

SADC Media Law: A Handbook for Media Practitioners

VOLUME 3

A comparative overview of media laws
and practice in Lesotho, Tanzania and the Democratic
Republic of Congo

SADC Media Law: A Handbook for Media Practitioners, Volume 3

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60 Hume Road, Dunkeld, 2195
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PO Box 1383
Houghton, 2041
Johannesburg, Republic of South Africa

Telephone: +27 11 2142900
Telefax: + 27 11 2142913/4
e-mail: g.neujahr@kas.org.za

<http://www.kasmedia.org>

Authors: Justine White and Daddy Bujitu
Editor: Jude Mathurine
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KAS Media Programme

Konrad Adenauer-Stiftung (KAS) is an independent non-profit organisation bearing the name of Germany's first Chancellor (1949-1963) after World War II.

In the spirit of Konrad Adenauer, the foundation aims to strengthen democratic forces and develop social market economies. For more than 40 years KAS has been cooperating with partner organisations in over 100 countries worldwide. For an overview of the organisation's range of activities, go to <www.kas.de>

The KAS Media Programme in sub-Saharan Africa promotes the media through support for advanced training, the development of educational materials for journalists, networking and advocacy. KAS views the media as an integral part of modern democracy, national development and integration. To this end, media have to be empowered and supported to fulfill their fourth estate role as whistleblowers and watchdogs within their society. But reporting on misdeeds of politicians and company executives who do not live up to their duties is not enough. The media must be a progressive force to support human rights and shape new ideas in an open society through informed, impartial reporting and analyses.

A free, sustainable and competent press is a catalyst and resource for literacy, modernization, informed politics and participatory development.

For more information on the KAS Media Programme and its activities, go to <www.kasmedia.org>.



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As a centre of excellence, the Mandela Institute undertakes research, develops policy and offers advanced teaching in global law at the University of the Witwatersrand - that is, those areas of law that connect South Africa and the developing world to the global economy. These include competition law, intellectual property law, banking law, company law, communications law, the development of appropriate regulatory regimes and international arbitration. The Mandela Institute is working to create an enhanced legal framework and skills base as a contribution to the wider goal of economic growth.

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The firm has advised many of South Africa's large corporations, national, provincial and local government departments and government enterprises in various commercial transactions and projects.

The Authors



Justine White

Justine White is a Director at Mukwevho Mkhabela Adekeye Inc. She is the Webber Wentzel Bowens Visiting Senior Fellow in Communications Law at the Mandela Institute at the School of Law, University of Witwatersrand, where she teaches Telecommunications Law, Broadcasting Law, Media Law and Space and Satellite Law. Justine has a BA degree and an LLB degree from the University of the Witwatersrand and an LLM degree from Yale University specializing in constitutional and administrative law. Justine is listed in the *International Who's Who of Regulatory Communications Lawyers*.

Daddy Bujitu

Daddy Bujitu is currently serving his articles of clerkship at Mukwevho Mkhabela Adekeye Inc. Daddy holds a Law degree (equivalent of an LL.B) from the University of Lubumbashi (Democratic Republic of Congo) and an LLM degree specializing in Communications Law from the University of the Witwatersrand.



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Introduction

1 General Overview

1.1 Purpose of the Report

The purpose of this report is to review the right to freedom of expression and the state of the mass media in the South African Development Community (“SADC”) region. For ease of reference we will use the term “mass media” in this report to refer to radio and television broadcast media, other electronic media and the print media. The three SADC countries selected for this report (“the target countries”) are: Lesotho, Tanzania and the Democratic Republic of Congo (“DRC”).

It is intended that this report should ultimately be used as a reference resource by journalists and others working in the media and by non-governmental organizations (“NGOs”) involved in the media sector.

1.2 A detailed breakdown on the volume

- The breakdown of each target country comprises the following:
- An overview of the political history and the market structure for broadcast and print media;
- a summary of the interviews with people engaged in the mass media sector including academics, people working in the public and private broadcasting sectors, journalists in the print media sector, journalists working for news agencies, employees of broadcasting regulatory bodies, and those working in media organizations and interest groups in the target countries;

- an analysis of the right to freedom of expression as enshrined in each country's constitution;
- an overview of the most important legislation that impacts on the media's right to freedom of expression consisting of, where applicable, legislation providing for the:
 - establishment of an independent communications regulator;
 - regulation of broadcasting services;
 - establishment and regulation of the public broadcaster;
 - regulation of the print media;
 - censorship of publications;
 - promotion of access to information;
 - disclosure of official state secret information;
 - disclosure of journalists' confidential sources of information; and
 - regulation of defence and internal security;
- the most important codes of conduct prescribing standards of conduct for the broadcasting and print media industries; and
- the most important cases impacting on the right to freedom of expression of the media (where available).

1.3 The interviews with journalists

Interviews were conducted in each of the target countries. In most cases a range of people engaged in the mass media sector – including academics, people working in the public and private broadcasting sectors, journalists in the print media sector, journalists working for news agencies, employees of broadcasting regulatory bodies, and those working in media organizations and interest groups - were interviewed in the target countries.

Only a minority was comfortable with the full details of their interviews being made public. Most, if not all of the journalists, editors and others were reluctant for their names to be disclosed although they did not object to the content of their interviews being made available to the public. Indeed some of the interviewees from Tanzania refused to give their names to us even on a confidential basis, for fear of reprisals. Interestingly however, we were surprised by how many media practitioners in the DRC were willing to talk on the record about their experiences.

In the end, we decided to summarise the interviews and provide an overall synopsis of the interviews for each country.

2 Political history, market structure ad experiences of journalists in the target countries

All of the target countries have difficult political histories, a legacy of colonialism and poor post-independence governance. For many years, each of the target countries operated as one-party states or under military rule. In the case of the DRC, Mobutu Sese Seko's dictatorship lasted for 32 years. The lack of political freedom that characterized the history of the target countries is reflected in the fact that no independent media was allowed in each of the target countries until 15 years ago or so.

However, since the 1990s, all of the target countries have experienced a significant flowering of democratic practices although how well-entrenched these are in fact remains to be seen. It is too early to say with any real confidence that these countries will become stable democracies based on the rule of law and respect for human rights and freedoms. Nonetheless, each of the target countries is operating under a new constitution, with greater protection for civil liberties, including freedom of expression. Further, each of the target countries has experienced a significant opening up of the mass media market – with many alternative independent voices being available in both the print and broadcast media.

As regards broadcasting, every target country had failed to transform its state broadcasting service into a public broadcasting service, operating in the public interest (at the time of writing). The differences between a state and a public broadcaster are measured in a number of different ways, including: the level of independence of the functioning of the board, the appointments and removals procedures for members of the board and the general mandate and overall content broadcast. However, all of the target countries have made great strides in respect of the liberalization of the broadcast media. Indeed, only in Lesotho does the state television broadcaster have a monopoly over free-to-air television broadcasting. In both Tanzania and DRC there are a number of private television

free-to-air broadcasters. Further, in all target countries private subscription broadcasters are in operation and there are numerous alternative voices on radio, both private and community, including a number of religious radio stations.

Our interviews with journalists and media workers in the target countries show that the degree of freedom of expression in the three target countries remains far below the required standards of robust democratic countries. Journalists spoke routinely about abuses committed by their governments and the undermining of press freedom that takes place in these countries. However, journalists were generally upbeat about the current status of media freedom when compared with the state of affairs prior to democratization. Journalists were particularly excited about the improving diversity of mass media outlets in their respective countries. However, when asked pointed questions about evidence of the levels of press freedom, it became clear that the journalists and media workers operate in less than ideal circumstances that would not meet international standards of media freedom given the level of interference, intimidation and abuse that continues to take place.

3 Enshrining the right to freedom of expression in the constitution

All target countries theoretically espouse the principle of constitutional supremacy as opposed to parliamentary sovereignty. However in all instances the concept of constitutional supremacy is undermined. In DRC, for example, the Transitional Constitution is given the same legal status as provisions in the Peace Agreement. Further, all of the target countries' constitutions contain numerous internal limitations. The wording of these limitations is such that fundamental rights are subject to the ordinary laws of the land. This greatly curbs the notion of constitutional supremacy and by doing so, undermines the force and effectiveness of the rights enshrined in the constitutions (such as freedom of expression and press freedom).

The constitutions of Tanzania, Lesotho and DRC all enshrine the right to freedom of expression but limit this right to varying degrees. Constitutional provisions that limit the right to freedom of expression generally take one (or a combination) of three forms as set out below:

The first way that limitations of rights can be provided for is on an internal, clause-by-clause basis. Where a limitation is provided for in this way, the limitation typically tends to take the form of a list of “grounds of exclusion” from the right to freedom of expression. Lesotho and DRC both fall into this category as they both permit laws to restrict freedom of expression in order to protect, among other things: public order, public morality, and reputations and privacy rights of others. The Tanzanian constitution is even more deferential in that it provides that the right to freedom of expression is “without prejudice” to laws of the land relating to expression issues.

The second way in which limitations of rights can be provided for is on the basis of a catch-all limitations clause, which broadly applies to all of the fundamental rights that are protected by the constitution. It is important to note that none of the target countries’ constitutions have a “general” limitations clause in the ordinary sense of the word. Thus each of the constitutions of the target countries contains limitations to the rights of freedom of expression which are provided for in the provisions on the right itself. However, the Tanzanian constitution is interesting in that it provides for a general limitations clause in addition to the limitations found in the right to freedom of expression. Further, this general limitations clause provides that the provisions on human rights and freedoms do not invalidate any legislations aimed at, among other things, defence, public order, public morality, protecting reputations of others, privacy etc. This is a wide formulation that makes it easy to undermine the ostensible right to freedom of expression.

The third way in which limitations of rights can be provided for is by way of a derogation clause that allows for the suspension of certain rights during a state of emergency. Of the target countries, the only constitution that contains such a derogation clause is Lesotho and it is important to note that freedom of expression is in fact a non-derogable right there.

4 Legislation and law impacting on freedom of expression

4.1 General

We surveyed legislation in each of the three countries according to several broad

theme areas: broadcasting, the print media, censorship, access to information, defence and internal security and the protection of confidential sources.

Not all of the target countries have enacted legislation in each of these areas. Many countries have supplemented their statutory regime with codes of conduct. Codes of conduct tend mainly to be used to regulate standards of conduct in the broadcasting and print media sectors and are administered on a voluntary or self-regulatory basis. The case law that we surveyed relates broadly to the application of the right to freedom of expression in the common law and the development of the law of defamation.

