority.

Prohibition on the importation of publications

Section 46 of the Penal Code deals with prohibiting the importation of publications. In terms of section 46(1), if the minister believes that a publication is contrary to the public interest, he may, in his absolute discretion, prohibit the importation of the publication or all publications published by any person.

In terms of section 47, any person who prints, imports, publishes or sells a publication that is prohibited from importation is guilty of an offence and is liable, on conviction for a first offence, to a fine and imprisonment and the publication is to be forfeited.

A clear problem with the provisions of section 46 of the Penal Code is that they are not objective. In other words, the publication does not have to pose a genuine, realistic or objective threat to the public interest; the minister just has to believe this is the case before he makes an order prohibiting the importation of a publication. This does not comply with internationally accepted standards for prohibiting the publication of information.

Prohibition of seditious publications

Section 51 of the Penal Code also falls under the heading 'Treason and other Offences against the Government's Authority'. It provides, among other things, that any person who prints, publishes, sells, distributes or even possesses a seditious publication is guilty of an offence and is liable to a fine and imprisonment. Furthermore, any seditious publication is to be forfeited to the state. Note that in terms of section 50(1), a seditious intention is an intention, among other things, to:

- excite disaffection against the president or government of Malawi
- excite the inhabitants of Malawi to procure the alteration, by illegal means, of any matter established by law
- excite disaffection against the administration of justice in Malawi
- raise discontent or disaffection among the inhabitants of Malawi
- promote feelings of ill-will or hostility between different classes of the population of Malawi.

However, section 50(1) also explicitly provides that a publication is not seditious by reason only that it intends to:

- show the president has been misled or is mistaken in any of his measures
- point out errors or defects in the government or Malawi constitution, or in the legislation or administration of justice in Malawi, to remedy these
- persuade the inhabitants of Malawi to attempt to procure changes by lawful means
- point out, with a view to their removal, any matters which are producing feelings of ill-will between different classes in the population.

Prohibition of false alarming publications

Section 60(1) of the Penal Code falls under Treason and other Offences against the Government's Authority and provides, among other things, that any person who publishes any false statement, rumour or report that is likely to cause fear and alarm to the public or to disturb the public peace is guilty of an offence. Note, however, that section 60(2) specifically provides a defence to this offence, namely that before publication, the person took: 'such measures to verify the accuracy of such statement, rumour or report as to lead him reasonably to believe that it was true'.

Official Secrets Act, Act 3 of 1913

Section 4 of the Official Secrets Act makes it a misdemeanour to communicate (other than to an authorised person) any information which relates to a prohibited place (defined in section 5 as including government-owned establishments), or which has been entrusted to him or her in confidence by any person holding government office. The penalty is a fine and imprisonment.

Protected Places and Areas Act, Act 6 of 1960

The Protected Places Act was enacted before Malawi's independence and has not been repealed. Although it does not directly prohibit the publication of information, section 4 of the Act makes it an offence for any unauthorised person (for example, a journalist) to be in a protected place (defined as a place which has been declared a protected place by the minister) without a permit. The penalty is a fine and imprisonment.

This provision has implications for the media, making it more difficult for journalists to perform their reporting functions.

Prisons Act, Act 9 of 1955

Section 83 of the Prisons Act makes it an offence to publish, whether whole or in part, a letter or document written by a prisoner, which has not been endorsed by a prison officer. The penalty is a fine and imprisonment.

3.9.3 Prohibition on the publication of information that constitutes intimidation

The Penal Code, Act 22 of 1929, sets out a list of crimes. Part II, Offences against Public Order, is divided into three parts, one of which is Unlawful Societies, Unlawful Assemblies, Riots and other Offences against Public Tranquillity. Section 88 makes intimidation an offence; that is, it is an offence to publish any writing threatening a person. The penalty is a fine and imprisonment.

3.9.4 Prohibition on the publication of information that is obtained from public officers and relates to corrupt practices

Although the Corrupt Practices Act, Act 18 of 1995, does not prohibit the publication of information, it is important to note certain prohibitions contained in the Corruption Practices (Prohibition of Abuse of Information Obtained in Official Capacity) Regulations, 1999, which are dealt with in section 4, on regulations, below.

3.9.5 Prohibition on the publication of information that insults the president, the flag and protected emblems

Section 4 of the Protected Flag, Emblems and Names Act, Act 10 of 1967, makes it an offence to publish anything liable to insult, ridicule or show disrespect to, among other things, the president, the Malawian national flag and the national coat of arms. The penalty is a fine and imprisonment.

3.9.6 Prohibition on the publication of information that is obscene or contrary to public morals

Censorship and Control of Entertainments Act, Act 11 of 1968

Part VII of the Censorship Act deals with publications, pictures, statutes and records. Section 23(1) of the Censorship Act makes it an offence to import, publish, distribute, sell or offer any publication (which is defined in section 2 as including any newspaper, book, periodical or other printed matter) that is deemed undesirable.

In brief, section 23(2)(a) provides that a publication will be deemed to be undesirable if it is indecent or obscene or is offensive or harmful to public morals. Note that none of these terms is defined. The penalty for such an offence is a fine and imprisonment, in terms of section 32 of the Censorship Act.

Electronic Transactions and Cybersecurity Act, Act 33 of 2016

Section 85(1) of the ETA prohibits child pornography (defined as representing or an image representing a person who is or is presented to be a person under 18 years of age engaged in sexually explicit conduct) in an electronic form. This is an offence punishable, on conviction, to a fine and imprisonment in terms of section 85(2).

3.9.7 Prohibition on the publication of information that constitutes defamation or otherwise causes contempt and defamation of foreign princes

Defamation — Penal Code, Act 22 of 1929

Part II, Division III of the Penal Code contains Offences Injurious to the Public in General and Chapter XVIII is headed Defamation. Section 200, which falls under that chapter, makes defamation a misdemeanour termed libel.

What is defamatory matter?

Section 201 of the Penal Code provides that defamatory matter 'is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation'.

When is the publication of defamatory matter unlawful?

Section 203 provides that any publication of defamatory matter will be unlawful unless:

- the matter is true, and publication was for the public benefit, or
- publication is privileged.

Two types of privilege are recognised under the Penal Code, absolute privilege and conditional privilege.

Absolute privilege

In terms of section 204 of the Penal Code, the publication of defamatory matter is absolutely privileged in the following cases:

- publications published under the authority of the president, Cabinet or National Assembly
- publications to and by a person having authority over an individual who is subject to military or naval discipline, about that person's conduct and is published by a person who has authority over that individual in respect of such conduct
- publications arising from judicial proceedings published by a person taking part in the proceedings in an official capacity
- fair reports of anything said, done or published in Cabinet or the National Assembly
- if the publisher was legally bound to publish the matter.

Once the publication of defamatory matter is absolutely privileged, it is immaterial if the matter is false or published in bad faith.

Conditional privilege

In terms of section 205 of the Penal Code, the publication of defamatory matter is conditionally privileged provided:

- it is published in good faith
- the relationship between the parties by and to whom the publication is made is such that the persons publishing and receiving the matter are under a legal, moral or social duty to publish or receive same, or has a legitimate personal interest in publishing or receiving same
- publication does not exceed, either in extent or subject matter, what is reasonably sufficient for the occasion, and in any of the following cases, namely, if the matter published:
  - is a fair and substantially accurate report of court proceedings, provided the court has not prohibited publication
  - is a copy or a fair abstract of any matter which has previously been published and which was absolutely privileged
  - is an expression of opinion in good faith as to the conduct of a person in a judicial, official or other public capacity or as to his personal character so far as it appears in such content
  - is an expression of opinion in good faith as to the conduct of a person as disclosed by evidence given in a public legal proceeding, or as to the conduct or character of any person as a party or witness in any such proceeding
  - is an expression of opinion in good faith as to the merits of any book, writing, painting, speech or other work, performance or act published or publicly made or otherwise submitted by the person to the judgment of the public, or as to the character of the person in so far as it appears in such work
  - is a censure passed by a person in good faith on the conduct or character of another person in any matter, where he or she has authority over that person
  - is a complaint or accusation about an individual's conduct or character made by a person of good faith to a person having authority over the individual and having authority to hear such complaints
  - in good faith for the protection of the rights or interests of
    - the person publishing it
    - the person to whom it was published.

