

THE KINGDOM OF LESOTHO

1 INTRODUCTION

The Kingdom of Lesotho ("Lesotho") has been an independent country since 1966. However, Lesotho 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 continued 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, essentially, in protecting it and putting down a would-be military coup. As recently at 2009, there was an unsuccessful assassination attempt on the Prime Minister.

There is little doubt that the media environment in Lesotho is, sadly, not in accordance 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 but amendments to governing legislation over the past four or five years have deprived it of a lot of the functional independence it once had and have given a significant number of powers over 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 wider range of news and information and generally view points than was previously the case.

In this chapter, working journalists and other media practitioners will be introduced to the legal environment governing media operations in Lesotho. The chapter is divided into five sections:

- the Constitution
- Media-related Legislation
- Broadcasting-related Regulations
- Media Self-Regulation
- Media-related Common Law based on decided cases.

The aim of this chapter is to equip the reader with an understanding of the key laws governing the media in Lesotho. Key weaknesses and deficiencies in these laws will also be identified. In doing so, we hope to encourage media law reform to better enable the media to fulfil its role of providing the public with relevant news and information and to serve as a vehicle for government/citizen debate and discussion.

2 THE MEDIA AND THE CONSTITUTION

By the time you have read this section you will know:

- What a Constitution is
- 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 conflict with media interests
- What key institutions relevant to the media are established under the Lesotho Constitution
- How rights are enforced under the Constitution
- What is meant by the “three branches of government” and “separation of powers”
- Whether or not there are any clear weaknesses in the Lesotho Constitution which ought to be strengthened to protect the media

2.1 **What is 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 for a professional association such as a Press Council. Such constitutions set out the rules by which the members of the organisation agree to operate. However, Constitutions can also govern much larger entities, indeed entire nations.

The Lesotho Constitution, for example, sets out the foundational rules of the Kingdom of Lesotho. These are the rules upon which the entire country operates. A key Constitutional provision in this regard is section 1(1) which states: “Lesotho shall be a sovereign democratic Kingdom”:

2.2 **What is meant by Constitutional Supremacy?**

“Constitutional Supremacy” means that the Constitution takes precedence over all other law, for example, legislation or case law, in a particular country. It is important to ensure that a Constitution does have legal supremacy because it means that if a Government passed a law that violated the Constitution - that was not in accordance or conflicted with a constitutional provision - such a law could be challenged in a court of law and could be overturned on the ground that it is “unconstitutional”.

The Constitution of Lesotho is a constitution which makes provision for constitutional supremacy. Section 2 specifically states that “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 **What is a Limitations Clause?**

The concept of a limitations clause is often difficult for non-lawyers to understand clearly. So we will try to explain this in fairly simple terms. It is clear that rights are not absolute as society would probably be unable to function. For example, if the right to “freedom of movement” was absolute, then society would not be able to imprison convicted criminals. Similarly, if the right to freedom of expression was absolute the state would be unable 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. This can only be done however in accordance with the Constitution because of the supremacy of the Constitution.

The Constitution of Lesotho makes provision for legal limitations on the exercise and protection of rights that are contained in Chapter II of the Constitution of Lesotho, which chapter is headed “Protection of Fundamental Human Rights and Freedoms”. Section 4(1) specifically provides 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”.

Consequently it is clear that the rights contained in Chapter II of the Constitution of Lesotho are subject to the limitations that are contained within the provisions of the right itself. We shall deal with the limitations in respect of each right dealt with below.

2.4 **Which Constitutional Provisions Protect the Media?**

The Constitution of Lesotho contains a number of important provisions in Chapter II, which is headed “Protection of Fundamental Human Rights and Freedoms”, that 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.

- *Freedom of Expression*

The most important provision that protects the media is section 14(1) part of the section headed “Freedom of expression” which states: “Everyone shall be entitled to, and (except with

his own consent) shall not be hindered in his enjoyment of freedom of, freedom of expression, including freedom to hold opinions 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 correspondence”.

This provision needs some detailed explanation.

First of all this freedom applies to “everyone” and not just to certain people such as citizens for example. Hence all persons, everybody, enjoys this fundamental right.

Secondly, the freedom is not limited to speech (whether oral or written) but is also extended to non-verbal or non-written “expression”. There are many different examples of this including physical expression such as mime, or dance as well as photography or art works.

Thirdly 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.

Fourth, section 14(1) specifies that the right to freedom of expression includes the “freedom to receive information and ideas without interference”. This freedom of everyone’s 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 which 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.

Fifth, 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 a vitally 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.

Sixth, 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 an important 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...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 clear that the Constitution envisages that a right of reply is an important way of mediating disputes arising out of the right to freedom of expression. However note that this right of reply is also not limitless and must be exercised in accordance with the law.

As has been discussed previously, constitutional rights are never absolute. Sections 14(2) and (3) set out the basis upon 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 upon public officers,
and further the limitation must be practically necessary in a democratic society.
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- *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 journalists’ trade is an important right but it can be limited.

As has been discussed previously, Constitutional Rights are never absolute. Sections 10(2) and (3) set out the basis upon which the right to freedom from arbitrary search or entry set

out 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 utilization of mineral resources or any other property to promote the public benefit. Note that 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 in relation to government property; or
- is done in terms of a court order,
and further the limitation must be practically necessary in a democratic society.

- *Freedom of Conscience*

A third protection is contained in section 13(1) of the Lesotho Constitution which 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 has been discussed previously, Constitutional Rights are never absolute. Sections 13(5) and (6) set out the basis upon which the right to freedom of conscience set out 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 the 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;
or
- protects the rights of others,
and further the limitation must be practically necessary in a democratic society.