4.2 Broadcasting

Laws related to the regulation of the broadcasting industry typically deal with things such as the establishment of a communications regulator, establishment and oversight of the state broadcasters, and the regulation and licensing of broadcast services.

All three countries have established regulatory authorities with oversight over the broadcasting sector. However, none of these regulatory authorities is in fact independent, as is more fully set out in the respective chapters.

4.3 Print media

Of the target countries, Tanzania and DRC most heavily regulate the print media. In both jurisdictions there are detailed statutory provisions regarding the establishment and proper registration of the print media. Further, In DRC journalists are required to hold permits to practice their professions.

4.4 Access to information

None of the target countries has passed access to information legislation, granting journalists the right to access information held by organs of state. While a draft Bill on access to information is currently circulating in Lesotho this has yet to be formally introduced into Parliament.

Lesotho

1. Introduction

1.1. Political landscape¹

The Kingdom of Lesotho is a small, mountainous country that is entirely surrounded by the territory of South Africa. The state has an estimated population of 1.8 million people, the majority of whom are from the ethnic Basotho tribe.

Formerly known as Basutoland, Lesotho was a British protectorate during the colonial era. Basutoland became the independent Kingdom of Lesotho on 4 October 1966, with King Moshoeshoe II as sovereign.

Lesotho has a history of political instability. In the 1950s a number of political parties began to emerge. The two major ones were the Basutoland Congress Party (“BCP”), and the Basutoland National Party (“BNP”). In the 1965 elections, the BNP gained a narrow majority over the BCP. In 1970, the first elections after independence were narrowly won by the BCP. However, the elections were annulled and the Constitution of the Kingdom was suspended by then Prime Minister Leabua Jonathan who declared a state of emergency. King Moshoeshoe II was briefly dethroned but was later allowed to return as a ceremonial head of state with no political role.

The BNP ruled by decree until 1986 when a military coup led by Major General Justin Lekhanya forced it out of office. The Military Council granted certain executive powers to King Moshoeshoe II but after a political disagreement the King was again forced into exile and his son Letsie III was installed in 1990.²

The 1980s were marked by tensions within Lesotho regarding how to respond to the South African Apartheid regime. The BNP government of the 1970s and early 1980s had offered shelter to a number of South African political refugees causing tension between Maseru and Pretoria. In 1982, the South African Defence Force attacked homes in Maseru killing at least 40 people, many of whom were Lesotho citizens. The SADF justified the invasion as a “pre-emptive strike against ANC terrorists” in Lesotho. Not surprisingly, the result of the military raids in Maseru led to deterioration in the relationship between the two countries. Lesotho refused to expel political refugees contrary to Pretoria’s demands and at the same time South Africa placed severe restrictions on the movement of goods and people across the border, effectively closing it. The political crisis was mirrored in internal Lesotho political debates with a pro-South African faction (led by Major-General Lekhanya) arguing for a policy that was more amenable to it. After Lekhanya’s military coup in 1986, relations with South Africa improved leading to the signing of the Lesotho Highlands Water Treaty and the establishment of a South African trade mission in Lesotho.

In 1991, the Military Council drafted Lesotho’s current Constitution (“the Constitution”). It was approved by a constituent assembly but not promulgated until March 1993 in order to pave the way for democratic elections. Later in 1993, the first free elections in 23 years were held and resulted in a landslide victory for the BCP.

Five years later, elections again took place and despite being declared free and fair by a variety of observers, angry supporters of the BCP, the BNP and other opposition parties that lost the election protested for weeks in front of the King’s palace claiming voting fraud. The election was won by the Lesotho Congress for Democracy (“LCD”), a breakaway party of the BCP. Protesters demanded that the government step down and hold fresh elections. Eventually troops from South Africa and Botswana entered the country to prevent an insurrection and put down a mutiny by the Lesotho armed forces. Five years later, the LCD again won a landslide victory in the 2002 elections.

Lesotho is a Constitutional monarchy with a bi-cameral Parliament consisting of a Senate or upper house, two-thirds of which is made up of Principal Chiefs with other Senators nominated by the King acting in accordance with the Council of State, and the Assembly. The lower house or Assembly is made up of members

elected by popular vote and currently includes representatives from nine political parties.

The Gross Domestic Product in Lesotho is estimated at approximately US\$ 5.6 billion with an annual growth rate of approximately 4%. Water, agricultural and grazing land and diamonds are the country's main natural resources. For decades, Lesotho's economy was dependent on the South African mining industry that employed a large number of Basotho migrant workers.

In terms of trade, Lesotho exports approximately US\$ 450 million worth of products such as clothes, furniture, footwear, wool, food and live stock and imports approximately US\$ 661 million worth of products such as corn, clothing, building materials, vehicles, machinery, medicines and petroleum products. Its main trading partners are South Africa, Botswana, Namibia, Swaziland, the United States of America ("the US") and the European Union ("the EU"). Lesotho is heavily dependent on economic aid from the World Bank, the International Monetary Fund, the EU, the United Nations, the United Kingdom, Ireland and the US.

The right to freedom of expression, including the right to hold opinions and the freedom to receive and communicate ideas and information is protected in the Constitution subject to a number of limitations.

1.2. The mass media market in Lesotho

Lesotho boasts approximately 16 newspapers or periodicals although none of these is published on a daily basis. According to industry sources, this state is due to general poverty, a scarcity of advertising and high production costs. A majority of the newspapers are independent and commercial and the rest are owned by or affiliated to the Churches and political groupings. Four newspapers are published by the government: *Lesotho Today*, *Lentsoe la Basutho* (published by the Ministry of Communications, Science and Technology), *Mara* (published by the Lesotho Defence Force) and *Leseli ka Sepeolesa* (published by Lesotho Mounted Police). The state also operates a news agency, the Lesotho News Agency. Among the most prominent of the private newspapers are: *MoAfrika*, *Setsomi*, *Makatolle* and *Mohlanka*, published weekly in Sesotho; *Mopheme*, published weekly in Sesotho and English; and *The Mirror* and *Public Eye*, published weekly in English.

Until 1998, the government had a monopoly over the electronic media through the only radio station (*Radio Lesotho*) and television station (*Lesotho Television*) operated under the Lesotho National Broadcasting Service. Generally speaking, the state-owned media reflects the official positions of the ruling LCD party.

In 1998, the electronic media sector began to open up as the government licensed a number of new, non-state broadcasters, both television and radio:

- it licensed the subscription Christian television station, *Trinity Broadcast Network*. The South African multi-channel satellite subscription broadcaster *Multichoice* and its sister terrestrial subscription broadcasting service *M-Net* are present and operate in Lesotho although they have not yet been licensed; and
- a small number of private radio broadcasters including *MoAfrica FM* (which broadcasts news seven times a day), *Peoples' Choice FM*, and *Joy Radio FM* have also been licensed. A few religious radio stations have also been licensed including, *Catholic Radio FM*, *Harvest Radio* and *Jeso ke karabo*. However the state-owned *Radio Lesotho* remains the only broadcaster with national coverage despite the process of liberalisation.

2. Experiences of journalists in Lesotho

2.1 Overview

Interviewing journalists in Lesotho presented several challenges. Many journalists, and particularly those from the state-owned media, were unwilling to talk without permission from their superiors. Many journalists refused to speak even after confidentiality was promised. We were however able to interview a range of journalists from the commercial print media, the state radio broadcaster, the state-owned news agency and also some media workers from non-governmental organisations (“NGOs”) that focus on press freedom issues.

All interviewees said that media freedom in Lesotho was far better today than when the country was under military rule. Interviewees pointed to the opening up of the commercial radio broadcast sector as evidence of this. It is clear that the

past 13 years has brought about a sea change in the level of press freedom. All interviewees were confident about their ability to keep sources confidential although some said that it was sometimes difficult to convince potential government whistle-blowers of this. Some journalists reported that government officials asked about sources and some business people offered bribes for information about sources.

The interviewees described a number of persistent problems in the Lesotho media sector which offer proof that at “grass-roots level” the media is not as free as democratic standards would dictate:

- All interviewees cited the low level of education and training of a professional cadre of journalists as a major problem. Many journalists are junior and have no formal or theoretical training. Indeed there is no tertiary level education for journalists available in Lesotho apart from a Mass Communications course run by an institute attached to the University of Lesotho. As most journalistic training takes place on the job, many journalists make errors, leading to civil litigation against media companies. Low levels of formal training contribute to a general lack of awareness about applicable media laws. This is exacerbated by the fact that there is no agreement on a national Code of Conduct for journalists. MISA Lesotho has published a draft Code of Ethics for journalists; however, it was met with resistance by the Ministry responsible for the state media and has not been adopted. One interviewee said he tried to respect Basotho values in the absence of a Code of Conduct but acknowledged that it was difficult to determine precisely what this meant in practice.
- Several interviewees spoke of recent assaults on reporters by members of the Lesotho Mounted Police and the security guards of the Maseru City Council when they had covered a story about the forced removal of street vendors in preparation for a state visit by former Mozambique Head of State, Joaquim Chissano. At least four journalists were assaulted. One reporter subsequently laid charges but no progress has been made thus far. All said that journalists were more likely to be harassed by government officials than by, for example, business people (although harassment by members of the private sector was not unheard of). For example, one reporter related how he was slapped by a businessman he had named in a story, until security guards came to his rescue.

Although charges were pressed, no progress has been made in this case.

- Print media journalists told how the courts are used as a mechanism to silence journalists and media houses. Interviewees said that so many defamation suits were successful in the courts (often with punitive damages awards being granted) that this contributed to significant “self-censorship” by Lesotho journalists. Further, a number of interviewees were critical of the judiciary itself, saying that judges and magistrates often sided unfairly with political and governmental officials, to the point of refusing to recuse themselves from hearing cases even when this would have been justified.
- Another serious challenge is that government is a major source of advertising for Lesotho newspapers. Because government can and does refuse to advertise in newspapers viewed as hostile to it, this causes a number of media houses to tacitly support self-censorship to avoid financial difficulties.
- A significant problem identified by nearly all interviewees was the difficulty of getting information from government officials. This problem did not relate only to investigative journalists tackling sensitive issues but also included trying to get officials to hold press conferences and obtaining comment from political parties on the issues of the day. One journalist said that political parties express a view on an issue “only when political tensions are high” and that generally government has to approve distribution of any information.

2.2 The print media sector

As is set out above, there are a number of general problems with regard to the media in Lesotho, many of which impact on the viability of a critical and vibrant press. Some variations on the general problems that became clear from the interviews include the following:

- The current rash of civil litigation suits against newspapers hamper the day to day running of newspapers. In one case, a leader of an opposition party successfully sued *The Mirror* for defamation. *The Mirror* appealed the judgement but notwithstanding that the appeal was still in the pipeline, the Sheriff of the High Court still attached some of *The Mirror*'s property,

particularly, computers, printers, scanners which hampered its operations significantly.