Definition of good faith

In terms of section 206 of the Penal Code, a publication of defamatory matter will

not be deemed to have been made in good faith if it appears that:

- the matter was untrue, and the publisher did not believe it to be true
- the matter was untrue, and the publisher did not take care to ascertain whether it was true or false
- the publisher acted with intent to injure the person defamed in a substantially greater degree than was reasonably necessary for the public interest or for the protection of a privileged interest.

There is a presumption of good faith if defamatory matter was published on a privileged occasion, unless the contrary is proved, in terms of section 207 of the Penal Code.

Censorship and Control of Entertainments Act, Act 11 of 1968

Part VII, section 23(1) of the Censorship Act makes it an offence to import, publish, distribute, sell or offer any publication (which is defined in section 2 as including any newspaper, book, periodical or other printed matter) which is deemed undesirable.

In brief, section 23(2)(b)(ii) provides that a publication will be deemed undesirable if it is likely to bring any member or section of the public into contempt. Note that the term contempt is not defined, but it appears to imply a lowering of someone's standing in the community and would be similar to defamation. The penalty for such an offence is a fine and imprisonment in terms of section 32 of the Censorship Act.

Defamation of Foreign Princes — Penal Code, Act 22 of 1929

Section 61 of the Penal Code, although still forming part of Part II of the Penal Code, which sets out a list of crimes, and of Division I of Part II which contains Offences against Public Order falls under the heading Offences Affecting Relations with Foreign States and External Tranquillity. Essentially it makes it an offence to publish anything tending to degrade, revile, expose to hatred or contempt any foreign prince, potentate, ambassador or other foreign dignitary with intent to disturb the peace and friendship between Malawi and that person's country.

3.9.8 Prohibition on the publication of information that is likely to offend religious convictions

Censorship and Control of Entertainments Act, Act 11 of 1968

Part VII, section 23(1) of the Censorship Act makes it an offence to import, publish, distribute, sell or offer any publication (which is defined in section 2 as including any newspaper, book or periodical or other printed matter) which is deemed undesirable.

Section 23(2) of the Censorship Act contains several provisions that deem

publications undesirable. In brief, section 23(2)(b)(i) provides that a publication will be deemed undesirable if it is likely to offend the religious convictions or feelings of any section of the public. The penalty for such an offence is a fine and imprisonment in terms of section 32 of the Censorship Act.

Penal Code, Act 22 of 1929

Part III of the Penal Code sets out a list of Offences Injurious to the Public in General, and Chapter XIV sets out Offences Relating to Religion. Section 130 of the Penal Code falls under that heading and makes it a misdemeanour to 'write any word or place any object' with the deliberate intention of wounding the religious feelings of any other person. The penalty is imprisonment.

3.9.9 Prohibition on the publication of information that harms relations between sections of the public

Part VII, section 23(2)(b)(iii) of the Censorship and Control of Entertainments Act, Act 11 of 1968, provides that a publication will be deemed undesirable if it is likely to harm relations between sections of the public. The penalty for such an offence is a fine and imprisonment in terms of section 32 of the Censorship Act.

3.9.10 Prohibition on the publication of information that constitutes commercial advertising involving traditional music

Section 4 of the Commercial Advertising (Traditional Music) Control Act, 1978, makes it an offence to publish any sound, cinematographic or photographic record of any Malawi traditional music or dancing for use in commercial advertising. This is defined in section 2 of the Act as music, dancing, singing or drumming performed in connection with any official celebration or act of public acclaim of the president or any other notable person or visitor to Malawi. The offence is punishable by a fine or imprisonment.

3.9.11 Prohibition of publication of information relating to foreign exchange

Section 8 of the Exchange Control Act, Act 17 of 1984 makes it an offence for any person to publish 'any information related to foreign exchange' unless done so in the process of compiling statistics or satisfying a court order. The definition relating to non-publishable material does not align with international best practice relating to freedom of expression in a democratic country.

3.10 Legislation that specifically assists the media in performing its functions

In countries that are committed to democracy, governments pass legislation that specifically promotes accountability and transparency of both public and private institutions. Such statutes, while not specifically designed for use by the media,

can be, and often are, used by the media to uncover and publicise information in the public interest.

3.10.1 Access to Information Act, Act 13 of 2017

The Access to Information Act (AIA) was passed to provide for the right of access to information held by public bodies and private bodies in certain circumstances.

In terms of section 3(1) of the AIA, the Schedule to the AIA sets out the information holders to which the Act applies. These are:

- the executive, all its organs and persons in their service
- the legislature, all its organs and persons in their service
- the judiciary, all its organs and persons in their service
- institutions and organisations in which the government holds shares or exercises financial or administrative control and persons in their service
- commissions established under the constitution or an act of parliament and persons in their service
- organisations contracted by the government to do work for the government and persons in their service
- NGOs constituted for public benefit and persons in their service.

This last inclusion is noteworthy as NGOs are not public institutions, and it is extremely unusual for private organisations such as NGOs to be expressly included in access to information legislation.

In terms of section 3(2) of the AIA, the following records are exempt from the provisions of the Act:

- Cabinet records and those of its committees
- court records before the conclusion of a matter.

Section 5 of the AIA is extremely interesting. Section 5(1) provides that any person has the right to access information that is required for him or her to exercise their rights which is under the control of a public body or a relevant private body to which the Act applies expeditiously and inexpensively. This requires some discussion. A 'relevant private body' is defined in section 1 as:

> *a body which would otherwise be a private body that is*
>
> *(a) wholly or partially owned, controlled or financed directly or indirectly by public funds; or*
>
> *(b) carries out a statutory or public function or service but only to the extent of such function or service.*

The effect of this is that private bodies are not subject to the Act unless they are NGOs or private bodies engaged in providing public services or which are state-funded. Further, the restrictions regarding exercising rights mean that there is no blanket right of access to information held by public bodies. Instead, there is a hurdle of demonstrating that the information is required to exercise another right.

Part II of the AIA sets up an oversight mechanism for implementation of access to information. Section 7 designates the Human Rights Commission (HRC), set up in terms section 129 of the constitution, as the oversight body for implementation of the provisions of the AIA. In terms of section 8 of the AIA, the HRC, in performing its oversight functions, is empowered to:

- raise awareness of the right to access of information. This is expanded in terms of section 9 of the AIA, which requires the HRC publish:
  - the objects of the AIA
  - contract details of the HRC as it relates to the AIA
  - methods for applying for access to information through both the information holder and the HRC
  - the rights of the public and any available assistance available to them from the HRC as it relates to the AIA.
- advise the information holders on the management of information in their custody
- review applications for access to information and advise the information holders on those applications
- make recommendations to government regarding the declassification of information exempt from disclosure to enable access to that information
- review decisions made by information holders as they relate to the denial of requests for access to information.

Importantly, in terms of section 10 of the AIA, 'no civil or criminal proceedings' may be made against any staff member of the HRC or information holder to which the AIA applies for the disclosure of information done in good faith. This is important as it serves to encourage public servants to provide access by shielding them from court proceedings in the event of an incorrect granting of access to information done in good faith.