- *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 conduct media operations.

As has been discussed previously, Constitutional Rights are never absolute. Sections 16(2) and (3) set out the basis upon which the right to freedom of association set out 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 the freedom of conscience 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; or
 - imposes restrictions on public officers,
- and further the limitation must be practically necessary in a democratic society.

- *Right to a Fair Trial*

A fifth protection is provided in section 12(9) of the Lesotho Constitution which has, 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. Therefore it seems that the Ombudsman’s proceedings, for example, would similarly be public.

As has been discussed previously, Constitutional Rights are never absolute. Section 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 Which Constitutional Provisions Might Require Caution from the Media or 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. There are a number of these:

- *Right to Respect for Private and Family Life*

Section 11(1) of the Lesotho Constitution provides that “[e]very 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 etc. 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 and the nature of the issue being dealt with by the media.

- *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 that 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 a period of 14 days. If each House of Parliament approves the declaration then it will remain in force for six months (although this can be further 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 **What key Institutions Relevant to the Media are Established under the Constitution of Lesotho?**

There are a number of important institutions in relation to the media that are established under the Constitution, namely, the Judiciary, the Judicial Services Commission, and the Ombudsman.

- *The Judiciary*

In terms of section 118(1) of the Constitution of Lesotho, judicial power vests 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 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 to 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 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 section 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 the advice of 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 Judicial Service Commission (“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.

- *The Judicial Service Commission*

The Judicial Service Commission (“the JSC”) is a Constitutional Body that is established essentially to participate in the appointment of puisne and Appeal Court judges and which is responsible for exercising disciplinary control over registrars, magistrates, and members of subordinate courts. Many would query why the JSC is a body that is relevant to the media. It is 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 Chairman of the Public Service Commission, and an appointee of the King recommended by the Chief Justice who is appointed for a five-year term.

- *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 in accordance with 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.

2.7 **How are rights enforced 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 through the courts, the Constitution of Lesotho also envisages the right of people, including of the media, to approach a body such as the Ombudsman to assist in the enforcement of rights.

Perhaps one of the most effective ways in which rights are protected under the Constitution is through the provisions of the Constitution which entrench most of the provisions of Chapter II, the chapter which is 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 **What is meant by 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" and yet not many working journalists have a clear idea as to what these terms actually mean.

2.8.1 Branches of Government:

Generally speaking it is recognised that governmental power is exercised by three different so-called "branches of government", namely the Executive, the Legislature and the Judiciary. In brief, these are:

- **The Executive**

Executive power in Lesotho vests, in terms of section 86 of the Constitution, in the King. In terms of section 44(1) of the Lesotho Constitution, 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 twenty-two 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 Constitution of Lesotho.

Section 86 of the Lesotho constitution provides that executive power in Lesotho is exercised by the King through the officers or authorities of the Government of Lesotho.

Section 88 of the Constitution of Lesotho provides for a Cabinet of Ministers consisting of the Prime Minister and the other Ministers which 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 and 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 Principle 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, skill 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 upon 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 Lesotho Constitution. In terms of section 89 of the Constitution of Lesotho, 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 active 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

Legislative or law-making power in Lesotho vests, in terms of section 70(1) of the Lesotho Constitution, in Parliament.

In terms of section 54 of the Lesotho Constitution, 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 twenty-two Principal Chiefs (or their designated representatives) and eleven 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 has been set out previously in this chapter, vests in the courts and essentially 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 recognised that in a functioning democracy it is important to divide governmental 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 is to, as the Lesotho Constitution has largely done, separate the functions of the three branches of government, namely the Executive, the Legislature and the Judiciary so that no single branch is able to operate alone, assuming complete state control and amassing centralised power. While each branch performs a number of different functions, they also play a “watchdog” role in respect of each other and help 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 **Are there any Clear Weaknesses in the Constitution of Lesotho which ought to be Strengthened to Protect the Media?**

In our view there are indeed a number of respects in which the Lesotho Constitution is weak. If these provisions were strengthened, there would be specific benefits for Lesotho media.

- **Remove Internal Constitutional Qualifiers to Certain Rights**

The Constitution of Lesotho, as has been set out above, makes provision for certain rights to be subject to “internal” limitations, that is, the provision dealing with right contains its own limitations clause, setting out ways in which a government can legitimately limit the ambit of the right.

These internal limitations occur within 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 has been more fully discussed above, in this chapter, the right to freedom of expression contains such an internal limitation. In other words, the section which contains the right also sets out the parameters or limitations allowable in respect of that right.

We think that it would strengthen the rights contained in the provisions dealing with Fundamental Human Rights and Freedoms set out in Chapter II of the Lesotho Constitution if the rights were subject to a single generally-applicable limitations clause rather than each having their own limitations clause.

Such a limitations clause would apply to all of the provisions of Chapter II of the Lesotho Constitution ie to the fundamental rights and freedoms and 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 are not specific limitations provisions which apply to each right separately.

- **Strengthen Procedural Consultation Provisions**

On the face of it, the Lesotho Constitution makes provisions for close consultation by various state actors: for example, the King often is required to act in accordance with 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 into whether or not such procedurally-important consultations in fact took place. We would suggest that these provisions be amended or repealed altogether because they undermine the very notion of constitutional supremacy. If the Constitution requires prior consultation by key state actors, this should be done and 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.