- Print journalists relayed an example of harassment by the Chief Magistrate who refused to allow a particular reporter to remain in court to cover on a case (despite other journalists being present). The case involved corruption in the Lesotho Highlands Water Project and it appears that the Chief Magistrate's refusal to allow the journalist to attend at court may have been based on personal animosity.
- That the judiciary and the press do not have a relationship that strengthens both important institutions is evidenced by the recent refusal by the Chief Justice to allow a judge to address the Lesotho Press Club on the issue of Defamation.

Journalists from state-owned media organisations were extremely cagy about harassment. One said: “No, no, no, no, no, I can't say stuff over the phone about harassment of journalists. There is no harassment of journalists.”

A number of print journalists interviewed told us about the difficulties they have in covering sensitive stories. The issues that are currently “sensitive” include:

- Corruption: journalists made reference to a belief that corruption is rife within government and that reporting corruption is difficult as this is often seen as a “no go area” - with government officials refusing to give out information. This is particularly so when reporting on corruption involving the Lesotho Highlands Water Project within which a number of national and local government agencies and parastatals operate.
- Critical reporting on governmental officials: a number of print journalists spoke about the difficulties of interacting with government officials (in all branches of government, ie, the executive, the legislature and the judiciary) and obtaining official information on particular issues. One journalist reported that dealing with military or para-military institutions, such as the police or the army, was always complicated.
- Reporting on activities of political parties: a number of journalists complained about secrecy, particularly with regard to the ruling party. A number of journalists complained that the ruling party effectively divulges information only to the state-owned media and are generally suspicious of the independent media.
- Reporting on HIV and Aids: while there has been significant donor funding to

tackle the disease, it is difficult to get statistics from government about the extent of the spread of the disease in Lesotho or information about treatment campaigns.

- **Reporting on the Royal Family:** Lesotho is generally traditional and conservative. There appears to be an unspoken rule in Lesotho about reporting on the King and his immediate family. There is a basic agreement that the media will not bring the King or his family into disrepute. A number of interviewees spoke about the stir that was caused when a newspaper ran a photograph of the Queen with the headline “The Queen is Pregnant” before the royal pregnancy was announced officially by the spokesperson of the Royal Household.

However, a journalist from a state-owned media organisation was less than forthcoming on such sensitive issues, making a raft of rather bald denials such as “The media in Lesotho is free... I don’t know of any sensitive issue that cannot be covered... Because we are government owned we are free to do anything.”

It appears that print media journalists in Lesotho are poorly paid and that there is a high level of rotation in and out of the profession. This contributes to the lack of skills and training identified above as a general problem facing the media. There is a difference in the salaries earned by journalists in the state media as opposed to those in the private sector. Generally speaking it seems that within the state media, the general salary of a journalist with a diploma in journalism is between 1500 to 2000 Maloti and the general salary of a journalist with a degree in journalism is between 2500 and 3000 Maloti. The situation in the private sector is far less stable. Salaries are extremely low and in many instances, some journalists do not receive salaries as such, they work as freelancers - getting paid for work as it is published.

2.3 The television broadcasting sector

There is no commercial free-to-air television broadcaster in Lesotho and we were unable to find a single representative of the state-owned Lesotho Television who would speak to us either “on” or “off the record”. One journalist who did contact us said she had been refused permission to speak to us. This could be viewed as symptomatic of a lack of openness and transparency on the part of the state television broadcaster.

At the moment, media NGOs in Lesotho are engaged in advocacy campaigns to transform *Radio Lesotho* and *Lesotho Television* into public broadcasters, with a proper public service mandate and an independent board to exercise oversight. However, the Bill that is corporatising the state broadcaster does not provide for independent oversight as the Minister responsible for broadcasting appoints the Board. A number of interviewees said that the government is hostile to the idea of a public broadcaster because generally speaking, the state-owned broadcasters serve the interests of the ruling party, rather than the needs of the people of Lesotho. One interviewee working for Lesotho Radio queried the wisdom of corporatising the state broadcaster. “There really are not the resources or the people to support a separate corporate entity... where are we going to get the people and the finances to sustain a corporation?” the journalist said.

Also, the government is in the process of determining an ICT policy that will impact on the electronic media although its provisions are so broad that is hard to determine whether there will be significant changes made to the broadcast sector.

Opinion of the Lesotho Telecommunications Authority’s (“the LTA”) regulation of the broadcast sector was not very high. Journalists questioned why the only real division in broadcasting was between state and non-state broadcasters and that no distinction was made between religious broadcasters and purely commercial broadcasters, for example. Further, due to poor television coverage it appears that programmes broadcast by the South African Broadcasting Corporation are watched more than Lesotho Television although new signal distribution infrastructure is to be introduced by the latter. Importantly, the LTA does not issue invitations to apply for broadcasting licences, these are licensed on a first come first served basis and so the process does not involve a weighing up of competing applications. The LTA declined to answer questions on its independence or on the state of press freedom generally in Lesotho, making it clear that it “did not want to venture into that territory”.

2.4 The radio broadcasting sector

The advancing of standards for a free and open press has had an impact even on the state-owned radio broadcaster. Indeed one interviewee recalled how under military rule, news bulletins had to be pre-approved. Now, the reporter says, Ministers can get questioned about their work. This is regarded as a radical change. One problem that persists however is that the state broadcasters are required to

wait for official government statements before reporting on state activities. For example, when King Moshoeshoe II died, *Radio Lesotho* was aware of his passing within hours – but was unable to broadcast the news until the government had made an official pronouncement. This led to an embarrassing situation of being scooped by the international media.

A number of journalists related evidence of harassment of radio journalists, including:

- A radio presenter and a reporter who made a number of critical remarks on radio about the administration of soccer by the Lesotho Football Association were subjected to death threats.
- A radio reporter who was critical of the appointment of the King's brother as ambassador to the United Kingdom received threatening anonymous phone calls.
- government harassment of *MoAfrica* because of the often critical stance against government taken by the radio station. The station had been closed down several times and had been interdicted from using a new transmitter.

One journalist said that while state radio reporters had an open line to government officials and did not find it difficult to access information or comments on stories, the experience of the commercial broadcasters was different. The reporter opined that government distrusted the commercial media because they “distort what government officials say”. Interestingly, no one from the state radio broadcaster could relay any anecdotes regarding harassment except for a particular time during the SADC military invasion of Lesotho in 1998 about which it was said “...our journalists had a hard time because the opposition was totally against the media.” This might well be an indication of how partisan the state broadcaster was seen by members of the opposition. Immediately prior to the invasion, the opposition was in the process of driving out the government by force, and might have felt more able to express their anger at perceived partisanship on the part of the state broadcaster.

However, it is often harder for journalists in state media to cover sensitive stories such as corruption in an impartial or fair manner. Instead, the state-owned broadcasters see themselves as a supportive instrument to government. One state-owned broadcaster employee acknowledged that state-owned media journalists

practise a form of self-censorship. In part this stems from a commitment that all new state employees take not to divulge government secrets. “I cannot really even think on reporting on corruption,” said one interviewee. Interestingly, the media environment in Lesotho seems to have restricted commercial broadcasters advancing into the “corruption reporting” or “investigative journalism” news space left by the state broadcaster. As one state-broadcaster interviewee opined: “Frankly, those who work in the private media ought to be able to do much better than us. But they don’t break new stories before us and we do not consider that we have a great deal of competition.”

3. The Constitution of Lesotho

Commencement date

2 April 1993

Supremacy of the Constitution

Section 2 of the Lesotho Constitution acknowledges the Constitution as the supreme law of the land (as opposed to supremacy vesting in parliament). If any law is not consistent with the Constitution, it is considered void to the extent of the inconsistency.

Establishment of an independent regulator

There is no provision in the Constitution for setting up an independent regulatory authority for the communications sector.

Provisions impacting on the media

Chapter II of the Constitution deals with Protection of Fundamental Human Rights and Freedoms. Section 14 is headed Freedom of Expression. Section 14(1) includes the following as examples of freedom of expression: freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference and freedom from interference with correspondence. The right to freedom of expression in section 14 does not explicitly guarantee the freedom of the press or other media. Nevertheless, we are of the view that some of the specific examples of freedom of expression provided for clearly indicate that the right to a free

press is included in the general right. The key examples are: the freedom to receive ideas and information without interference and the freedom to communicate ideas and information without interference.

The exact phrasing of section 14 (1) of the Constitution provides as follows:

Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of, freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

The right to freedoms of expression is not absolute, it is subjected to a number of restrictions, which are listed in sub-sections (2) and (3) of Section 14.

Section 14(2) and (3) states that if a law makes provision for:

- the protection of: defence, public safety, public order, public morality or public health;
- reputations, rights and freedoms of other persons, the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating the technical administration or operation of telephony, telegraphy, posts, wireless broadcasting or television;
- imposing restrictions upon public officers,

then no person can rely on such provision in judicial proceedings except to the extent that the provision does not abridge the rights in section 14(1) to a greater extent than is necessary in a practical sense in a democratic society in the interests of any of the matters specified above.

The effect of this is that the right of freedom of expression contained in section 14(1) is significantly limited. While it is true that the limitations may not abridge the right to freedom of expression to a greater extent than is necessary in a practical sense in a democratic society, it is unfortunate that the interests that are required

to be considered are not the freedom of expression rights but in fact the interests of the matters that are set out in the limitations namely, defence, public order, personality rights and even technical administrative issues. In a democracy, the rights of freedom of expression are usually better protected by a general limitations clause, rather than a number of specific internal limitations set out in a particular right, as is done in the Lesotho Constitution.

Section 14(4) grants to any person aggrieved by false statements disseminated to the public, a right of reply or correction using the same medium used to disseminate the statement in the first place (provided that this is done in accordance with conditions established by law). Unfortunately, it is clear from the interviews we conducted with Lesotho journalists that this mechanism for redressing inaccurate reporting is being ignored in favour of using the courts and damages claims for defamation.

Limitation clause

The Constitution does not contain a general limitations clause. Section 4(1) states that clauses that limit the fundamental rights in Chapter II are contained in the rights themselves and are set out on a section-by-section basis. This is the case with Freedom of Expression (section 14) as set out above.