In terms of sections 15 to 17 of the AIA, information holders are required to publish certain information relating to their functions and operations; these include manuals, procedures, forms and annual reports. In terms of section 16(3) of the AIA, information holders are required to update and republish any of the required information in cases where material changes to the information have occurred.

In terms of section 25 of the AIA, in cases where an information holder refuses an application for access to information, they are required to inform the applicant of

their reasons why and specify the provisions in the AIA they have used to justify their decision. The information holder is also required to inform the applicant of the availability of a review process on the decision and how to lodge a request for review of a decision.

Sections 28 to 36 of AIA makes it clear that there are grounds for refusing access to information. Refusal to disclose the requested information may be done only in cases where the information requested:

- is specifically exempted from the provisions of the AIA, such as Cabinet records, section 28(1)
- would constitute an unreasonable disclosure of personal information of a third party, section 29
- can reasonably be expected to cause damage to the security or defence of Malawi or the defence of a foreign government and the information has been communicated in confidence, section 30(a)
- could compromise the identity, or reveal the existence, of confidential sources of information concerning the administration or enforcement of the law, section 30(b)
- could endanger the life, health or physical safety of any person, sections 30(b) and 31
- could cause substantial harm to the legitimate interests of Malawi concerning crime prevention, section 30(c)
- relates to an ongoing academic or recruitment process, and the release of the information could jeopardise the integrity of the process, section 33(1). However, in terms of section 33(2) of the AIA the information may be disclosed once the process has been completed
- contains trade secrets of the information-holder or third party, section 35(a);
- contains information relating to the information-holder or a third party that would substantially prejudice the legitimate interest of either of them, section 35(b)
- where the information-holder considers the request for access to information to be malicious, frivolous or vexatious. The information-holder must state the reasons for the refusal to disclose the information, section 36
- consists of confidential medical information between a medical practitioner and a patient, section 32(1)(a)
- consists of confidential communication between a lawyer and a client, section 32(1)(b)
- consists of confidential communication between a journalist and an informant,

section 32(1)(c). This is very important as it assists journalists and the media in the protection of their sources by guaranteeing a journalist's right to refuse to reveal information that pertains to his or her confidential informants

- would otherwise be privileged from production in legal proceedings, section 32(1)(d).

It is noteworthy that, in terms of section 32(2) of the AIA, privileged information regarding medical patients, legal clients, information sources or any other person entitled to the privilege of confidentiality of information can be released when the person either consents to, or a court order demands, the release of the information.

Section 34 of the AIA specifically relates to information that may be withheld for the protection of Malawi's international relations. This information is protected where:

- the information has been supplied by, or on behalf, of Malawi to another state or international organisation pursuant to an international agreement which requires the information to be held in confidence
- confidentiality is required under international law
- the information relates to positions adopted, or to be adopted, by Malawi or another state or organisation that relates to present or future international negotiations
- the information constitutes diplomatic correspondence
- the information would substantially prejudice the relations between Malawi and another state or international organisation.

Section 37 of the AIA is awkwardly drafted, but it appears to allow an information-holder to release third party information that would otherwise be exempt from disclosure if this is in the public interest (note this is not defined). This requires them to notify any affected third party of the impending release and inform them of:

- the right to have the decision reviewed
- to whom requests for review should be submitted
- the deadline for making an application for review.

Section 38 of the AIA provides that, in cases where an information-holder refuses to grant access to information, the information-holder must prove that:

- the information is exempted from disclosure under the AIA or
- harm would result from the disclosure of the information under the relevant exemption.

Part IX of the AIA is of importance to the media as it relates to the protection of whistleblowers. Section 50(1) of the AIA provides that no one may:

> ***be penalised in relation to any employment, profession, voluntary work, contract, membership of an organisation, the holding of an office or in any other way as a result of having made or attempted to make a disclosure of information which the person obtained in confidence in the course of that activity if the disclosure is of public interest.***

While public interest is not defined, section 50(4) sets out examples of such information including:

- violations of the law, including human rights violations
- mismanagement of funds
- conflicts of interest
- corruption
- abuse of public office
- risks and threats to public health, safety and the environment.

Any disclosures made to a law enforcement agency or an appropriate public agency under section 50(1) shall be deemed to have been made in the public interest, section 50(2).

Section 50(3) of the AIA provides that any person who has information they believe to be in the public interest and has a reasonable belief in the truthfulness of the information is required to disclose the information.

Section 50(5) of the AIA provides that a person shall be considered to have been penalised in cases where that person is:

- dismissed
- discriminated against
- made the subject of reprisal or another form of adverse treatment
- denied appointment, promotion or advantage that otherwise would have been provided if they hadn't acted as a whistleblower.

In terms of section 50(6) of the AIA, any term of any settlement that relates to the disclosure of information that includes any clause that imposes confidentiality on any of the parties involved concerning information that is accurate 'shall be unenforceable'.

Section 50(7) of the AIA provides that it shall be a defence in any proceedings held for the contravention of any statutory prohibition or restriction on the disclosure of information, that the disclosure was in the public interest or the disclosing official believed it was in the public interest.

Part X of the AIA sets out several different offences, the penalties for which are a fine or a fine and imprisonment. In brief:

- destroying, damaging, altering, concealing or falsifying a record, while trying to deny a right of access, section 51
- maliciously falsifying information intending to injure another person, section 52
- wrongfully refusing to disclose information, section 53
- using information granted to him or her under this Act for unlawful purposes, for a reason other than for the purpose for which the request was made (without the permission of the information-holder), or in a manner that is detrimental to the interests of public officers, the information-holder or the public interest, section 54.

3.10.2 The National Assembly Powers and Privileges Act, Act 4 of 1957 (Powers and Privileges Act)

The Powers and Privileges Act confirms the privileges and immunities that are given to members of parliament in terms of section 60 of the constitution dealt with above.

An important additional section in the Powers and Privileges Act is section 25 which protects anyone in civil proceedings from an adverse finding for reporting about parliamentary votes and proceedings and for publishing reports or extracts of reports, minutes or other matters in good faith and without malice.

3.10.3 The Courts Act, Act 47 of 1967 (Courts Act)

In terms of section 60 of the Courts Act, court proceedings should occur in open court to which the public should have access, but if, in the opinion of the presiding judge, it is in the interests of justice, the proceedings may be heard *in camera*. This means that journalists have access to judicial proceedings unless they are specifically refused access by the presiding judge.

3.10.4 The Criminal Procedure and Evidence Code Act, Act 36 of 1967 (Criminal Procedure Act)

In terms of section 71 of the Criminal Procedure Act, all court proceedings must be held in open court to which the public shall generally have access; however, the court has the power to hear all or part of a matter before them in a closed court, outside public viewing.

It should be noted that section 71(b) excludes matters before courts that include:

- proceedings relating to juveniles
- high court proceedings relating to people under the age of 18 years

- the deliberation of a jury in the course of any proceedings
- proceedings, other than a trial or inquiry that the Chief Justice directs, in writing, should be heard in a closed court.

In terms of section 71A of the Criminal Procedure Act in matters where evidence is being given by a victim of sexual assault, and upon application by a party to the proceedings or the victim of the assault, the presiding judge may require the evidence be held in a closed court.

These sections ensure that judicial proceedings are available to the public, and journalists may attend and report on court matters.

4 Regulations affecting the media

In this section, you will learn:

- ▷ what regulations are
- ▷ regulations governing the media generally
- ▷ regulations governing the broadcast media
- ▷ regulations governing digital terrestrial television broadcasting (DTT)

4.1 Definition of regulations

Regulations are subordinate legislation. They are legal rules that are made in terms of an empowering statute (for example, an act of parliament), and are made by a public functionary, usually a minister or a regulatory body.