- **Bolster Independence of the Broadcasting Regulator and of the Public Broadcaster**

It is disappointing that the Lesotho Constitution 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

By the time you have read this section you will know:

- What legislation is and how it comes into being
- Key legislative provisions governing the publication of print media
- Key legislative provisions governing the broadcasting media in general
- Key legislative provisions governing the state broadcasting sector and the state news agency
- Key legislative provisions governing broadcasting signal distribution
- Generally applicable statutes that threaten a journalist’s duty to protect sources
- Generally applicable statutes that prohibit the publication of certain kinds of information
- Generally applicable statutes that specifically assist the media in performing its functions

3.1 Legislation – Introduction

3.1.1 What is Legislation?

Legislation is a body of law consisting of Acts properly passed by Parliament, the legislative authority. As we know, legislative authority in Lesotho vests in Parliament which is made up of the King, the National Assembly and the Senate in terms of the Constitution. Consequently, both

houses of Parliament and the King are ordinarily involved in passing legislation. There are detailed rules in sections 78 to 80 of the Constitution and in section 85 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 of the fact that the Constitution requires different types of legislation to be passed in accordance with particular procedures. The procedures are complicated and in a work of this kind it is not necessary to set these out. However, it is important for journalists to be aware that, in terms of the Constitution, there are three different kinds of legislation, each of which has particular procedures and/or rules applicable to it. They are:

- Legislation that amends the Constitution – the procedures and/or applicable rules are set out in section 85 of the Constitution.
- Ordinary Legislation – the procedures and/or applicable rules are set out in sections 78 and 80 of the Constitution.
- Legislation that deals with financial measures – the procedures and/or applicable rules are set out in section 79 of the Constitution.

3.1.2 What is the difference between a Bill and an Act

A Bill is essentially a piece of draft legislation. A Bill is a draft law 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 in accordance with 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 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 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 **Statutes Governing the Operations of the Print Media**

Unfortunately, there are a number of restraints on the ability to operate as a print media publication. In particular, Lesotho requires the registration of newspapers which is out of step with international best practice. These kinds of restrictions effectively impinge upon the public's right to know by setting barriers to media operations.

3.2.1 The Printing and Publishing Act, Act 10 of 1967

There are certain key requirements laid down by the Printing and Publishing Act 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 having previously obtained a certificate of registration from the Registrar-General and paying the prescribed fee therefor. 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 or to a period of imprisonment or to both, under section 15 of the Printing and Publishing Act.
- Further 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 and the provision of any false information is an offence and the person concerned can be sentenced to a fine or to a period of imprisonment or to 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 by the publisher to the Registrar-General and failure to do so is an offence and the person concerned can be sentenced to a fine or to a period of imprisonment or to 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 printed legibly on its first or last sheet: the address at which the printed matter is published and the name and address of the proprietor, publisher and printer thereof, and failure to do so is an offence and the person concerned can be sentenced to a fine or to a period of imprisonment or to both, under section 15 of the Printing and Publishing Act.

3.3 **Statutes Governing the Broadcast Media Generally**

3.3.1 Which Statutes Regulate Broadcasting Generally?

Broadcasting in Lesotho is regulated in terms of the Lesotho Communications Authority Act, Act 5 of 2000, (“the LCA Act”) which has been amended a number of times.

3.3.2 How is the Lesotho Communications Authority Established?

The LCA Act provides, in section 4, that the Lesotho Communications Authority (“the LCA”) is established as a body corporate. Sadly the 2006 Amendment Act specifically deleted the words

“autonomous and independent” from the description of the LCA, severely undermining its former position as an independent authority. Section 5 of the LCA Act provides that the LCA operates through a Board which is responsible for the exercise of the powers and performance of the duties of the LCA.

3.3.3 What are the LCA’s Main Functions?

In terms of section 15(1) of the LCA Act, the LCA’s general duties are to promote, develop and supervise the provision of efficient, national regional and international communication services in Lesotho. In section 2 of the LCA Act, communication is defined as meaning “any domestic or international transmission of information by wire, radio waves, optical media or other electromagnetic systems, between or among the points of the user’s choosing” and clearly this definition includes broadcasting. Section 15(2) gives some examples of the LCA’s duties that impact upon broadcasting matters and these include: promoting universal service and access; ensuring the efficient and effective use of the radio frequency spectrum, promoting the range and quality of communication services; and promoting private ownership and sustainable and fair competition.

3.3.4 Who appoints the LCA Board Members?

In terms of section 5(2) of the LCA Act, the LCA Board consists of 7 members including the Chief Executive all of whom are appointed by the Minister (who is defined in section 2 as the Minister responsible for Communication services, currently the Minister for Communications, Science and Technology).

Section 5(4) of the LCA Act sets out criteria for appointment and these are all essentially technical competencies. Section 6 of the LCA Act sets out grounds for disqualification of LCA Board members and these include: being an unrehabilitated insolvent, having a conviction of an offence involving dishonesty, conflicts of interest (directly or through a family member) and being a member of Parliament.

3.3.5 How is the LCA Funded?

In terms of section 19(1) of the LCA Act, the LCA is funded from a range of sources including:

- money appropriated by Parliament, in other words, funding for LCA must be provided for in the National Budget)
- service, licence and administration fees
- fines imposed by the LCA
- grants, contributions or endowments
- loans.

3.3.6 How are Broadcasting Regulations Made?

Under the LCA Act there are two kinds of subordinate legislation, regulations and rules.

The LCA Act, at section 64(a) provides that the Minister, in consultation with the LCA (which means that the LCA must agree) may by notice published in the Government Gazette make Regulations for the carrying into effect the provisions of the LCA Act. Effectively this means that it is the Minister (albeit with LCA consent) that makes broadcasting regulations.