In the event of a war or state of emergency, section 21(1) of Chapter II permits some fundamental rights in the Constitution to be derogated. The rights that can be limited under these conditions are: the right to personal liberty, the right to freedom from discrimination and the right to equality before the law and equal protection of the law. Section 21(1) *does not* make specific mention of any derogation of the right to freedom of expression (section 14) and therefore that right is non-derogable.

Courts which have jurisdiction to decide on Constitutional matters

There is no separate Constitutional Court in Lesotho. Section 128(1) of the Constitution confers jurisdiction on the High Court of Lesotho where any question as to the interpretation of the Constitution arises in any proceedings of a lower court or tribunal. In other words, questions of law regarding a violation of rights and freedoms must be determined by the High Court. Section 129(1)(a) read with section 69 of the Constitution gives the Court of Appeal the final say on Constitutional matters (except for matters regarding questions as to

the membership of Parliament which are determined by the High Court and are not subject to appeal).

Hierarchy of the courts

Chapter XI of the Constitution is headed “The Judicature” and in terms of this Chapter, the Court of Appeal is generally the final Court of Appeal, and thus the highest court in the land. Below the Court of Appeal is the High Court, below which are the subordinate courts and tribunals.

Appointment and removal of judges

Sections 120(1) and (2) and 124(1) and (2), respectively, empower the King, acting on the advice of the Prime Minister, to appoint the Chief Justice of the High Court and the President of the Court of Appeal. The King is also empowered to appoint:

- the judges of the High Court, acting on the advice of the Judicial Service Commission (a body consisting of the Chief Justice, the Attorney General, the Chairman of the Public Service Commission and a member (who holds or has held high judicial office) appointed by the King on the advice of the Chief Justice)
- the judges of the Court of Appeal, acting on the advice of the Judicial Service Commission which in turn consults with the President of the Court of Appeal.

High Court and Court of Appeal judges have to vacate their offices upon the attainment of the prescribed age, which is 75 years, or such other age as may be prescribed by Parliament, under sections 121(1) and 125(1) of the Constitution.

Sections 121(3) and 125(3) provide that a High Court or Court of Appeal judge may be removed from office only if he or she is not able to perform the functions of office or for misbehaviour.

The King is allowed to remove judges on the above grounds in accordance with the following procedures (set out under Sections 121(4) and 125(4) under Chapter XI of the constitution):

- if the Prime Minister represents to the King that the removal of *the Chief Justice of the High Court* on the above grounds ought to be investigated,

a tribunal selected by the Prime Minister is appointed by the King to investigate the matter and advise the King accordingly. The Chief Justice shall be removed if so advised by the tribunal;

- if the Chief Justice of the High Court represents to the King that the removal of a *judge of the High Court* on the above grounds ought to be investigated, a tribunal selected by the Chief Justice is appointed by the King to investigate the matter and advise the King accordingly. The High Court Judge shall be removed if so advised by the tribunal;
- if the Prime Minister represents to the King that the removal of *the President of the Court of Appeal* on the above grounds ought to be investigated, a tribunal selected by the Prime Minister is appointed by the King to investigate the matter and advise the King accordingly. The President of the Court of Appeal shall be removed if so advised by the tribunal; or
- if the President of the Court of Appeal represents to the King that the removal of a *justice of the Appeal Court* on the above grounds ought to be investigated, a tribunal selected by the President of the Court of Appeal is appointed by the King to investigate the matter and advise the King accordingly. The Justice of the Court of Appeal shall be removed if so advised by the tribunal.

Independence of the judiciary

The Constitution vests judicial power in the Courts. Although section 118(2) of the Constitution provides for the independence of the judiciary, this is not only subject to the Constitution, but also to “any other law”. Thus there is the *possibility* that parliament would be able to pass a law that undermines judicial independence. This is a serious weakness, which could be argued to undermine the supremacy of the Constitution.

4. Legislation that governs the media

The principal statutes, upcoming legislation and policy developments which impact on media freedom in Lesotho, include the following:

- Lesotho Telecommunications Authority Act 2000 (Act No 5 of 2000): which provides for the development of telecommunications and the establishment of

an independent regulatory authority.

- Lesotho Telecommunication Authority (Broadcasting) Rules 2004 (Notice No 9 of 2004): which is the primary law dealing with the regulation of broadcasting.
- Obscene Publications Proclamation of 1912 (No 9 of 1912) which prohibits the sale or exhibition of obscene publications.
- Sedition Proclamation of 1938 (No 44 of 1938): which provides for the suppression of sedition and seditious publications and for the punishment of seditious offences.
- Internal Security (General) Act, 1984 (Act No 24 of 1984): which contains provisions regarding terrorism, defence and internal security.
- Parliamentary Powers and Privileges Act, 1994 (Act No 8 of 1994): which provides for powers, privileges and immunities of each of the Houses of Parliament and for related matters including printing and publication of proceedings.
- Human Rights Act 1983 (Act No 24 of 1983): which guarantees and safeguards the rights of individuals.
- The Criminal Procedure and Evidence Act 1981 (Act No 9 of 1981) which consolidates and amends the law relating to procedure and evidence in criminal cases.
- Printing and Publishing Act (1967).
- Lesotho Broadcasting Corporation Bill 2004: the main object of which is to make provision for the restructuring of the Department of Broadcasting by establishing a broadcasting corporation.
- Access and Receipt of Information Draft Bill 2004: which provides for access to information.
- ICT Policy for Lesotho 2005: a document setting out broad government policy for the ICT sector as a whole.

4.1. Lesotho Telecommunications Authority Act 2000 (Act No 5 of 2000):

Commencement date

9 June 2000

Purpose of the Act

The original goal of this Act was to provide for the restructuring and the development of telecommunications, the establishment of an independent regulatory authority, namely the Lesotho Telecommunications Authority (“LTA”)

and related matters. However a change to the Act in 2001 amended the definition of telecommunication to include broadcasting such that broadcasting is also regulated in terms of the Act.

Sector of the media affected by the Act

The LTA Act applies to and regulates both the broadcasting and telecommunication sectors.

Key provisions

Section 4 of the Act states that the LTA is an independent body corporate capable of suing and being sued.

In terms of section 5(1), the powers and duties of the LTA are to be exercised by a board consisting of five members including the Chief Executive appointed by the appointing authority ie the Minister responsible for telecommunication services (“the Minister”) through a transparent process.

Section 5(2) provides that candidates for appointment to the LTA are to be selected and forwarded by an Appointments Recommendation Committee (“ARC”) composed of a nominee of each of the following, namely, the Ministry of Communications, the Ministry of Finance, the Attorney-General’s Chambers and the Ministry of Trade. Generally speaking, best practice in this regard requires public nominations and a transparent selection process with recommendations to the executive being made by a multi-party body such as Parliament.

Although it is clear that the Minister does not make the appointments of the LTA Board alone, it is noteworthy that the ARC is a body that is largely made up of appointees of the executive. This may have adverse implications for the independence of the regulator from the executive arm of government.

In terms of section 5(3), a member of the LTA Board can hold office for up to three years and can be re-appointed upon the expiry of his or her term of office.

In terms of section 5(4), persons appointed to the LTA Board must collectively have knowledge, qualifications or experience in the fields of economics, accounting, telecommunications technology, engineering, public policy, business practice, finance, law or any other relevant experience.

The Minister is vested, according to section 5(5), with the right to specify whether the appointment is on full time or part time basis, being guided by the requirements of the business of the LTA.

In terms of section 8(2), a member of the Board may be removed from office for misconduct, or physical or mental incapacity. It is worthwhile noting that section 8(1) provides for the Minister to prescribe the rules of conduct for members of the Board. The Act is silent on how to remove a Board member in cases of physical or mental incapacity. In regard to misconduct however, section 8(3) provides that the Minister may appoint a tribunal, headed by a judge or person qualified to hold judicial office, to investigate any alleged misconduct. During the tribunal, the Minister is required to suspend the Board member in terms of section 10 of the Act.

In terms of section 8(4) the Minister must act in accordance with the recommendations from the tribunal. Again, the fact that a member of the executive (the minister responsible for broadcasting) is entirely responsible for determining the composition of the tribunal that deals with misconduct issues raises doubts about the level of independence enjoyed by the LTA.

Section 16 sets out the general powers of the LTA and these include the right to issue administrative orders and rules regarding matters such as: the ability to grant, amend and revoke broadcasting and telecommunications licences³ and to assign and manage the use of the radio frequency spectrum and satellite orbital locations⁴, the appointment, removal and disciplining of its own staff⁵ and the entering into contracts with such professional outside consultants and advisors as may be necessary⁶.

According to section 3 of the Act, the Minister determines general policies for the telecommunications sector (which includes broadcasting) in consultation with the LTA. Section 16(2) of the Act gives the LTA the authority to make administrative rules to implement such policies.

Section 19(1) of the Act provides for the different sources of funding of the LTA and these include, appropriations by Parliament, service fees, licence fees, fines and grants. The LTA can set its own budget and submit it to the Minister under Section 20 of the LTA Act.

Section 27(1) of the Act makes it an offence to provide a telecommunication service without a licence. Further section 27(2) provides that the LTA shall license such private and public telecommunication service providers as market conditions and the public interest may warrant. It is important to note that given the definitions used in the Act (most of which do not refer to broadcasting apart from the basic definition of telecommunication itself), it is very difficult to see exactly how these provisions apply to broadcasting. Nevertheless, these provisions are used for the licensing of broadcasters.

Various sections of the Act give the LTA the power to impose licence conditions⁷ on applicants – each licence must describe the services to be provided in terms of that licence⁸. Section 53 allows LTA to engage in a competitive bidding procedure for the assignment of the radio frequency spectrum if this would be in the public interest. In other jurisdictions, selling off the frequency spectrum has resulted in a great boon for the fiscus given the huge sums that have been netted as a result of spectrum auctions. However, in countries where there are clear developmental goals to be met, sometimes auctioning spectrum to the highest bidder does not necessarily further other social or developmental goals as much as a broader comparative assessment process might.

Powers granted to the Minister or Director General by the Act

As has been discussed above, the Minister, in consultation with the LTA, formulates policies for telecommunications (which includes broadcasting) in terms of section 3 of the Act.

In terms of section 64, the Minister, in consultation with the LTA, is empowered to make regulations to carry into effect the provisions of the Act and to amend the fines and sentences provided for in the Act.

The powers granted to the Minister might be limited by a requirement that these be exercised in consultation with the LTA, thus ensuring the LTA's agreement with the exercise of the Minister's powers.

Provisions for media not controlled by the state

Although not explicit, it appears that the LTA is empowered to regulate all players in the broadcasting sector.