4.2 Key regulations governing the media generally

The Public Security Regulations published in Government Notice 70 of 1964 (the Security Regulations) were passed in terms of the Public Security Act (see the section on legislation above). The regulations have significant implications for the media because they contain prohibitions on publication, as well as provisions that undermine a journalist's duty to protect his or her sources.

Section 4 of the Public Security Regulations makes it an offence to, and prohibits any person from, publishing anything likely to:

- be prejudicial to public security

- undermine the authority of the government
- promote feelings of ill-will or hostility between sections, classes or races of the inhabitants of Malawi.

The penalty is a fine and imprisonment.

Section 9 of the Security Regulations empowers an army or police officer or any other person authorised as an officer by the relevant minister or the Commissioner of Police to demand the production of or seize any information or document in a persons' possession if the officer considers it necessary in the interests of public security. Failing to comply is an offence punishable by imprisonment. It is important to note that the criterion here is not an objective one; it is based on the opinion of the officer and not on the objective test of actually being in the interests of public security. Consequently, this provision is not in accordance with international best practice.

4.3 Key regulations governing the broadcast media

4.3.1 The Licensing Regulations

The Communications Act, in section 6(2)(b), authorises Macra to grant licences for the provision of communication services in Malawi. This is expanded in section 32 of the Communications Act giving Macra the authority to dictate rules concerning the types and categories of communications licences that Macra will prescribe. In accordance with these provisions in the Communications Act, the Minister of Information and Communications Technology, on the advice of Macra, issued the Communications (Telecommunications and Broadcasting Licensing) Regulations published in Notice No. 32 Gazette No, 15A dated 25 November 2016 (the Licensing Regulations). For this chapter, we will focus on licences dealing with broadcasting and signal distribution.

Categories of licences

In its relevant part, the first schedule to the Licensing Regulations provides for the following classification of licences:

- *Broadcasting signal distribution licences* (category 2b): authorise licensees to provide broadcasting distribution services for terrestrial television and radio. Licences in this category are divided into two sub-categories, those provided with national signal coverage and those who are self-provisioning (that is broadcasters who are providing their own signal distribution). While national broadcast signal distributors are authorised to carry the broadcast signal of other broadcasters, self-provisioning broadcast signal distributors may only carry their own signal. The licences are individual licences and last for ten years. The fees associated with licencing include an application fee, an initial fee and an annual fee. Licensees are also required to pay a levy of 1% of their gross annual revenue to Macra.

- *Broadcast (content) services licences* (category 4): authorise licensees to provide broadcasting content services by satellite and terrestrial television and radio broadcasting. Licences in this category are divided into seven sub-categories, being national television and radio, public national television and radio, regional radio, community radio and subscriptions management services. The licences are individual licences and last for seven years. The fees associated with licencing include an application fee, an initial fee and an annual fee. Licensees are also required to pay a levy of 1% of their gross annual revenue to Macra.

Applications for licences

Part II of the Licensing Regulations focuses specifically on the licensing scheme. In terms of section 5 of the licensing regulations, Macra is authorised to issue licences in accordance with the above categories for the periods stated in the first schedule. This section also requires licensees to pay the fees outlined in the first schedule of the licensing regulations.

The Licensing Regulations are extremely poorly drafted and many of their provisions appear to contradict and be *ultra vires* the provisions of its governing legislation, namely the Communications Act. For example, the Communications Act, section 38, requires a restricted procedure for licensing electronic communications that require the allocation of scarce resources such as the radio frequency spectrum. However, the Licensing Regulations make no reference to a restricted licensing process and specifically make provision, in section 6(5), for a person wishing to provide an electronic communications service to apply for a licence making use of the prescribed forms at any time. If such a person wishes to make use of the radio frequency spectrum, then section 8(3) of the Licensing Regulations requires that a separate application for radio frequency licence be made after the electronic communications licence has been granted by Macra. The result of this is that it is extremely unclear how Macra conducts its processes in respect of broadcasting and signal distribution licences.

Modification of licences

Section 10 of the Licencing Regulations empowers Macra to modify or amend licences in the following circumstances:

- for the efficient management of the communications sector, as long as the amendment does not cause substantial prejudice to the licensee
- to comply with international agreements
- when the amendment is in the public interest
- with the agreement of the licensee.

Licensees may apply, in writing, for an amendment to be made to any term of their licence.

Before amending any provision of any licence, Macra must give the licensee and all interested parties notice of the amendment in the gazette, as well as an opportunity to make representations concerning the proposed amendment.

Section 10 also makes provision for Macra to conduct investigations regarding uses of licences that are not in the public interest as a precursor to potentially amending a licence to solve the identified problem.

Renewal of licences

In terms of section 11 of the Licensing Regulations, before renewing any communications licences, Macra must evaluate the licensee to determine that they:

- have performed in accordance with the obligations of their licence
- continue to meet the eligibility requirements
- continue to be financially and technically capable
- have not contravened any provisions of the Communications Act, the conditions of their licence or any other relevant laws issued by Macra.

Macra must also determine that the renewal would be in the public interest.

Unless otherwise stipulated, licensees must apply for the renewal of their licences six months before their expiry and Macra shall renew the licences on receipt of the prescribed fee. It should be noted that Macra may issue the renewal with little or no changes to the licence, or else issue an entirely new licence with new conditions, depending on the needs of the prevailing regulatory environment.

General conditions of licences

Part III of the Licensing Regulations, General Conditions, outlines the basic provisions of service to which all licensees must adhere to meet the requirements of their licences.

Section 12 outlines the first which is that, unless otherwise provided, a licensee is required to complete the rollout of its licenced services within 12 months of receiving the licence, should they fail to do so due to a *force majeure* reason, as determined by Macra, the licensee may request an extension. If Macra is satisfied with the *force majeure* reasons, they may issue an extension. If the licensee again fails to provide the licenced service, the licence will be revoked.

Within four months of the end of each financial year, licensees must give Macra audited financial statements certified by a qualified independent auditor. Macra may request other documentation to fulfil the provisions of these regulations, section 14.

Section 15 of the Licensing Regulations require that licensees do not intentionally interrupt or suspend the operation of a licenced service without informing Macra in writing and providing advance notice to any persons likely to affected.

Section 17 is related to technical requirements with which licensees must comply. If Macra determines any facility operated by a licensee does not meet the required standards, they may seal the installation.

Licensees are required to ensure the privacy of any information it has obtained in the course of business and is required to keep sufficient records of confidentiality procedures to the satisfaction of Macra, section 18.

Section 21 requires that any licensee take all adequate safety measures to ensure that proper safety measures are taken to ensure the safe use of its equipment or installations.

Section 23 prohibits discrimination by licensees, and section 24 prohibits anti-competitive behaviour which Macra views as inhibiting or impeding fair competition.

Section 25 requires that licensees conform to the complaints handling requirements provided in the regulations made under the Communications Act and in complaints handling procedures issued by Macra. Licensees are required to file its complaints handling procedures with Macra.

Section 26(2) reaffirms the requirements laid out in the Communications Act that all licensees have a minimum of 20% local Malawian shareholding, except for broadcasting (content) services which are required to have an 80% local shareholding in terms of the Communications Act.

In terms of section 26(3), a licensee may not make any shareholder changes without the prior approval of Macra, and an application for approval is required to be made in accordance with the provisions of section 26(4). Any shareholding changes in a licensee made without the prior approval of Macra may result in the revocation of the licence in terms of section 26(5).

Transfer of licence obligations

Licensees are prohibited from transferring any of the rights or obligations licensed to them without the prior approval of Macra in terms of section 22(1). The transferee is treated as a new applicant in term of section 22(5).