Further, the LCA Act, at section 16(2), 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 LCA Act. However, it is critical to note that since the 2006 Amendment Act, the Minister acts alone in formulating Government policies for the communications sector and no longer does this in consultation with the LCA, as was the case previously. Further the Minister is entitled to give directives to the LCA, after consultation with it, in relation to a number of matters including the imposition of licence conditions, giving the Minister a very direct role in broadcasting licensing matters.

3.3.7 What is the Licensing Regime for Broadcasters in Lesotho?

- **Broadcasting Licence Requirement**

Section 27(1) of the LCA Act prohibits any person from establishing or providing a communication service (which includes a broadcasting service) in Lesotho except under, and in accordance with, a licence issued pursuant to the LCA Act.

- **Classes of Broadcasting Licences**

Section 26 of the LCA Act authorises the LCA to prescribe classes of communication services including both public and private communication services. The different classes of broadcasting communication licences that relate to broadcasting are set out later on this chapter under the heading dealing with regulations.

- **Broadcasting Licensing Process**

Prior to the 2006 Amendment Act the LCA (or its forerunner authority) was solely responsible for licensing private and public communication services (including broadcasting). However the 2006 Amendment Act introduced a Ministerial approval requirement for the licensing of communication service providers. As it currently reads, section 27(2) of the LCA Act provides: "The [LCA] shall, upon approval by the Minister, issue licences or amend such licences

issued, to private and public communication service providers as market conditions and the public interest may warrant”.

- **Frequency Spectrum Licensing**

Prior to the 2006 Amendment Act, the LCA (or its forerunner authority) was solely responsible for allocating (this means determining how particular parts of the radio frequency spectrum may be used) and assigning (this means granting the exclusive right to use a particular frequency to a particular user) radio frequency spectrum to, among others, sound and television broadcasting operations. However the 2008 Amendment Act introduced a Ministerial approval requirement for the allocation and assignment of radio frequency spectrum. As it currently reads, the relevant part of section 51(4) of the LCA Act provides: The [LCA] shall, with the approval of the Minister, allocate and assign radio frequency spectrum to- (a)...sound and television broadcasting operations”. The effect of this is that the LCA is not able to allocate and assign radio frequency spectrum without the agreement of the Minister.

3.3.8 What Responsibilities do Broadcasters in Lesotho Have under the LCA Act?

- Adherence to licence conditions:

Prior to the 2006 Amendment Act, the LCA (or its forerunner authority) was solely responsible for the imposition of licence conditions. However the 2008 Amendment Act effectively made the Minister responsible for the imposition of licence conditions. As it currently reads, the relevant part of section 30(1) of the LCA Act provides: “The [LCA] shall...impose such conditions on licences as the Minister may, from time to time, direct”.

In terms of section 30(2) of the LCA Act, “[a] licensee who fails to comply with the conditions of a licence may be subject to the following penalties:

- (a) revocation of the licence by the [LCA] upon approval by the Minister, or where necessary, in terms of this Act, by the Minister;
- (b) suspension of the licence by the [LCA] upon approval by the Minister, or where necessary, in terms of this Act, by the Minister; or
- (c) any other penalty that may be appropriate in the circumstances.”

Clearly the Minister now has a key role broadcasting regulatory matters including in regards to revocation or suspension of a licence for non-compliance with licence conditions.

- Reporting obligations:

Section 46 of the LCA Act requires any person who provides a public communication service to file with the LCA annual reports and any occasional reports that it may issue from time to time as well as any reports that the LCA may require.

- Adherence to broadcasting rules and regulations

Clearly broadcasters will be subject to rules and regulations made in terms of the LCA Act which are dealt with further on in this chapter.

3.3.9 Is LCA an Independent Regulator or not?

We think it is incontrovertible that the LCA can no longer be said to have any real vestiges of independence left. As has already been pointed out, even the statutory description of the LCA as “autonomous and independent” has been repealed. The various amendments to the LCA Act over the years have stripped the LCA of any substantive independence. Effectively the LCA operates as an arm of the Minister in the following ways:

- All the LCA’s Board members are appointed by the Minister
- The Minister’s approval is required in relation to the issuing, amendment, revocation and suspension of communications licences, including sound and television broadcasting licences
- The Minister’s approval is required for the allocation and assignment of radio frequency spectrum to broadcasting operations;
- All of the LCA’s former powers in relation to international matters have been repealed
- The Minister is responsible for making communications regulations, albeit in consultation with the LCA

Perhaps the most clear-cut evidence of the lack of independence or real authority of the LCA is to be found in subsection 30(3), a new subsection introduced by the 2008 Amendment Act, which provides that the “...the Minister shall have power, in substantial, exceptional and compelling circumstances, to revoke a licence and close or cause to be closed the communications services authorised under the licence without a prior hearing if he or she has reason to believe that the communications services to which the licence relates may prejudice or endanger public interest unless urgent action taken by him as contemplated in this subsection is taken”. Unfortunately the LCA Act does not specify what these “substantial, exceptional and compelling” circumstances are, creating the scope for a great deal of Ministerial interference in, among others, broadcasting operations, without the operator being afforded a prior hearing.

It is fair to say that the LCA Act does not comply with agreed international best practice for broadcasting regulation.

3.3.10 Are there any Weaknesses in the Legislation which should be Amended to strengthen the Broadcasting Media Generally?