Body which enforces compliance with the Act

The LTA is responsible for enforcing compliance with the Act⁹. Note that decisions of the LTA can be reviewed by the High Court¹⁰.

Provisions limiting media ownership

The LTA Act does not limit media ownership as such but section 32 provides that a licensee may not transfer, assign or sell a licence or cede control of the operations of the licence without the LTA's prior written approval, which may not be unreasonably withheld.

Consequence of non compliance with the Act

A person found guilty of an offence under the Act can be sentenced to a minimum fine of 6000 Maloti and/or imprisonment for at least six months. Maximum sentences or fines are not prescribed.

4.2 Lesotho Telecommunication Authority (Broadcasting) Rules 2004*Commencement date*

10 February 2004.

Purpose of the regulation

It is important to note that these are a set of administrative rules made by the Lesotho Telecommunications Authority ("the LTA") governing the broadcasting sector that were made in terms of section 16(2) of the Lesotho Telecommunications Authority Act, 2000.

Sector of the media affected by the regulation

The rules apply only to radio and television broadcasters.

Key provisions

The rules regulate several administrative and content issues in the broadcast sector.

Section 3 deals with records that are to be kept by licensees and include: corporate status documents, employee records, programme schedules and logs as well as advertising and music logs. Original recordings of all programmes broadcast must be retained for at least three months.

Part III of the rules is headed Code of Practice and deals with content regulation. Key aspects of this part are as follows:

- Section 6 of the Code of Practice deals with broadcast content regulation and prohibits a licensee from broadcasting content which, when measured by contemporary community standards:
 - offends against good taste or decency;
 - contains the gratuitous use of offensive language, including blasphemy;
 - presents sexual matters in gratuitous, explicit and offensive manner;
 - glorifies violence;
 - is likely to incite crime or lead to disorder; or
 - is likely to incite hatred based on a number of grounds including race ethnicity, nationality, gender, marital status, sexual preference, age, disability, religion or culture.

- Section 7 requires licensees to avoid content, which may disturb or be harmful to children such as offensive language, or explicit sexual or violent material.

- Section 8 deals with news and information programming and requires:
 - fairness, accuracy and impartiality in news and information programmes;
 - that news and information to be presented in context and in a balanced manner
 - that where reports are founded on opinion, supposition, rumours or allegations, this be clearly indicated;
 - that where there is reason to doubt the correctness of a report that verification be undertaken and if this is not possible that this fact be mentioned; and
 - corrections of factual errors be broadcast as soon as reasonably possible and with due prominence.

- Section 9 deals with news and information programmes on controversial issues and its key provisions are as follows:
 - in reporting on controversial issues of political, industrial or public importance, an appropriate range of views are to be reported either within a single programme or in a series of programmes;
 - during phone-in programmes, a licensee shall ensure that a wide range of opinions is represented over a reasonable period of time;

- o a person or organisation whose views have been criticised during a programme on a controversial issue of public importance, shall be offered a reasonable opportunity by the licensee to reply to such criticism and the reply shall be given a similar degree of prominence and broadcast during a similar timeslot as soon as reasonably possible after the original criticism.
- Section 10 deals with the conducting of interviews and its key provisions are as follows:
 - o that persons interviewed by the licensee shall be advised of the subject of the interview and be informed beforehand whether the interview is to be recorded or broadcast live; and
 - o that before conducting an interview with a child, a licensee shall request permission in writing from the child's parent or guardian.
- Section 11 deals with comment and provides that a comment, whether by the licensee or by a person invited on air by the licensee, shall be presented in manner that clearly indicates that it is a comment. Further, a comment shall be an expression of opinion and shall be based only on facts.
- Section 12 deals with privacy and provides that 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.
- Section 13 deals with payment for information obtained from criminals and provides that a licensee shall not pay persons involved in crime or persons who have previously engaged in crime to obtain information unless there are compelling public interest reasons for doing so.
- Section 14 deals with party-political broadcasts and advertisements and the most important aspect of this is that it provides that although a licensee is not required to broadcast a party-political advertisement, if it elects to do so, it shall afford all other political parties a similar opportunity in a non-discriminatory manner.

Part IV of the rules contains the Advertising and Sponsorship code, the key aspects of which are as follows:

- Section 15 requires that broadcast advertisements must be decent, conform to principles of fair competition in business and should not mislead the audience or discredit other products.
- Section 16 deals with scheduling of advertisements and requires, among other things, that there be a clear distinction between advertisements and programming and that advertising be appropriate for children during times when children may be expected to be in the audience.
- Section 17 deals with sponsorships and provides that a licensee may accept sponsorships for programming, including of news bulletins, provided:
 - the licensee retains ultimate editorial control over the programming;
 - impartiality and accuracy of the programming is not compromised;
 - sponsorship is clearly acknowledged.

Part V deals with complaints and investigations and the key aspects of this are as follows:

- Section 18 requires that a broadcaster must ensure that a complainant is advised of their right to take a complaint to the LTA if s/he is not satisfied with the broadcaster's response to the complaint.
- Section 19 requires broadcasters to make copies of relevant programming available to any person who requests same in circumstances where the person has reason to believe that he or she has been unfairly treated.
- Section 20 and 21 provide for the LTA to initiate investigation and monitoring procedures and for broadcasters to co-operate therewith. These sections and specifically provide that broadcasters have a right to make oral or written representations to the LTA.

Part VI deals with amendments of licence conditions. Section 23 deals with amendments imposed by the LTA whereas section 24 deals with amendments requested by a licensee. It is important to note that section 23 requires notification be given to the licensee but does not provide for a broader public process while section 24 gives the LTA the choice whether to invite other licensees to make representations on the requested amendment.

We are of the view that giving competitors and the public an opportunity to make representations on all proposed amendments to licences ensures that the regulator is likely to have access to the best possible information on the relevant issues.

Powers granted to the Minister or Director General by the regulation
None.

Provisions for media not controlled by the state

The Act does not make specific provisions for media not controlled by the state but applies broadly to both private and state broadcasters.

Body which enforces compliance with the regulation

The LTA is responsible for enforcing compliance with the rules.

Provisions limiting media ownership

The rules do not provide for any type of media ownership limitation.

Consequence of non-compliance with the regulation

In the event of a finding that a licensee has failed to comply with a requirement of the LTA Act, 2000, the rules or a license condition, the LTA may impose a fine, direct the licensee to broadcast a correction or an apology, or both. In terms of section 26(2), the LTA determines the amount of the fine payable.

4.3. Obscene Publications Proclamation No 9 of 1912

Commencement date

26th February 1912

Purpose of the proclamation

The proclamation criminalises the importation, production, sale, exhibition, posting or advertising of indecent or obscene publications including books, newspapers, pamphlets, pictures, photographs within Lesotho.

Sector of the Media governed by the proclamation

The proclamation does not apply only to the print media, it is extended to electronic media even though specific reference is not made to it.

Key provisions

It is important to note that the term “indecent or obscene” is not defined in the proclamation.

In terms of sections 2 and 3 any person who imports into Lesotho or who, within Lesotho, produces any indecent or obscene publication is guilty of an offence.

Section 7 criminalises a person who sends by post any indecent or obscene publication or post card, letter etc.

Section 8 prohibits: the possession of any obscene publication for the purposes of trade; taking part in any business concerned with obscene publications or the advertising of obscene publications. Such activity constitutes an offence.

Section 4 sets out a range of actions that the District Council may take in relation to a suspected indecent or obscene publication on any premises. These include: searching premises (including the use of force) and seizing the publication and destroying same, subject to certain procedural requirements. Note that the owner of any obscene or indecent publication is liable to be prosecuted and convicted of any offence that may be proved against him. While this is an old statute (1912) and its provisions could not have contemplated broadcasting and the Internet, we are of the view that its provisions can be extended to the electronic media, including the Internet and mobile phones (although there is no case law on this that we have seen).

Powers granted to the Minister or Director General in the proclamation

None.

Provisions for media not controlled by the state

The proclamation applies to both state and private publications.

Body which enforces compliance with the Act

The District Council jointly with the Court enforce offences committed under the proclamation.

Provisions limiting media ownership

None

Consequences of non-compliance with the proclamation

Any person who is guilty of an offence shall be liable upon conviction to a fine of up to R500.00 and/or to imprisonment for a period of up to two years.

4.4. Sedition Proclamation No 44 of 1938

Commencement date

30 September 1938

Purpose of the proclamation

The proclamation makes provision for the suppression of sedition and seditious publications, and for the punishment of seditious offences.

Sector of the media governed by the proclamation

The proclamation applies to publications and the definition thereof is sufficiently wide to include the electronic media.

Keys provisions

In terms of Section 1 a “seditious publication” is defined as a publication having a seditious intention. A “seditious intention” is defined in section 3 as an intention:

- to bring into hatred, contempt or to excite disaffection against the person of the King, his heirs, successors, or the Government of the territory;
- to excite the King’s subjects or inhabitants of the territory to attempt to procure the alteration otherwise than by lawful means, of any matter in the territory as by law established;
- to bring into hatred or contempt or to excite disaffection against the administration of justice in the territory;
- to raise discontent or disaffection amongst the King’s subjects; and
- to promote feelings of ill-will and hostility between different classes of the population of the territory.

However the definition specifically provides that an act, speech or publication is not seditious if it intends to show that the King has been misled or mistaken in any of his measures, or to point out errors or defects in the government.

Section 4(1) of the Proclamation prohibits any person who does or attempts or makes any preparation to do or conspires with any person to do any act with seditious intent. The section further prohibits the sale, distribution or reproduction of any seditious publication. The importing of any seditious publication is also prohibited but an exception is provided in the case where

the person has no reason to believe that the publication is seditious. Section 4(2) prohibits the possession of any seditious publication.

Power granted to the Minister or Director –General by the proclamation

None

Provisions for media not controlled by the state

The proclamation applies to all media.

Body which enforces compliance with the proclamation

Courts are responsible for prosecuting offences committed under the proclamation.

Provisions limiting media ownership

None

Consequences of non-compliance

Any person who is found guilty of sedition shall be liable upon conviction to a fine of up to R200.00 and/or to imprisonment for a period of up to seven years. Any person who is found guilty of being in possession of a seditious publication shall be liable upon conviction to a fine of up to R200.00 and/or to imprisonment for a period of up to two years.

4.5. The Internal Security (General) Act, Act No 34 of 1984

Commencement date

1 March 1985

Purpose of the Act

The purpose of this Act is to make provision for matters relating to the national security of Lesotho. In relation to the media, the Act prohibits the spreading or use of information that is detrimental to the national security interests of Lesotho.