Specific licence conditions

Part IV of the Licensing Regulations stipulate requirements specific to the categories of licences. Section 30 relates to broadcasting (content) services licences and requires that a licensee submits to Macra:

- its programme line up
- its human resource development created in terms of section 31 of the licensing regulations which requires that licensees make reasonable provisions to ensure that Malawian Nationals in their employment acquire the necessary skills and knowledge to discharge their duties effectively

- proof of qualified staff.

Enforcement and complaints

Section 32 of the Licensing Regulations outlines the procedure to be followed when a complaint is made against a licensee. Macra is required to investigate any matter where it suspects a licensee has contravened the terms of its licence. If Macra determines that there has been a contravention of the Communications, Act, regulations passed thereunder or of the licence conditions, it must decide on the matter. Macra has the authority to give a licensee an interim order to stop specific conduct before an investigation has been undertaken or concluded.

Where Macra has determined that a licensee has contravened a provision of the Communications Act, a regulation or a condition of its licence, Macra must impose a sanction in line with the severity of the contravention and the licensee's history of contraventions, if any. Macra may consider mitigating factors.

Revocation of a licence

Section 33 of the Licensing Regulations empower Macra to revoke a licence where it determines that:

- there has been a substantial or continuing breach of a licence condition, a regulation or of the Communications Act
- the licensee has been declared insolvent
- the licensee has agreed, in writing, to the revocation of its licence.

Before revoking a licence, Macra must notify the licensee of the alleged breach and give the licensee 30 days to remedy the breach or show cause why the licence should not be revoked.

Where a licence is revoked, licensees are required to surrender their licence within 14 days.

4.3.2 The Broadcasting Regulations

The Communications Act, section 200, empowers the Minister of Information and Communications Technology, on the recommendation of Macra, to issue regulations relating, among other things, to broadcasting. The minister has passed the Communications (Broadcasting) Regulations published in Notice No 26 Gazette No 10A dated 28 June 2019 (Broadcasting Regulations). The Broadcasting Regulations deal with a broad range of issues as set out below. Where these regulations merely repeat provisions of the Communications Act, we do not include them in this section.

General broadcasting provisions

Part II of the Broadcasting Regulations relates to general provisions in broadcasting.

Sections 5 and 6 of the Broadcasting Regulations define the categories and associated fees and levies associated with the different types of broadcasting content licences. Failure to pay the fees prescribed by Macra is an offence, the penalty for which is a fine and a term of imprisonment in terms of section 52 of the Broadcasting Regulations

Section 7 of the Broadcasting Regulations requires that a successful applicant for a broadcasting licence is required to roll out its services within 12 months for television and six months for a radio broadcasting service. This period will not be extended, except on the ground of *force majeure*.

In terms of section 8 of the Broadcasting Regulations, licensees must publish a notice in a newspaper with wide circulation in the licensee's coverage area 14 days before the commencement of service.

Section 9 of the Broadcasting Regulations empowers Macra to amend a licence:

- to ensure efficient management of the communication sector
- to comply with any international broadcasting standards
- at the request of the licensee.

Section 10 of the Broadcasting Regulations requires licensees to apply for renewal of their licences six months before expiration. Where licences are renewed, licensees must pay the requisite fees.

Section 11 of the Broadcasting Regulations prohibits licensees from broadcasting discriminatory material. Additionally, broadcasters are required to:

- maintain editorial independence
- respect copyright obligations
- keep and store sound and video recordings of all programmes broadcast for a minimum period of three months or such further period as Macra may direct
- ensure the provision of programming that is accessible to disabled persons;
- annually file information with Macra showing their station identity and any changes thereto, ensuring that their station identity is unique and does not cause confusion; this identity must be broadcast every 60 minutes
- keep records as required by Macra
- state, at least twice within twenty-four hours, all the frequencies and channels on which the broadcasting station is licensed to operate
- free-to-air broadcasting licensees must provide the amount of local content as specified in the licence, news and information in its programming, as well as discussions on matters of national importance and adhere to any applicable code of conduct as well as its programming schedules.

In terms of section 12 of the Broadcasting Regulations, licensees are required to stipulate the broadcasting format it intends to provide on its licence application and ensure that its programming conforms to its broadcast format.

Obligations on specific categories of broadcasters

Public broadcasters

Section 16 of the Broadcasting Regulations sets out the responsibilities of a public broadcaster; these include the requirement that public broadcasters:

- provide independent and impartial broadcasting services of information, education and entertainment in English and Chichewa and other languages at the broadcaster's discretion
- conduct the broadcasting services impartially and consider the interests and susceptibilities of the different communities in Malawi
- provide and receive material to be broadcast, without changing their distinctive identity or failing to cater to audiences not catered for by other public broadcasting services.

Other regulations outlined in section 16 of the Broadcasting Regulations include where public broadcasters may generate their revenue and prohibits public broadcasters from transferring or leasing the frequency assigned to them for public broadcasting. On request by the public broadcaster, Macra may grant a public broadcaster a licence to provide a commercial broadcasting service. Public broadcasters are required to adhere to programming quotas outlined by Macra.

Commercial broadcasters

Section 17 of the Broadcasting Regulations sets out the responsibilities of a private commercial broadcasting licensee providing commercial free-to-air broadcasting services, including restrictions and quotas on programming. Macra, in consultation with the Minister of Information and Communication Technology, is authorised to license foreign commercial content broadcasters, subject to availability of frequencies or channels. Section 17 also sets out when advertisements are to be broadcast and how long broadcasters must keep records of the programming for inspection by Macra.

Community broadcasters

Section 18 of the Broadcasting Regulations provides for Macra to issue community content licences on geographical or interest-based categories. It also outlines the broadcasting requirements to which community broadcasters are required to adhere. Funding for community broadcasting licensees is required to ensure that all the funds generated from the operations of a community broadcasting station are reinvested in activities benefiting the community; this will be monitored by Macra.

Community Broadcasting Licensees must ensure that their services are available to the members of the community so that they can participate in the programmes, express their needs and wants or discuss issues of interest relating to their own community. It must be based within the community which it is serving or at a strategic location and be equally accessible by the entire community so that community members can reach the station and benefit from it. Community content broadcasters must be affordable, acceptable and accountable to the community they serve.

Subscription broadcasting services

Sections 19 and 20 of the Broadcasting Regulations provide for Macra to issue subscription broadcasting services licences for subscription broadcasting and subscription management services. Macra may require a licensee granted a licence to distribute broadcasting services, whether by cable or satellite within Malawi and provide a prescribed minimum number of Malawian broadcasting channels. Satellite subscription broadcasting service providers, whose signal originates from outside Malawi and who intend to provide its broadcasting services in Malawi, must provide such services through a person with a subscription management service licence.

Subscription broadcasting services or subscription management services licensees are prohibited from acquiring exclusive rights for the broadcast of any event which is classified to be in the public interest by Macra and must ensure the provision of 'free to air' broadcasting services on its bouquet as determined by Macra. Subscription broadcasting services, or subscription management services, are required to provide Macra with equipment and access to their services free of charge.

Special event broadcasting

Macra may issue a special event broadcasting licence to any person for any event not lasting for more than 30 days. The broadcasting of a special event without a licence is an offence the penalty for which is a fine in terms of section 21 of the Broadcasting Regulations.

Programming classification and the watershed period

Section 24 of the Broadcasting Regulations provides that the watershed period shall be from 22h30 to 04h30 and, besides allowing for the broadcast of content that is classified not suitable for children in this period, broadcasters may also broadcast promotional material which is unsuitable for children. Broadcasting of material which is unsuitable for children outside the watershed period is an offence the penalty for which is a fine or imprisonment.