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

- First, Lesotho ought to introduce legislation to establish a genuinely independent broadcasting regulatory authority to act in the public interest free from executive interference. The mandate of such an independent broadcasting authority should be to ensure that the citizens of Lesotho have access to a diverse range of high quality public, commercial and community broadcasting services and to ensure that freedom of expression is appropriately protected from commercial and governmental interference.
- The 2008 Lesotho Communications Policy released by the Ministry of Communications, Science and Technology in advance of the Lesotho Communications Authority Amendment Act, 2008 promised that the LCA would serve as an independent regulator and that the National Assembly would be involved in approving Ministerial board appointments and that removals of any LCA Board member would require a two-thirds vote of the National Assembly. Sadly none of these policy proposals made it into the LCA Amendment Act which in fact left the LCA with even less independence than it had under the 2006 Amendment Act. Consequently, the LCA remains a body whose levels of independence do not comply with internationally-accepted standards.
- Second, it is clear that the LCA Act started out as purely telecommunications-related legislation, and broadcasting has been dealt with as merely a subset of telecommunications through rules and regulation. Regulating broadcasting effectively through subordinate legislation such as rules and regulating is clearly not ideal. Lesotho ought to introduce appropriate broadcasting legislation with the broad aim of ensuring that the citizens of Lesotho have access to a diverse range of high quality public, commercial and community broadcasting services and of ensuring that freedom of expression is appropriately protected from commercial and governmental interference.

3.4 **Statutes that regulate the State Broadcast Media and the State News Agency**

3.4.1 State Broadcast Media

Sadly, Lesotho still has not passed legislation to create a public broadcaster. The Lesotho National Broadcasting Service (“the LNBS”) is a part of the Ministry of Communications, Science and Technology and according to the 2009 Lesotho Media Policy (“the 2009 Media Policy”), the LNBS continues to operate “as an arm of the Government”. The LNBS is made up of:

- Television Lesotho: providing free-to-air television in Lesotho. It is important to note that terrestrial infrastructure is limited which means that it is only accessible throughout the entire country via satellite.

- Radio Lesotho: providing two sound broadcasting channels or services which are available free-to-air throughout the entire country.

In 2004 a Lesotho Broadcasting Corporation Bill was published, which Bill aimed to transform the state broadcaster (the Lesotho National Broadcasting Service (“LNBS”)) into a public broadcaster but the Bill was never enacted.

In the 2008 Lesotho Communications Policy (“the 2008 Communications Policy”), the Ministry of Communications, Science and Technology promised that the Lesotho Government would undertake a number of regulatory reforms in including transforming the Lesotho National Broadcasting Service (“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.” Further, 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.

Indeed in 2009, the Government adopted another policy styled the Lesotho Media Policy (“the 2009 Media Policy”) which also dealt with transforming the LNBS from a state broadcaster into a public broadcaster to be known as the Lesotho Broadcasting Corporation of Lesotho (“LBC-L”). The 2009 Media Policy said that the LBC-L would act “independently of Government or commercial influence.” Further it stated 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 it after consultation with the National Assembly’s Portfolio Committee responsible for communications. It is important to note that such Ministerial appointments would not be in accordance with 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 into 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 within the Ministry of Communications, Science and Technology. In the 2009 Media Policy, the Government undertook, as a matter of policy to corporatize LENA and transform it into an “autonomous news service”. It further undertook to ensure that LENA would be headed by an “independent board, appointed by the Minister, representing a broad spectrum of experience and

views.” Clearly an organisation whose entire board is appointed by the Minister cannot be said to be independent of government. In any event and disappointingly, Lesotho has yet to pass legislation transforming the LENA from a state news agency into an independent news agency.

3.5 **Statutes Governing Broadcasting Signal Distribution or Transmission:**

The Lesotho Communications Authority Act, 2000 (“the LCA Act”) is relevant to broadcasting signal distribution or transmission, the technical process of ensuring that the content-carrying signal of a broadcaster is distributed such that it can be heard and/or viewed by its intended audience. The LCA Act makes it clear that broadcasting signal distribution or transmission is a form of communications network service which would require to be licensed under the LCA Act and would be required to comply with all relevant statutory provisions including in relation to tariffs and other matters. The Lesotho National Broadcasting Service, the state broadcaster, operates terrestrial broadcasting transmission infrastructure in Lesotho that is used by its competitors too.

3.6 **Statutes that Undermine a Journalist’s Duty to Protect his or her Sources**

A journalist’s sources are the life blood of his or her profession. Without trusted sources, a journalist cannot obtain new 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” – those sources on the inside 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. They recognise that without such protection, the information which the public needs to know about would simply not be given to journalists.

3.6.1 The Criminal Procedure and Evidence Act, 1981

- *Preparatory Examinations*

In terms of section 65 of the Criminal Procedure and Evidence Act (“the 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 a period of imprisonment.

Further, in terms of section 68 of the CPEA, any persons 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 section 203 and 207 of the CPEA, any persons 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 The Internal Security (General) Act, 1984

Section 9(1) of the Internal Security (General) Act (“the Internal Security Act”) makes it an offence to fail to disclose any information to a member of the police force 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. Anyone found guilty is liable to a fine or to a period of imprisonment (section 12). Clearly, 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 in fact an unconstitutional violation of the right to freedom of expression, will be dependent on the particular circumstances in each case, particularly 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. Importantly, the 2009 Media Policy stated 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 in serious injury persons or property
- for the investigation of prosecution of a serious crime; or
- for the defence of a person accused of a criminal offence”.

To date however, no such legislation has been enacted.