Sector of the media governed by the Act

The provisions of this Act are of general application to the public. Therefore, it applies to all sectors of the media.

Key provisions

The Act contains a definition of “subversive” which includes, among other things, supporting any act prejudicial to the public order or security of Lesotho, incitement to violence, counselling disobedience to the law, bringing into hatred or contempt or to excite disaffection against any public officer.

Section 9 makes it an offence for person who is in possession of any information and who knows or believes that the information might assist in preventing any subversive activity, or securing the apprehension, prosecution or conviction of a person for an offence involving the commission, preparation or instigation of any subversive activity, and fails to disclose the information as soon as is reasonably practicable to a member of the police force. In our view, this particular section is concerning as it could potentially be used to force journalist to disclose confidential sources of information.

In terms of section 26, a person who uses obscene, abusive, threatening or insulting words or behaviour or swears, shouts, screams or otherwise conducts himself with the intention to provoke a breach of peace, commits an offence.

In terms of section 28, a person who unlawfully and without proof utters any words, does any act or thing indicating or implying it is or might be desirable to do, or omit to do any act the doing or omission of which is likely to bring death, or injury to any person, to lead to damage of property, commit an offence and shall be liable upon conviction to a fine, or imprisonment or both.

Section 34 makes it also an offence for any person who speaks or publishes words that could result in public violence by persons to whom the speech or publication was addressed.

Section 38 empowers the Minister of Defence (“the Minister”) to declare any place to be a protected place in the interests of public safety and section 39 prohibits any person from approaching or entering such place without the permission of the person in charge of the place. This prohibition would clearly apply to journalists who enter or approach national “keypoints” or protected places.

Powers granted to the Minister or the Director-General by the Act

Section 38 empowers the Minister to declare any place a protected place in the interests of public safety.

Further section 78 empowers the Minister to make regulations in terms of the Act.

Provisions for media not controlled by the State

The Act applies broadly and extends to all sectors of the media.

Body which enforces compliance to with the Act

The courts enforce compliance with the Act and section 58 of the Act provides that the High Court has jurisdiction in respect of any offence under the Act committed outside of Lesotho. It is important to note that section 80 of the Act contains provisions that limit legal proceedings from being instituted against a range of governmental institutions and officials.

Provisions limiting media ownership

None

Consequences of non-compliance with the act

In terms of section 12, a person convicted under section 9 is liable to pay a fine of between 10 000 and 100 000 Maloti or to be sentenced to a period of imprisonment of between five to 20 years.

In terms of section 40, a person who approaches or enters a protected place without permission is guilty of an offence and is liable upon conviction to a fine of 1000 Maloti and/or to imprisonment for a period of one year.

4.6. Parliamentary Powers and Privileges Act, Act No. 8 of 1994

Commencement date

Although this Act has been passed, we have been unable to ascertain its commencement date. Therefore it might be that this Act is not in fact in force. We include it in the review for the sake of completeness.

Purpose of the Act

The purpose of this Act is to declare the powers, privileges and immunities of each of the Houses of the Parliament of Lesotho, its committees, members and related matters.

Sector of the Media affected by the Act

The Act applies to Parliament and its proceedings. As a focus of political coverage, it is relevant to all sectors of media.

Key provisions

Section 3 makes provision for immunity from legal proceedings. Section 3(1) provides that no civil or criminal proceedings may be instituted against a Senator or a member of the Assembly (the Senate and the Assembly being the two houses of Parliament) for words spoken before, or written in a report to, the Senate or to the Assembly or to a Committee. However, this immunity is subject to the limitations set out in section 3(2) namely that the words:

- were not written or spoken maliciously or with object of exposing another person to hatred, contempt or undue ridicule; and
- were germane and reasonably appropriate to the proceedings.

According to section 4, no Senator or member of the Assembly may be arrested for civil cause while going to, attending or returning from a sitting of the Senate or the Assembly or a committee.

In terms of section 13(1) a person summoned to attend to give evidence or to produce any paper, book, record or document before the Senate, the Assembly or a committee is entitled to the same rights or privileges as before a court of law. Section 13(2) provides that no person in the employment of the Government shall refuse to produce before the Senate, the Assembly, or a committee any paper, book, record or document.

Sections 16 and 17, respectively, set out offences relating to people that are at Parliament in contravention of an order by the Speaker of the Assembly or by the President of the Senate and in relation to people disobeying an order to produce documents or answer questions in Parliament.

Section 22 prohibits a person from printing or causing to be printed a copy of any report, paper, minutes or votes and proceedings of the Senate, the Assembly or a

committee without the authority of the Speaker of the Assembly or the President of the Senate.

In proceedings instituted for publishing a report, paper, minutes, votes and proceedings of the Senate or the Assembly, section 23 provides that it is a defence if the report was published in good faith without malice.

Powers granted to the Minister or Director General by the Act

None

Provisions for media not controlled by the state

The application of the Act includes the private media sector.

Provisions limiting media ownership

None

Body which enforces compliance with the Act

Any officer of the Senate or the Assembly may arrest without warrant a person who commits an offence under sections 16, 17, 18, 19 and 20 (the ones not dealt with above concern bribery on the part of members of the Assembly and Senators). Additionally, the Director of Public Prosecutions is vested with the power to institute prosecutions for offences committed under this Act.

Consequences of non-compliance

Offences committed under the Act are punishable by a fine, a term of imprisonment or both.

4.7. The Human Rights Act, Act No 24 of 1983

Commencement date

18 July 1984

Purpose of the Act

The Act's main purpose is to guarantee and safeguard rights of individuals (including freedom of expression and the media) and to ensure that the conduct of persons administering the laws of the country conform to the provisions of this Act. However, the Act also contains provisions regarding the individual's duties towards family, society, the State and others.

Sector of the media affected by the Act

The Act is of general application to the public. It is relevant to all sectors of media since it involves freedom of expression including freedom to seek, receive and impart information and ideas.

Key provisions

In terms of section 2 of the Act, every one is entitled to enjoy the rights and freedoms recognised and guaranteed in terms of the Act without any distinction. The right to express and disseminate opinions are amongst the rights guaranteed.

Section 8 provides for the right of every one to hold opinions without interference and the right to freedom of expression including freedom to seek, receive and impart information and ideas of all kinds. However section 8 also provides that these rights are subject to restrictions provided by law to protect; the rights or reputations of others, national security, public order, public health or morals.

Section 17(1) sets out a list of individual's duties and these include: preserving the harmonious development of the family, including, respecting parents; not compromising the security of the state, preserving national solidarity and national independence. Section 17(3) provides that the rights and freedoms of each individual are to be exercised with due regard to the rights of others, collective security, morality and common interest.

In our view this Act, while containing important statements on human rights, also contains a number of provisions that could seriously limit the exercise of such rights.

Powers granted to the Minister or Director General by the Act

None

Provisions for media not controlled by the state

This Act applies to both private and public media.

Provisions limiting media ownership

None

Body which enforces compliance with the Act

As there are no explicit enforcement provisions in the Act it appears that the courts are to play this role. However, section 16 provides that the state is under a number of duties regarding certain groups, such as, women and the disabled. Further, section 16(6) provides that the state is required to guarantee the independence of the courts and shall allow the establishment and improvement of national institutions entrusted with the protection of the guaranteed rights in terms of the Act.

Consequence of non compliance with the Act

None

4.8. The Criminal Procedure and Evidence Act, Act No 9 of 1981

Commencement date

Although the Act is in force, we were unable to obtain a commencement date.

Purpose of the Act

To consolidate and amend the law relating to procedure and evidence in criminal cases.

Sector of the media affected by the Act

The act is of general application and while its provisions do affect the media, most of its provisions are not specifically targeted at this sector.

Key provisions

In section 85(b) a magistrate is vested with the power to hold both preparatory examinations and trials behind closed doors (*in camera*) or to exclude women, minors, and the public generally or any class thereof (this would include journalists), if it appears to be in the interests of good order, public morals or the administration of justice.

Section 70(5) prohibits any unauthorised publication by radio, printing or any other method of any information relating to a preparatory examination held in connection with a charge of the commission or attempted commission of an indecent act or extortion unless the magistrate concerned has given written approval thereto after consulting the accused.

Powers granted to the Minister or the Director General by the Act

None

Provisions for media not controlled by the State

The Act is not media specific so its terms apply to all media where relevant.

Body which enforces compliance with the Act

Provisions are enforced through the courts.

Provisions limiting the media ownership

None

Consequences of non-compliance

Not provided for.

4.9. Printing and Publishing Act (1967)

Article XIX¹¹ has summarised the main limitations on the freedom of the press of the Printing and Publishing Act as follows:

- Section 10 of the Act makes it an offence to import, print, publish, sell or offer for sale, distribute or reproduce printed matter or an extract therefrom which proves to be “a clear and present danger to public safety, public order, public morality or fundamental human rights and freedoms”. A person found guilty of such an offence may be fined or jailed.
- Section 11 provides for the opening, examination and seizure of articles suspected of containing any prohibited matter.
- Section 12 provides for search and seizure of any printed matter and of any apparatus used for the printing of a banned or illegal publication.
- Section 13 provides for the arrest of a person suspected of committing, attempting to commit or instigating an offence under the Act.
- Section 14 gives the authorities far reaching powers of arrest without a warrant for any person who is found in possession of printed articles under section 10 of the Act.
- The Act also authorises legal action to be taken against publisher, owner and/or editor of the newspaper or any other journalist unless they can prove that a particular statement was published without their knowledge.

4.10. Lesotho Broadcasting Corporation Bill 2004

Commencement date

Not applicable as this still a Bill.

The purpose of the Bill

The stated purpose of the Bill is to establish of an independent public broadcasting corporation.

Sector of the media governed by the Bill

The Bill applies only to the public broadcaster.

Key provisions

Section 3 of the Bill makes provisions for the establishment of a corporation to be known as the Lesotho Broadcasting Corporation (“LBC”). In terms of Section 3(1) the LBC is a body corporate capable of suing and being sued. Upon the coming into force of the Bill, the LBC will become a successor of the Department of Broadcasting which operates Radio Lesotho and Lesotho Television.

The purpose and function of the LBC is mainly to provide public broadcasting services in Lesotho as prescribed by section 4 of the Bill. It is important to note that the LBC can broadcast programmes to another country only at the request of the Minister responsible for Broadcasting (“the Minister”).

The LBC shall function independently and separately from any organ of the government or any other political party and commercial interests in terms of section 5(1).