News and opinion broadcasting

Sections 26 to 29 of the Broadcasting Regulations provide the requirements on licensees when broadcasting news programming. Licensees must ensure news is accurate and, where a news report contains an allegation against any person, they

must be given the opportunity to reply. Licensees must also ensure that reports or broadcasts from its station are based on facts and not opinion unless the broadcast makes this clear. In cases where there is sufficient reason to doubt the accuracy of a report, and it is not possible to verify the report, it must not be broadcast. In cases where a report broadcast is determined to be incorrect, the licensee must retract the report and announce the error with the same prominence as the original report; this retraction must take place within 48 hours of the original report.

Interviews

Section 31 of the Broadcasting Regulations provides that, in the case of interviews, the person being interviewed must be advised of the subject of the interview and informed before the interview takes place whether the interview is to be recorded or broadcast live. Children may not be interviewed without the consent of a parent or guardian. In cases where interviews are being conducted with the bereaved or survivors or witnesses of traumatic events, licensees must exercise all necessary sensitivity. Improper conduct of an interview is an offence, the penalty for which is a fine.

Advertisements and sponsorships

Section 37 to 40 of the Broadcasting Regulations provide for the regulation of advertisements and sponsored content. Where licensees have received sponsorship to air a programme, the licensee must retain ultimate editorial control and must ensure that sponsorship of an informative programme does not compromise the accuracy and impartiality of the content of the programme. Licensees may not discriminate unreasonably against any sponsor, and sponsorship of a programme must be acknowledged immediately before and after the programme broadcast. Sponsoring programmes in breach of regulations is an offence, the penalty for which is a fine.

Licensees must ensure that its advertisements are lawful, decent and in conformity with the principles of fair trade; they must also be sensitive to gender culture, religion and age, and must be prepared with a sense of responsibility to the audience. Advertisements may not contain misleading material or attack competitors. Licensees must, where reasonably possible, ensure the accuracy of advertisements. Licensees are required to exercise responsible judgment when scheduling advertisements that may be unsuitable for children. Broadcasting advertisements in breach of these regulations is an offence, the penalty for which is a fine.

Broadcasters are prohibited from broadcasting infomercials for more than four hours a day, or during the transmission of a children's programme. Infomercials must be distinguishable from other programming and must be lawful, decent and in conformity with the principles of fair trade and must be prepared with a sense of responsibility to the audience. Broadcasting infomercials in breach of regulations is an offence, the penalty for which is fine.

Audience participation

Where audiences are invited on air to react or participate in a programme or competition, section 41 of the Broadcasting Regulations provides that licensees inform the public of the full cost of a telephone call or short message service. Audience members must be appraised of the rules of any competitions.

Local content requirements

Section 43 of the Broadcasting Regulations provides that, for this regulation, local content shall mean content:

- made by authors, producers and persons who are Malawians
- produced under the creative control of Malawians
- where production is supervised and controlled by one or more producers established in Malawi
- where a co-production is not controlled by one or more producers based outside Malawi
- where the production originates from any other country, and the production is made exclusively by Malawians or in co-production with non-Malawians in that country.

A licensee shall, within a period specified by Macra, comply with the requirements on the broadcasting of minimum local content as specified in the second schedule. The requirements differ depending on the broadcasting licence:

- public television content broadcasting licensees — 50%
- commercial television content broadcasting licensees — 35%
- subscription television content broadcasting licensees — 8%
- public sound broadcasting licensees — 60%
- private sound broadcasting licensees — 40%
- community sound broadcasting licensees — 40%.

Broadcasting in breach of local content requirements is an offence, the penalty for which is a fine.

Political broadcasting

Part IV of the Broadcasting Regulations stipulates specific rules related to the broadcasting of political broadcasting and broadcasting during an election period. This includes the period in which such broadcasts may be aired, the duration of the broadcasts and the manner in which such broadcasts may be aired. Public broadcasters are required to carry political broadcasts, however other broadcast

(content) licensees may refuse to do so. Any broadcaster that transmits any political broadcast must provide equal opportunities for views from all political entities without prejudice.

Monitoring and enforcement of licence conditions

Section 50 of the Broadcasting Regulations requires that Macra monitor the compliance of licensees with the Communications Act. Macra may hold public hearings on any matter relating to the monitoring and enforcement of these regulations and before imposing any regulatory sanction on a licensee it must:

- notify the licensee in writing
- invite the licensee for a hearing
- invite the licensee to make representations on the matter.

In cases where Macra is satisfied that the licensee has contravened the Communications Act, regulations or the terms of its licence, it must inform the licensee of its findings and publish them as well as its reasons. Macra is authorised to make an interim order requiring the licensee to cease and desist immediately any broadcast that Macra deems to be in contravention, pending a full hearing of the matter.

Macra may, from time to time, issue guidelines in respect of any regulatory matter.

Revoking a licence

Section 53 of the Broadcasting Regulations provides that Macra may revoke a content licence for any material or continued breach of the Communications Act, regulations or licence conditions.

4.3.3 The DTT Regulations

Section 200 of the Communications Act empowers the Minister of Communications and Information Technology, on the recommendation of Macra, to enact regulations to carry out the provisions of the Communications Act, 2016 better. In accordance with this provision of the Communications Act 2016, the minister enacted the Communications (Digital Terrestrial Television) Regulations, published in Notice No 25, Gazette No 10A dated 28 June 2019 (DTT Regulations).

Macra's authority

Part II of the DTT Regulations outlines the powers Macra has concerning DTT. In accordance with the Communications Act, sections 4 to 6 of the DTT regulations set out the authority Macra has over the allocation of frequencies for signal distribution and the registration of signal distributors for DTT.

Obligations of signal distributors

The obligations of a signal distributor are outlined in section 7 of the DTT Regulations. Signal distributors are obliged to meet various broadcasting standards and provide Macra with reports of their services and annual rollout plans to ensure the development and provision of DTT services. Signal distributors are also obliged to enter into agreements with broadcasting content services to provide access to the frequencies with which they have been licenced. Should they refuse to enter into an agreement with a broadcasting content licensee, they are obliged to inform Macra of the reasons.

Obligations of broadcasting (content) service licensees

In terms of section 8 of the DTT Regulations, broadcasting (content service) licensees are also obliged to undertake certain responsibilities in accordance with the DTT regulations. These responsibilities include entering into agreements with signal distributors. They are required to provide their signal distributor with information relating to their programming and must ensure that the signal they provide to the distributor carries the station identification.

Sections 9 to 14 of the DTT Regulations outline the technical specifications required to be followed by a DTT operator, including video quality standard, network configuration, signal distribution capacity and quality of service. These standards are determined and monitored by Macra. The specific technical specifications for DTT signal distribution are set out in both the first and second schedules of the DTT Regulations.

5 Media self-regulation

The body responsible for the self-regulation of the media in Malawi is the Media Council of Malawi (MCM).

5.1 History of the Media Council of Malawi (MCM):

The MCM was established in 1995. It has had a tumultuous existence. In the past, the MCM issued press cards to permanent employees of media outlets and freelance journalists; this helped protect the public from unscrupulous journalists. The process of handing out and monitoring the press was done in conjunction with the media houses and the Ministry of Information. Unfortunately, this process faltered because the MCM had been dormant since 2010.[14] Efforts to resuscitate the MCM began in 2018 and culminated in the recent re-launch on 31 December 2019. The re-launch aimed to educate the public, media houses and media owners of the new media self-regulation model that will be instituted by the MCM and provide a platform for stakeholders to offer direction to the MCM moving forward.[15] From what we have been able to establish, no constitutional or self-regulatory provisions

have yet been adopted, so we assume that the former constitutional and self-regulatory code remains in effect.