3.7 **Statutes that Prohibit 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 on the media's right to publish information. These statutes are targeted and prohibit the publication of certain kinds of information, including:

- identities of minors in court proceedings
- certain kinds of information regarding legal proceedings
- information regarding defence, security, prisons, the administration of justice, public safety and public order
- obscene materials
- materials which threaten fundamental rights
- information regarding certain financial institutions

It is often very difficult for journalists to find out how laws that would seem to have no direct relevance to the media can impact upon their work. So we set out below the key provisions of these kinds of laws. It is important to note that some of the laws listed below constitute subordinate pieces of legislation, in other words are regulations or orders (which are more specifically dealt with in paragraph 4). Unusually, we have included them in this section because they fit better with the subject headings and impact upon the media generally and not just the broadcast media.

3.7.1 The Prohibition on Publication of a Minor's Identity in Legal Proceedings

Subordinate Courts Order, 1988

Section 7(2) of the Subordinate Courts Order provides that the trial of any person who is less than eighteen years of age may be held in camera, in other words, without the public (including the media) being able to attend the court's proceedings. This is a departure from the general rule providing for court proceedings to take place in open court.

3.7.2 The Publication of Certain Kinds of Information Relating to Legal Proceedings

3.7.2.1 ***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 otherwise request. Where the complainant and the accused disagree on the above, the court must decide as it thinks fit, in terms of section 23(2). Further, 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”.
- However section 25(2) 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 eighteen or older.
- Section 25(3) prohibits the publication of any information which may reveal the identity of a complainant in a sexual offences case 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 upon conviction, as person may be sentenced to a fine, a period of imprisonment of not less than 3 months or to both such fine or imprisonment.

3.7.2.2 ***Criminal Procedure and Evidence Act, 1981***

The Criminal Procedure and Evidence Act (the CPEA), at section 70(5) of the CPEA, 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 the person against whom the offence is alleged to have been committed.

Failure to comply with section 70(5) of the CPEA is an offence and upon conviction a person can be sentenced to a fine and to a period of imprisonment.

3.7.3 The Publication of Information Relating to Defence, Security, Prisons, the Administration of Justice, Public Safety and Public Order

3.7.3.1 ***The Printing and Publishing Act of 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 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 to even possess such material. Section 10(3) provides that such printed matter and any apparatus used to printing such matter is liable to forfeiture to the state. The offences carry punishments of a fine, a period of imprisonment or both in terms of section 15.

3.7.3.2 ***The Official Secrets Act, 1967***

Although not directed at the media itself, certain of the 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 and if found guilty, such person is liable to a period of imprisonment (or to a fine in the case of a juristic person such as a company).

3.7.3.3 ***The Internal Security (General) Act, 1984***

- Section 38 of the Internal Security (General) Act ("the Internal Security Act") makes it an offence for a person to be in an area that has been declared a "protected area" by the Minister, and the offence is punishable by a fine, imprisonment or both. Consequently, reporting by the media on any activity within a "protected area" is made very 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.

3.7.3.4 ***The Police Service Act, 1998***

Although not directed at the media itself, it is important 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.

3.7.3.5 ***The Prisons Proclamation of 1957***

Although not directed at the media itself, it is important for journalists to be aware that section 156 of the Prison 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.

3.7.3.6 ***The Sedition Proclamation 44 of 1938***

The Sedition Proclamation makes it an offence to print, publish, sell, distribute or import any seditious publication and the offence is punishable by a fine, a period of imprisonment or both

for a first offence and for subsequent offences, a period of imprisonment. 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, for example, hinder reporting on industrial disputes. However, two recent cases have dealt with clear cases of sedition and therefore the courts 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 upon 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.

3.7.3.7 ***The 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 upon all employees in the National Security Service which includes an obligation not to disclose classified information.

3.7.4 Expression which is Obscene -The 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 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 morality”. Section 10(2) makes it an offence to even possess such material. Section 10(3) provides that such printed matter and any apparatus used to printing such matter is liable to forfeiture to the state. The offences carry punishments of a fine, a period of imprisonment or both in terms of section 15.

3.7.5 Expression which Violates Fundamental Rights – The 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 visible form capable of communicating, expressing or suggesting a meaning, information, or an idea”) which is a “clear and present danger” to, among others, “fundamental rights and freedoms”. Section 10(2) makes it an offence to even possess such material. Section 10(3) provides that such printed matter and any apparatus used to printing such matter is liable to forfeiture to the state. The offences carry punishments of a fine, a period of imprisonment or both in terms of section 15.

3.7.6 Expression relating to Financial Institutions – The Financial Institutions Act, 1999

The Financial Institutions Act regulates financial institutions in Lesotho. While none of its provisions relate to the media directly it is important to note that there are a number of secrecy-related provisions which may indirectly affect the media. In particular:

- Section 26 imposes a secrecy obligation upon 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 Act.
- Further, section 55 allows the Central Bank of Lesotho to publish any information or data collected under the Act, provided that no information that would disclose the particular affairs of a particular customer of a licensed financial institution may be published without that customer’s prior written consent.

3.8 **Legislation that Specifically Assists the Media in Performing their Functions**

In countries which 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 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 in relation to three important aspects of public life, namely: the conduct of elections and the operations of Parliament and the Courts, Lesotho has passed a number of 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 this Act introduced an Electoral Code of Conduct which contains a number of provisions which are aimed at protecting the media so that it is able to fulfil its functions during election periods. Section 8 of the Electoral Code is headed “Role of the Media” and it 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 National Assembly Election Order contains a number of provisions regarding the conduct of elections and campaigning therefor which are important for the media. These are:

- Section 47F, which 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, opinion held or campaign material produced, published or possessed while campaigning in the election.
- Section 47K, which deals specifically with news broadcasts and reports. We focus on those provisions which set out the obligations of the state broadcaster in relation to party political broadcasting and it provides that:
 - while every party has the right to have the substance of its campaign be covered in the news:
 - the content of the news is professional determined by the media
 - the media must maintain neutrality in its reporting and commentary
 - the Independent Electoral Commission (“the 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 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 (“the Powers Act”) makes provision for certain privileges and immunities that are given to Parliament. Certain of these are important for the media and assist it to perform its functions 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 which 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, a defence is that this was done in good faith and without malice. Although this provision is somewhat unclear

essentially it allows the media to report (in good faith) on the activities of the Senate or National Assembly without fears 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 pursuant to section 81(1) of the Constitution to govern its own operations. The National Assembly Standing Orders contain a number of provisions that will assist the media as it performs its task on 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...[c]onducting public hearings as and when necessary”.
- Section 77 which provides that “committee proceedings shall be open to the public” although 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 The High Court Act, 1978

The High Court Act contains provisions that are useful for the media, namely section 13 which provides that the pleadings (in other words, the documents that cases are based on: notices of motion, summons, affidavits, heads of argument and the like) 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 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 court if the judge sees fit at any time during the proceedings.

3.8.6 The Subordinate Courts Order, 1988

Like the High Court Act dealt with immediately above, the Subordinate Courts Order provides, at section 7, that subordinate courts’ 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. Further, section 8 of the Subordinate Courts Order provides by that the records and proceedings of the court shall in all cases be accessible to the public.

4 REGULATIONS OR RULES IMPACTING ON THE BROADCAST MEDIA

By the time you have read this section you will know:

- What regulations or rules are
- What are key regulatory provisions governing broadcasting content
- What the other key aspects of broadcasting-related regulations are

4.1 What are Regulations and Rules?

Regulations and rules are both types of subordinate legislation – they are legal rules which are made in terms of a statute. Broadcasting regulations and rules are legal mechanisms for allowing the Minister responsible for communications or the Lesotho Communications Authority (“the LCA”) to make legally binding rules governing an industry or sector, without having Parliament having to pass a specific statute thereon. As is more fully set out elsewhere in this chapter, the empowering statute, in this case the Lesotho Communications Authority Act, 2000 (“the LCA Act”) essentially empowers:

- the Minister to make regulations to bring into effect the provisions of the LCA Act (section 64)
- the LCA to make administrative orders and rules for exercising its powers and performing its duties in the implementation of policy under the LCA Act (section 16(2)).

4.2 Key Regulatory Provisions Governing Broadcasting:

4.2.1 Broadcasting Rules 2004

The Broadcasting Rules were made by the Lesotho Telecommunications Authority (the forerunner to the Lesotho Communications Authority) 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 key set of rules governing broadcasting in Lesotho. We shall focus on the key aspects of the Broadcasting Rules:

- **Code of Practice:**

Part III of the Broadcasting Rules contains a Code of Practice which all broadcasters are required to comply with. Essentially the Code of Practice lays down content restrictions upon broadcasters. The key aspects of the Code of Practice include:

- Community Standards:

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:

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:
 - 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 through:
 - 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:
 - 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 opinion 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:
 - 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.
 - Before interviewing children, written parental permission must be obtained
 - Due sensitivity must be exercised when interviewing bereaved persons or witnesses of traumatic incidents.
- Comment:

Comment must be clearly indicated and must be an expression of opinion based on fact.
- Privacy:
 - 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:

A licensee shall not pay criminals for information unless there is a compelling public interest in doing so.
- Party Political Broadcasts and Advertisements:
 - A Licensee is not required to broadcast party-political advertising but if it elects to do so, it must afford all political parties a like opportunity on a non-discriminatory, non-preferential, 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. Essentially the Advertising and Sponsorship Code lays down advertising and sponsorship restrictions upon broadcasters. The key aspects of the Advertising and Sponsorship Code include:

 - Community standards, accuracy and fairness in advertising:
 - 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 unfairly attack or discredit other products or advertisements
 - A licensee shall not unreasonably discriminate against or in favour of any particular advertiser
 - Scheduling of advertisements:
 - 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
 - Presents shall refrain from commenting on advertisements
 - Sponsorship:
 - 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 clearly acknowledged before and after the sponsored programme and any link between the programmes subject matter and the sponsor's commercial activities must be clear
 - A licensee must not unreasonably discriminate against or in favour of any particular sponsor.

- **Record keeping obligations:**

Licensees are required to keep a range of records and produce these upon request by the Lesotho Communications Authority. Such records include:

 - Companies' incorporation documents and shareholders' agreements
 - Audited financial statements
 - Board resolutions
 - Employees records
 - Weekly programme schedules
 - Daily programme logs showing categories of programming and timing thereof
 - Advertising and sponsorship logs
 - Music records detailing percentages of Sotho music and African music played
 - Complaints received and responses thereto
 - Retaining original recordings to all programmes broadcast for a period of 3 months.

- **Compliance issues:** The Lesotho Communications Authority may impose a fine, or direct the licensee to broadcast a correct or an apology or both for a failure to comply with the Broadcasting Rules in terms of section 26 of the Broadcast Rules.