Section 9 outlines public service obligations assigned to the LBC. The LBC mainly needs to promote the development of Lesotho’s forms of expression. Programming must reflect a diversity of views, opinions, ideas, values and artistic creativity in Lesotho, promote Basotho culture and talent, offer information and analysis concerning Lesotho from a Lesotho perspective, serve as a catalyst for nation-building and economic development and respond to the needs of the people. The programmes broadcast must also reflect the circumstances and aspirations of women, men, and children in contemporary Lesotho society. The LBC must provide programmes that serve the interests of persons with disabilities.

Section 13 provides for the constitution of the Board. The Board shall consist of no more than 10 persons including a Chair and Deputy Chair. The Minister appoints all Board members and determines who is to be the Chair. Generally speaking, best practice in this regard requires a public nominations process and a transparent selection process with recommendations to the executive being made by a multi-party body such as Parliament.

In terms of section 42(1), the Minister has the power to set government policy on any matter relating to broadcasting, or any matter of administration that is relevant to the performance or the functions of the LBC. The Board is responsible for ensuring that consideration is given to such policy.

In terms of content regulation, section 40(1) empowers the Lesotho Telecommunications Authority (“the LTA”) to issue rules governing public broadcasting including a code of conduct for public broadcasting, advertising standards, election coverage, complaints and other matters regarding best practice in public broadcasting.

Section 29 provides for the various sources of funding of the LBC and these include appropriations by Parliament. Note that in terms of section 35, all profits of the LBC are to be used exclusively for the purposes of the LBC.

In terms of section 30, the LBC prepares a budget that is approved by the Board and is submitted to the Minister.

Powers granted to the Minister or Director General by the Bill

Section 42(1) provides that the Minister may provide to the Board of the LBC a statement of policy on any matter relating to broadcasting, or any administrative matter relevant to the performance of the LBC that the Board must consider. However it is important to note that in terms of section 42(2), the Ministerial policy directions do not give rise to a duty that is enforceable by proceedings in Court. In terms of section 45, the Minister is also vested with the power to make regulations generally for giving effect to the provisions of the Bill.

Provisions for media not controlled by the State

The Bill applies to the public broadcasting service.

Body which enforces compliance with the Bill

Section 11 provides that the LBC is to be regulated by the LTA regarding its compliance with sections 4, 6, 7 and 9 which deal with: its purposes, general powers, obligations in respect of broadcasting services and principles, and guidelines for public broadcasting services.

Provisions limiting media ownership

None

4.11. Memorandum on Access and Receipt of Information Draft Bill*Commencement date*

Not applicable as this is a Draft Bill.

Purpose of the Draft Bill

The purpose of this Draft Bill is to give effect to the Constitutional right of freedom of expression by ensuring access to information and enabling people to use such information for the exercise or protection of their rights. The Draft Bill also provides for whistle-blower protection.

Sector of media governed by the Draft Bill

The present Draft Bill is not a media-specific statute.

Key provisions of the Draft Bill

Generally speaking, the Draft Bill gives the public a general right to access to information held by public bodies and a right of access to personal information held by private bodies. It also provides for whistleblower protection.

Section 9 of the Draft Bill gives every person the right of access to records of a governmental body. A governmental body is defined in section 3 as a department of state in the national or local sphere of the government or any other functionary or institution exercising a power or performing a duty in terms of the Constitution or exercising public power or performing a public duty under any law.

Section 48(1) gives every person requesting a record containing personal information about that person from a private body a right of access to that record. A private body is defined in section 3 as a person, other than a governmental

body in possession of or controlling a personal information bank (that is, a collection of personal information).

Sections 10 and 47 prohibit requests for access to a record of a governmental or private body, respectively, when such request is made after the commencement of civil or criminal litigation or if access is provided for under the law of evidence governing criminal or civil proceedings.

Section 33(a) read with section 48(6) of the Draft Bill requires governmental and private bodies to refuse access to records (mandatory non-disclosure) on two grounds, namely, protection of privacy - section 34(1) and third party commercial information – section 36(1).

Section 33(b) read with section 48(6) of the Draft Bill provides that governmental and private bodies have a discretion to refuse access to records (discretionary non-disclosure) on a number of grounds, namely:

- Frivolous or vexatious requests – section 24;
- Records that cannot be found or do not exist – section 25;
- Published records and records to be published – section 26;
- Records open to the public – section 27;
- Health of a requester – section 35(2);
- Records supplied in confidence - section 37;
- Safety of individuals and security of states structure and systems - section 38(a);
- Law enforcement - section 39;
- Records privileged from production - section 40;
- Governmental economic interests and commercial activities – section 41; and
- Operation of governmental bodies – section 42.

The only exception to both the mandatory and discretionary refusal grounds for governmental and private bodies is to be found in section 28(1) of the Draft Bill which makes provision for a public interest override of the mandatory refusal grounds where disclosure would reveal evidence of abuse of authority, illegality in the exercise of power, injustice, environmental or health dangers and the public interest in the disclosure outweighs need for non-disclosure. Further, section 29

provides that if it is possible to identify the disclosable portion of a record, that such disclosable portion may be disclosed.

It is also important to have regard to the provisions of section 61, which falls within Part V of the Draft Bill headed Protection of Whistle Blowers. Section 61(3)(b) read with section 61(2) provides that no person is criminally or civilly liable or may be subject to any disciplinary action if they disclose information to the news media believing:

- disclosure was necessary to avert a threat to safety or health of any person or to ensure that impropriety was properly and timeously investigated or to protect against reprisals for disclosure; or
- that the public interest in disclosure outweighed any need for non-disclosure.

Powers granted to the Minister or Director General by the Draft Bill

The Minister responsible for Communications is empowered by section 81 to make regulations generally for the purpose of giving effect to the Draft Bill.

Provisions for media not controlled by the state

This legislation is not media specific and therefore applies to all media.

Body which enforces compliance with the Draft Bill

In terms of Chapter 2 of Part VI, the courts enforce compliance with the Draft Bill.

Provisions limiting media ownership

None

Consequences of non-compliance with the Draft Bill

Any court which is dealing with an access to information case may, in terms of section 78, make any order which it considers just, including confirming, amending or setting aside a decision.

Section 80 provides for offences in terms of the Draft Bill. Upon conviction a person is liable to a fine, imprisonment or both. It is important to note that at this point all offences relate to instances of *disclosure*. This is problematic because it means that it is not an offence to *refuse to disclose information* in violation of the provisions of the Draft Bill.

4.12 ICT Policy for Lesotho

Commencement date

The ICT Policy document was published on 4 March 2005.

Purpose of the policy

To encourage the deployment of Information Communication technology (“ICT”) infrastructure in Lesotho and to give direction as to how ICT could be utilised to open up new opportunities, improve service delivery.

Sector of media governed by the policy

The policy is not specifically targeted at the media sector although certain provisions will impact on the media directly

Key provisions of the policy

The introductory part of Chapter 1 of the ICT Policy provides that the integration of Lesotho into the global information society calls for the development of an effective policy and regulatory framework to provide for convergence.

The ICT Policy emphasises the importance of regulation that promotes competition and protects and educates consumers.

The ICT Policy provides that the regulator of the ICT sector shall monitor market demand and supply capacity of service providers, and shall intervene and correct imbalances or markets distortions in favour of users. The ICT Policy provides that although the regulator is accountable to the Ministry of Communications, Science and Technology, it shall have the necessary independence from stakeholders to ensure impartiality, flexibility and transparency. The mandate of the regulator will include the regulation of telecommunications, ICT’s, broadcasting, radio frequency and postal services.

We are of the view that a genuinely independent regulator ought to be accountable to a multi-party body such as Parliament rather than to the executive, in the form of the Ministry.

Powers granted to the Minister or Director General by the policy

The role of Minister of Communications, Science and Technology is to broaden the mandate of the regulator to include responsibility over the entire ICT sector.

Provisions for media not controlled by the state
None

Body which enforces compliance with the policy
None

Provisions limiting media ownership
None.

Consequences of non-compliance with the policy
None

5. Codes of conduct

MISA Lesotho has published a draft Code of Ethics for journalists which has yet to be accepted by the Ministry responsible for the state media. For Broadcasting Code of Practice see Lesotho Telecommunications Authority Broadcasting Rules, 2004 (4.2).

6. Court cases

Overview

Two of the important High Court cases that impact on freedom of expression that we surveyed relate to defamation. They are:

- *Tlali vs Sa Libata and Others (CIV/T/42/01)*, which sets out the basis of the law of defamation in Lesotho.
- *Lephole vs the Editor, Mohlanka*, which laid down the principle that if the editor does not check whether or not what he or she has published is true, the conclusion must be that he or she acted recklessly and negligently.

6.1 *Tlali vs Sa Libata and Others CIV/T/42/01*

Date of judgment

26 October 2004

Sector of the media affected by judgment

The print media was the subject of the judgment although the principles apply to all media.

Key legal principles established

The court confirmed that once a statement has been published that injures a person's reputation, there is a rebuttable presumption of defamation and the onus is then on the maker of the statement to show that the publication did not amount to defamation.

The court confirmed that if the defamatory statement is a comment based on true facts then such comment must be fair as well as in the public interest.

The court further stressed that public interest is only one of the requirements of the defence of fair comment and that it cannot stand alone otherwise it would mean that it is enough for the defendant to claim that he made a publication in a public interest and he or she would escape liability regardless of all other requirements and/or circumstances.

The court handing down the judgement

The High Court of Lesotho.

Key provisions of the judgement

The plaintiff, Ms Tlali who is a nurse, sued the editor, publisher, distributor and the printer of *Setsomi Sa Litaba*, for publishing an article titled "*Namolela Litopo Bulane*" in which certain allegations were made regarding the Queen Elizabeth II hospital and its administration.

Amongst some of the allegations contained in the publication were that a corpse had been thrown on the floor and kicked and insulted by a colleague of the plaintiff. As for the plaintiff, the article mentioned that she was happy with this and had declared amongst other things that the majority of the Lesotho Congress Democratic party members would enter the hospital but they would never return. The plaintiff claimed that the publication was defamatory, while the defendants raised the defence that the statement was not a statement of fact but a comment concerning a matter of public interest.

The court upheld the Plaintiff's claim and found that the defendants had failed to verify the truth of the allegations. At a late stage the defendants tried to rely on the reasonableness of their attempts to confirm the truth of the allegations but this was rejected for not having been part of the plea and the court held that, in any event, they would not have satisfied the reasonableness requirement. Damages were awarded to the plaintiff.

6.2 Lephole vs the Editor, Mohlanka CIT/T/93/96

Date of judgement

22 November 2004

Sector of the media affecting the judgement

The print media was the subject of the judgment although the principles apply to all media.