5.2 The MCM Constitution

The MCM Constitution states that the MCM aims to uphold and maintain the freedom of the media in Malawi, including the freedom of expression and the public right to receive and impart information and opinion freely and to defend and protect the media from undue pressure from any source. They will also hold media practitioners to the highest possible standards with strict compliance to the code of ethics and assist journalists, both foreign and local, with accreditation in Malawi in conjunction with the relevant government agency. The MCM also aims to serve as an alternative dispute resolution mechanism on matters involving the media and the public.

5.3 Membership of the MCM

Membership is open to media houses, journalists, training institutions and press clubs. All members must meet the minimum prescribed standards set out by the MCM.

5.4 Functions of the National Governing Council

The National Governing Council (the Council) of the MCM consists of not fewer than seven and not more than 11 members chosen from paid up members of the MCM, as well as from other bodies including the Council for non-Governmental Organisations and the Malawi Law Society. The functions of the Council will be to establish committees, rules and procedures for the governing of media in Malawi.

5.5 Ethics, Complaints and Disciplinary Committee

The MCM will have an Ethics, Complaints and Disciplinary Committee (the Ethics Committee) responsible for updating, maintaining and promoting the Code of Ethics and professional standards for media practitioners, journalists and media organisations and responsible for receiving and adjudicating complaints and grievances as provided for in the rules of procedure. Adjudication will be the last resort if mediation cannot resolve the issue. The Ethics Committee may, upon completion of any adjudication proceedings:

- censure the journalist or media house against whom the complaint was made
- order an apology
- order publication of the corrected version of the article from which the complaint arose
- order full publication of the results of the hearing.

5.6 The MCM Code of Ethics and Professional Conduct

The MCM has published a Code of Ethics and Professional Conduct (the Code), which governs the conduct and practice of journalists in Malawi. The key aspects of the Code are summarised as follows:

5.6.1 The individual journalist

A journalist is responsible for providing the public with accurate information, shall conduct him/herself with propriety, shall dress decently and shall observe etiquette as the situation demands.

When conducting interviews:

- sources must be informed they are being interviewed for a story
- interviewees must not be insulted, abused or otherwise embarrassed
- interviewees are free to restrict what is to be published as well as what is to be attributed to them
- interviews are to be conducted in a language in which an interviewee is competent, or the journalist may arrange for an interpreter
- must avoid situations giving rise to conflicts of interest
- must observe his or her employer's editorial policy
- must not demand or accept payment for including or excluding material from a story.

5.6.2 The journalist's work

- All material produced by a journalist must be credible, balanced, fair, verifiable and must avoid unwarranted distortion and speculation, as well as discriminatory and inflammatory language involving, for example, racism, tribalism or religion.
- Headlines must reflect the gist of the story and must not be misleading.
- Pictures:
  - should not be traumatising, shocking or obscene
  - must be appropriate and must not be used for the sake of sales promotion
  - must not infringe on an individual's right to privacy.
- Quotations must be accurate.

5.6.3 General principles and issues

- Journalists must strive for accuracy, transparency, objectivity and thoroughness

in the reporting of news and avoid plagiarism. Whenever a significant inaccuracy, misleading statement or distorted report has been published, it should be corrected promptly and with due prominence, including an apology where appropriate. A distinction must be made between news reports, speculation and opinion. All sides of a story must be presented, and a fair opportunity provided for a reply.

- Advertising and public announcements must be accurate and clearly distinguishable from news.
- Legal reporting:
  - avoid practices which might interfere with the right to a fair trial
  - do not prejudice the outcome of a case when reporting on it.
- While facilitating the public's right to know, a journalist shall observe the following limits:
  - no identification of a victim of sexual assault unless the journalist is free to do so by law
  - no identification of any person under 13 years who are involved in sexual offences cases — as a victim, witness or defendant
  - avoid references to a person's race, colour, ethnic origin, religion, sex or sexual orientation, physical or mental illness or disability, unless this is relevant to the story
  - information or pictures may not be obtained by misrepresentation or subterfuge unless the material cannot be obtained by other means.

5.6.4 Relationship with the Public and other Journalists

- Give an opportunity to reply, allowing the public and institutions to respond to statements made about them in the media.
- Respect an individual's private life without intrusion or harassment.
- Strive for transparency at all times.

5.6.5 Media Houses shall ensure:

- journalists in their employ are properly dressed
- editorial policies shall not conflict with media ethics
- that they do not demand any financial inducement to publish or exclude material from publication
- that they publish rebuttals, as long as they are meant to clarify the issue at stake
- that rebuttals are run free of charge

- that they foster relations, exchange ideas, debate and discuss among themselves.

5.6.6 Professional misconduct

- An infringement of any of the provisions of the Code constitutes professional misconduct.
- The Ethics, Complaints and Disciplinary Committee shall be responsible for enforcing the observance of this code in accordance with the principles of natural justice (that is, with an unbiased adjudicator and observing the journalist's right to a hearing).

6 Case law and the media

In this section, you will learn:

- ▷ the definition of common law
- ▷ what is meant by judicial review, and in particular:
  - › the difference between a review and an appeal
  - › the various grounds for judicial review
- ▷ what the High Court of Malawi held in a case involving the judicial review of a decision to revoke a licence of a sound broadcaster in Malawi
- ▷ what the High Court of Malawi held in two cases involving the broadcast of criminal proceedings

6.1 Definition of common law

The common law is judge-made. It is made up of judgments handed down in cases adjudicating on disputes brought by people, whether natural (individuals) or juristic (for example, companies). In common law legal systems such as Malawi's, judges are bound by the decisions of higher courts and also by the rules of precedent. This requires that rules laid down by the court in previous cases be followed unless they were wrongly decided. Legal rules and principles are, therefore, decided on in an incremental, case-by-case basis.

This section considers three cases involving the revocation of a broadcaster's licence by Macra and two involving the broadcast of criminal proceedings.

6.2 Judicial review

6.2.1 The difference between a review and an appeal

When a court hears an application for judicial review of an administrative decision, this is not the same as hearing an appeal from a lower court. In an appeal, the court considers the facts and the law and essentially asks if the lower court came to the **correct** decision. In an application for judicial review, the court considers the facts and the law, but it asks a different question, namely, whether the **process** by which the decision-maker arrived at a decision being reviewed was flawed or not.

In a leading High Court of Malawi decision, *The State and the Malawi Communications Regulatory Authority ex parte Joy Radio Limited* (Miscellaneous Civil Cause No 143 of 2008, Macra v Joy Radio), the court reiterated that 'judicial review is not concerned with the merits of the decision … Rather it is concerned with the decision-making process followed by the maker of the impugned decision'.

Traditionally, judicial review was concerned with purely common law principles. This has, however, changed where constitutions provide a right to administrative justice, as is the case in Malawi. Nevertheless, common law principles play a significant role in determining the scope of the constitutional right.

6.2.2 Grounds for judicial review

There is no absolute, closed list of grounds for reviewing and setting aside an administrative decision. However, in *Macra v Joy Radio*, the High Court of Malawi specified a number of grounds, namely:

- where a decision is *ultra vires*, that is, where the decision-maker goes beyond his/her or its legal authority or mandate to act when making a decision
- where a decision was taken in a manner that did not observe the principles of natural justice (that is, a duty to act fairly). Although not specifically enumerated by the High Court, in most common law jurisdictions this is distilled into at least two duties, namely, to ensure that the decision-maker is not biased and to give persons affected by a decision a hearing
- errors which undermine the process
- unreasonable decisions.