4.2.2 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 important regulations made by the Minister specify four categories of broadcasting services, namely:

- a public broadcaster, which shall:
 - provide coverage for the whole country at all times
 - serve all sectors of society equally
 - provide services that realise the aspirations of the nation as regards democracy, development and national building
 - be a platform for voter education

- be accessible to all political parties and independent candidates on a fair and non-discriminatory basis, particularly during election campaigns
 - contribute in bridging the digital divide by providing transmission access to other broadcasters where possible
 - be funded by Parliament and other funds raised in the course of its business
- a private broadcaster, which shall:
 - be owned and controlled by any individual or organisation so permitted by law
 - operate on a non-profit making basis
 - have a right to provide coverage as they deem desirable provided there is available spectrum
- a commercial broadcaster, which 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
- community broadcaster, which shall
 - be owned and controlled by a specific community
 - transmit programmed that are determined by and realise the aspirations of that community
 - operate on a non-profit making basis
 - provide coverage to enable access by members of the community

4.2.3 Licensing Fees Rules 2008

The Licensing Fees Rules are contained in Notice No. 7 published in Supplement No. 1 to Gazette No 7 dated 1 February 2008. These Licensing Fees Rules are issued by the Lesotho Communications Authority and set out the various fees payable in respect of new licence application fees, licence amendment fees, initial licence fees and annual licence fees. For example, annual licence fees are:

- 20 000 Maloti for public, private and commercial television broadcasters
- 10 000 Maloti for public, private and commercial sound broadcasters
- 2 000 Maloti for community sound and television broadcasters

4.2.4 Administrative, Procedural and Service Provision Rules 2000

The Administrative, Procedural and Service Provision Rules are contained in Notice No. 212 published in Extraordinary Gazette No, 103 (Vol. XLV) dated 13 December 2000. These administrative and procedural rules contain provisions:

- governing the organisational and financial processes of the Lesotho Communications Authority including with respect to: complaint proceedings, other types of enquiries and conducting investigations, all of which are relevant to broadcasting; and
- governing essentially telecommunications-related issues including tariff issues, interconnection and equipment.

5 MEDIA SELF REGULATION

One of the very great problems facing the media in Lesotho is a 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 the attainment of appropriate professional standards for the media. The lack of self regulation has led, inevitably, to disputes involving the media being settled in the courts.

6 COMMON LAW IMPACTING UPON THE MEDIA

Elsewhere in this chapter we have already examined two cases dealing with seditious publications.

In this section you will learn:

- What the common law is
- Defamation:
 - what defamation is
 - what the defences to an action for defamation are
 - what the remedies for defamation are
- What is the basis of an action for an invasion of privacy
- What contempt of court is:
 - the *sub-judice* rule
 - scandalising the court

6.1 What is the common law?

The common law is judge-made law. It is made up of judgments handed down in cases adjudicating upon 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.

In this section we focus on three areas of common law of particular relevance to the media, namely, defamation, privacy, and contempt of court.

6.2 Defamation

6.2.1 What is defamation and what are the defences to an action for defamation?

Lesotho's common law is extremely 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". (Brand in LAWSA, 2 Ed, Volume 7, para 232 citing *Argus Printing & Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 (A) at 23D-I.)

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 What are the defences to an action for defamation?

There are several defences to a claim based on defamation, (see generally: *Defamation* by FDJ Brand in LAWSA, 2 Ed, Volume 7, paras 245ff.) namely:

- 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 etc
- statements made in judicial or quasi-judicial proceedings
- reporting on proceedings of a court, Parliament or of certain public bodies
- fair comment upon true facts and which are matters of public interest
- self-defence (to defend one's character, reputation or conduct)
- consent

We shall focus on the most important of these, namely 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, further, 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 is often the case that it will be in the public interest to publish true, if defamatory, material about public representatives. This is because of the importance of the public having accurate information to be able to engage in democratic practices, such as voting, effectively.

Prior to South Africa's transition 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 means 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, in other words, the courts were not required to find fault on the part of the media in the publication of a defamatory statement. See: *Pakendorf en Andere v De Flamingh* 1982 (3) SA 146 (A). 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* decision as being clearly wrong and adopted the approach that has been taken in England, Australia, and the Netherlands.

The new legal principle is stated at page 361 to 362 of the *Bogoshi* judgment:

"[t]he 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 the 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:

- nature and tone of the allegations
- nature of the information on which the allegations were based, for example, is the information related to an important political issue or not

- reliability of the source of the allegations
- steps taken to verify the allegations
- the 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 but 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 which published excerpts from a book which alleged that a senior named politician had misappropriated party funds, dealt illicitly in diamonds and had 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 but the editor appealed trying to argue that the publication was nevertheless reasonable. In its judgment, the Court of Appeal made some important comments on the reasonableness of the editor of the newspaper'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 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 What are the remedies for defamation?

Essentially 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
 - an action for damages
 - an action for prior restraint
- **Publication of a retraction and apology**
 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 a number of factors, including: the seriousness of the defamation; how quickly the retraction and apology is published; and the prominence given to the retraction and apology (this is a combination of the size of the retraction but also the positioning of it within the paper and on the particular page concerned).
 - **Action for damages**

This is where a person who has been defamed sues for monetary compensation. This 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 (in other words, the amount to be paid in compensation) will depend on a number of factors including whether or not an apology or retraction was published and also the standing or position of the person being defamed in society.

- **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 be able to 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 being a last resort mechanism and the legal systems of countries which protect the right to freedom of expression usually prefer to allow publication and to deal with the matter through damages claims, in other words, using “after publication” remedies.

6.3 **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 830 D). The personality interest is the concept of “*dignitas*” which “embraces privacy” (at 830E). The facts of this case involved an action for damages arising out 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).

6.4 **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.

6.4.1 The Sub-Judice Rule

The *sub-judice* rule is there to guard against people trying to attempt to influence the outcome of court proceedings while legal proceedings 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 para. [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 (impliedly 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 para. [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 para. [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 para. [28]).

6.4.2 Scandalising the Court

The reason why “scandalising the Court” is criminalised is, essentially, to protect the institution of the judiciary. The point is to prevent the public undermining of 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, namely: “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 unimpeachable and above criticism”.