Besides these grounds, which are specifically listed in the judgment, it is widely recognised that there are other grounds for judicial review, including the following:

- ulterior purpose, this is where a decision is taken ostensibly for one reason but is in fact taken for another, illegitimate reason;

- failure to apply the mind, this is a broad ground of review that is usually evidenced by one or more of the following instances of failure to apply mind:
  - Taking direction. This is a where a decision-maker who is empowered to act does so, but at the instruction of a person or authority who or which is not empowered to take the decision.
  - Taking irrelevant considerations into account. This is where a decision-maker takes account of considerations which he or she is not empowered or required to take into account.
  - Failing to take relevant considerations into account. This is where a decision-maker does not take account of considerations which he or she is empowered and required to take into account.

6.3 What the High Court of Malawi held in a case involving the judicial review of a decision to revoke a licence of a sound broadcaster in Malawi

Macra v Joy Radio

Facts of the case as determined by the court

The facts at issue involved a radio station, Joy Radio, licensed by Macra to provide a broadcasting service. Macra had issued Joy Radio with two licences, a radio (frequency) licence and a broadcasting licence.

Over a period in 2008, Macra repeatedly asked Joy Radio for copies of broadcasts, usually after the coverage of opposition political party events. At some point, Joy Radio asked Macra for justifications for the numerous requests for copies of broadcasting material, but Macra did not respond.

In August 2008, Macra wrote to Joy Radio and threatened to revoke its licence. It accused Joy Radio of violating the provisions of the Communications Act in that:

- at least one of its shareholders was a significant opposition party politician, thereby violating the prohibition against political parties being granted licences
- it had failed to submit copies of broadcasts as requested.

In October 2008, Macra revoked Joy Radio's radio licence. Joy Radio approached the High Court for judicial review of the revocation.

Court finding

The High Court of Malawi made several findings on the process which Macra undertook in revoking Joy Radio's radio (as opposed to broadcasting) licence.

- The court found that the Communications Act makes it clear that revocation is

a penalty which Macra may impose only if a broadcaster has failed to comply with an order prohibiting it from broadcasting for 30 days.

- Such 30-day prohibition order can be made only after a process which involves granting the party concerned a hearing.
- It found that Macra had revoked a radio licence on the grounds that related only to broadcasting licences and had nothing to do with radio spectrum management. This was unsound, and *ultra vires* its powers under the legislation.
- It found that Macra had a duty to respond to Joy Radio's written request for an explanation as to the frequency of the requests for copies of broadcasts.
- It found that Macra's refusal to respond to Joy Radio's request for an explanation, coupled with its threat to revoke Joy Radio's licence, demonstrated a desire to intimidate.
- It found that, by not holding a hearing into its allegations that Joy Radio's shareholding was not in order, Macra had failed to comply with the Communications Act's procedures in dealing with purported non-compliance in this respect.

The High Court concluded that Macra's decision-making process 'was flawed through and through with irregularities'. The court used strong language in commenting on this: 'I find that Macra behaved most disgracefully and that it not only acted *ultra vires* the powers the law has vested it with but also without fairness in the sense depicted by the principles of natural justice.' The court set aside the revocation of Joy Radio's radio licence and ordered Macra to pay all costs of the lawsuit.

6.4 What the High Court of Malawi held in two cases involving the broadcast of criminal proceedings

6.4.1 Times Television Limited and Another v the State and Others

Facts of the case

The applicants, in this case, approached the High Court seeking leave to install cameras in the courtroom for the recording of criminal procedures against respondents McDonald Kumwembe, Pika Pascal Monondo and Raphael Kasmabara in Criminal Case 65 of 2013, concerning the unlawful shooting of Paul Mphwiyo. It was argued that the case was a matter of significant public interest as the shooting of Mr Mphwiyo led to revelations of looting of public funds dubbed 'cashgate'.

It was argued by the media applicants that Malawians had a legitimate public interest in the case and, as such, installing cameras in the courtroom to broadcast proceedings was in accordance with the right of access to information. The application was made under section 60 of the Courts Act, which provides that court proceedings should occur in open court to which the public should have access but, if in the opinion of the presiding judge, it is in the interest of justice, the proceedings may be heard *in camera*. The application was also made under section

71(1) of the Criminal Procedures and Evidence Code which provides that all proceedings, except those provided for by law, be carried out in open court.

The application was further made under sections 35 and 36 of the Republic of Malawi Constitution which guarantees the rights to freedom of expression and press freedom respectively.

The respondents claimed that it is a well-established principle in common law in Malawi that a court exercising judicial functions has an inherent power to regulate its own procedures unless it contradicts enacted law.

In this case, it was held that in exercising its control over the conduct of proceedings being heard before it, a court was entitled to derogate from the principle of open justice by sitting in private or permitting a witness not to disclose his name when giving evidence if it was necessary to do so in the due administration of justice.

Court finding

The High Court found that broadcasting of Criminal Case 65 of 2013 was in the public interest and allowed the televised and radio broadcast of the proceedings.

- The judgment stated that the applicants, their agents or their authorized representatives or both, be granted leave to set up their equipment to obtain and broadcast live audio-visual, audio recordings or both of proceedings in the delivery of judgment in Criminal Case Number 65 of 2013 between the State and MacDonald Kumwembe, Pika Pascal Manondo and Raphael Kasambara.

- The applicant was given leave to install four video cameras in the courtroom. The cameras focused on the judge, the accused, the Director of Public Prosecution, and the public gallery. Of these, the only camera allowed to be operated by broadcasting personnel was the one focused on the public gallery, except during the passing of judgment.

- The applicants were not permitted to take any still photographs in the courtroom neither were they permitted to use still images obtained from the audio-visual recordings of the proceedings.

- The applicants were required to make the feed from the authorised broadcasts referred to above available free of charge to other media houses wishing to broadcast the delivery of judgment with the usual acknowledgement that the feed was made available courtesy of the Times Group.

- The ruling included the provision that if the applicant, any media house or any officer or agent of any media house disobeyed this would be an offence punishable by a prison sentence or the seizure of assets.

Despite the opposition from the respondents, it appears that though the court chose not to allow the taking of still photographs, it did choose to uphold the open justice principle under section 60 of the Courts Act and section 71 of the Criminal Procedure and Evidence Code.

6.4.2 Zomba District Registry, Criminal Cause No 2 of 2014. *The Republic v Asward Lutepo*

Facts of the case

The following case is relevant, not because of the subject matter of the case, but because of the court ruling on the conduct of the media in the courtroom.

On entering the court, the presiding judges noted a large number of audio-visual cameras had been set up by numerous media outlets including Reuters News Agency and the Malawi Broadcasting Corporation. The court made the observation that the journalists were in court without their legal counsel present. Nevertheless, the court proceeded to address the matter.

The court requested the Director of Public Prosecutions (DPP) and the defence counsel to address the court on the permissibility of such media coverage *vis-a-vis* the principle of open justice, before continuing with the ordinary court proceedings. The DPP observed that cameras, or other forms of electronic recording devices, are generally not allowed in court. The DPP acknowledged that, in other jurisdictions, leave had been given to allow such devices in court stressing, however, that there are protocols in place for the broadcasting of court proceedings, namely that an application by the relevant media house should have been made to the Registrar of the High Court and Supreme Court of Appeal. The DPP acknowledged the important issue of principle brought into focus in the attempt made by the media, however, that it was unfortunate that procedures had not been followed and thus the media should not be allowed to broadcast the proceedings. The defence counsel was in full agreement with the DPP.

The Court noted that the principle of open justice contained in the Courts Act and the Criminal Procedure and Evidence Code potentially clashed with the right of the accused person and the prosecution to a fair trial.

Court finding

The Court ordered that without the leave of the Court granted on specific application being made to the Court, no person, including any media house, may record, broadcast or both, proceedings electronically, whether by audio, audio-visual or photographic means.

Notes

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