Key legal principles established

The court affirmed that when a publisher does not check whether what he published is true or not, there should be no difficulty in concluding that he acted recklessly and negligently, particularly when he published an untrue defamatory statement.

The court handing down the judgement

The High Court of Lesotho

Key provisions of the judgement

In the present case, the plaintiff Ephraim Lefa Lephole sued the editor of *Mohlanka* newspaper and the Basoto National Party that is the proprietor and publisher of the newspaper, for defamation.

During October 1995 *Mohlanka* published an article under the heading "*We would rather push each other at the fato-fato*". The plaintiff (Lephole) was mentioned in this article that said that a number of dam projects were reduced with the intention of dividing the surplus funds among persons in authority.

The editor said he did not defame the plaintiff at all because he believed that the information given to him was correct even though he did not verify the correctness of the information. He highlighted that he was also exercising his right to freedom

of expression and freedom of the press and that the comment made was in the public interest.

The Court reiterated the importance of the right to freedom of expression which includes the freedom of the press and said that the Common Law recognised that the press is a social and public asset and that the publication of misdeeds by people in public office was encouraged. The court set out a number of key issues regarding the law of defamation:

- Where a defence of truth and in the public interest is relied upon the statement must at very least be substantially true
- A person who publishes a defamatory rumour cannot escape liability by saying that he merely passed it on
- A publisher must avoid publishing defamatory statements that are deliberately or recklessly false
- Where there is reason to doubt the veracity of the report and it is practical to verify the correctness thereof, it should be verified; and
- What will feature is the nature of the information on which the allegation is based, the reliability of its source and the steps taken to verify the information.

The court found that the statement was defamatory in an unlawful way unless it was true. The court found further that the first defendant (the editor) had not provided sufficient facts to render publication of Lephole's comments as "reasonable" and that in fact he acted recklessly and negligently when he published an untrue defamatory statement.

The court also found the second defendant, the owner of *Mohlanka*, vicariously liable for the first defendant's conduct as the first defendant was engaged in the second defendant's political activity. The court consequently awarded damages and costs to the plaintiff.

** Endnotes

¹ Information for this section was obtained from:

US Department of State: Bureau of African Affairs January 2005 (<http://www.state.gov/r/pa/ei/bgn/2831.htm>)

Trusha Reddy: Lesotho Media Report: (<http://journ.ru.ac.za/amdlesotho.htm>)

Lesotho Press Overview: (http://www.ijinet.org/FE_article/asset)

Infoplease: Lesotho ; (<http://www.infoplease.com/ipa/A0107714.HML>):

Media Law and Practice in Southern Africa NO 14, Lesotho, (<http://www.article19.org/docimages/519.htm>)

Encyclopaedia Britannica Library.

² *Although Moshoeshoe II was reinstalled at later date, he has since died and Letsie III is the current King.*

³ *Section 16(1)(e).*

⁴ *Section 16(1)(g).*

⁵ *Section 16(1)(a).*

⁶ *Section 16(1)(i).*

⁷ *Section 30.*

⁸ *Section 31(1).*

⁹ *Sections 60(1) and 61.*

¹⁰ *Section 60(2).*

¹¹ *See: <http://www.article19.org/docimages/519htm>*

United Republic of Tanzania

1. Introduction

1.1 Political landscape¹

The United Republic of Tanzania (“Tanzania”) was created from the union of the former colonial territories of Tanganyika and Zanzibar on 26 April 1964. The population is approximately 34.57 million in mainland Tanzania and 1 million on the semi-autonomous island Zanzibar. The official languages are Swahili and English.

Immediately after independence from Britain on 9 December 1961, mainland Tanzania installed a parliamentary system of government. In 1962, a Presidential form of government replaced it. In 1964, Julius Nyerere, the leader of the Tanzania African National Union (“TANU”) was elected President. Affectionately known as *Mwalimu* (meaning teacher – due to his vision for the education and development of the Tanzanian people), Nyerere took steps to form a unified state. His efforts led to the adoption of the interim Constitution of Tanzania and to the union between mainland Tanzania and Zanzibar.

The union was cemented on 5 February 1977 with the merger of mainland Tanzania’s ruling party TANU and Zanzibar’s Afro Shirazi Party to form a new party called the Chama Cha Mapinduzi (“CCM”). The adoption of a permanent Constitution on the 26 April 1977 with provisions that allowed Zanzibar to elect representatives to the National Assembly further strengthened these ties. The National Assembly was made up of a single party’s representatives (CCM) and was not a multi-party body. However, Tanzania did not follow the typical one-party state model. Nyerere was committed to the policy of *Ujamaa* or “self-reliance” the aim of which was to ensure that national resources were used for the

common good. While the CCM was the sole instrument for mobilizing and controlling the population in all significant political and economic activities, voters did have a choice between different candidates (albeit from the same party) and this meant that sometimes legislators could lose their seats.

The union has not been entirely stable given the significant degree of wealth inequality between the richer mainland Tanzanian inhabitants and the poorer Zanzibar inhabitants. There are also other reasons for the tensions between the mainland and Zanzibar, these include religious differences between the mainly Muslim Zanzibar and the mainly Christian mainland, political tensions caused by the perceived overrepresentation of Zanzibar in Tanzania's political structures (relative to population number) and ethnic tensions that derive from the fact that mainland Tanzanians are ethnically African while many Zanzibaris are ethnically Arab.

In 1985, Ndungu (meaning comrade) Ali Hassan Mwinyi became President of Tanzania, after Nyerere stepped down. Mwinyi started a process of political and economic reform moving away from the socialist economic policies of President Nyerere. One of these reform objectives was realised in 1992 when the Tanzanian constitution was amended to introduce a multi-party system.

Benjamin William Mkapa was elected President on 13 November 1995 and re-elected in 2000. Mkapa continued to carry out political and economic reforms begun by Mwinyi. Today, he presides over a relatively stable political environment. However, the recent violence that attended the 2005 elections in Zanzibar is evidence of the simmering political tensions that exist in Tanzania.

At the national level, Tanzania operates what is effectively a federal system of government for mainland Tanzania and Zanzibar. In Tanzania there is a unicameral parliament or National Assembly that has 295 members. Membership of the Assembly includes: the Attorney General, five members elected from the Zanzibar House of Representatives to participate in the Parliament, special women's seats comprise 20% of the seats of each party in the House, 181 constituents seats of members of Parliament from mainland Tanzania, and 50 seats from Zanzibar. In 2004, the ruling party, the CCM held approximately 93% of the seats in the National Assembly.¹

The National Assembly's laws apply to Zanzibar only in respect of certain so-called "Union Matters". Union matters are listed in the First Schedule to the Constitution and constitute 22 difference issues, including: Foreign Affairs, Defence, Police, Immigration, External Borrowing and Trade, Higher Education and the Registration of Political Parties. Media and broadcasting regulation are not Union Matters – this has resulted in Zanzibar having a relatively autonomous media regime from mainland Tanzania.

Zanzibar has its own representative body, namely the House of Representatives which has jurisdiction over all "Non-union Matters". The House of Representatives has 76 members made up of: 50 elected members, 10 appointed by the President of Zanzibar plus five ex officio members and the Attorney General of Zanzibar.

Tanzania is divided into 26 regions which are further divided into 99 districts presided over by local government authorities.

Significant measures have been taken to liberalise the Tanzanian economy along markets lines and to encourage both foreign and domestic private investment. In 1999 Tanzania embarked on a major restructuring of state-owned enterprises. Overall, real economic growth has averaged about 4% a year since then. Presently, agriculture dominates the economy, providing more than 60% of the country's GDP (which amounts to \$23.71 billion) and 80% of its employment. Tanzania's industrial sector is one of the smallest in Africa. The main industrial activities include producing raw materials, import substitutes, and processing agricultural products. Tanzania remains one of the poorest countries in Africa.

1.2. The mass media market in Tanzania

There are now approximately four hundred publications, including newspapers and magazines, available in Tanzania. Tabloid titles tend to be the most widely read. It is estimated that each newspaper is read by between eight to ten people due to relatively expensive cover-prices.

The print-media sector is made up of privately-owned, political and state-owned publications.

Privately-owned papers include: *Alisiri*, *Nipashi* (both published in Swahili), *The Sunday Observer*, *Arusha Times*, *Business Times*, *The Express* and *The Guardian*,

all of which are English papers published weekly. Foreign newspapers are also available, for example, *The Citizen* from Kenya.

There are a number of opposition-owned print media including *Tanzania Daima* and *Halisi*.

There are also a number of government-owned print media such as *Uhuru* (Swahili), *Daily News* (published in English).

In respect of the electronic media, there are private, state-owned and community sound broadcasters. There are approximately 20 private radio stations, although legislation restricts their coverage to 25% of the country. Most private stations are concentrated in the urban areas and only the state-owned stations are licensed to broadcast nationally.

The state-run radio stations include: *Radio Tanzania Dar es Salaam*; *Propaganda Radio Tanzania*; *Voice of Tanzania-Zanzibar*.

Radio Uhuru belongs to an opposition party. The privately-owned radio stations include: *Radio Magic*; *Clouds FM*; *Radio Free Africa*; *Radio 1*; *East Africa Radio*; *Triple A* and *Kiss FM*.

Community sound broadcasters include *Radio Tumaini*, owned by the Roman Catholic Church and *Arusha Orkonerei Radio Service* a community-owned radio station. It is useful to note that news bulletins from international radio services including *BBC*, *Voice of America* and Germany's *Deutsche Welle*, are carried by many stations.

Television was a relatively late development in Tanzania, relative to other African nations, and currently there are both state-owned and private television services. *TV Zanzibar* and *Televisheni ya Taifa* are state-run television services. *Star TV* is government-aligned in that it was owned by a Minister of Water and Livestock Development (at the time of writing).

There are also a number of privately-owned television services including: *Independent Television*; *Dar es Salaam Television*; *East African TV*; *Coastal Television Network* and *Abood TV*. From a regulatory point of view, it is clear that Tanzania has embraced robust market liberalization. However, it is not at all clear

how many of the existing broadcasters, particularly the private television stations, will still be operational in the medium to long term.

2. Experiences of journalists in Tanzania

2.1 Overview

Interviewing journalists in Tanzania presented certain problems. Some journalists were reluctant to talk to us and wanted to pass us on to others or to obtain clearance from their superiors. A number of journalists refused to speak even after confidentiality was promised and some journalists who did agree to be interviewed were reluctant to expand upon the media problems they had identified. This apprehension about talking about working conditions and press freedom is cause for concern. Regardless of these challenges a range of journalists from commercial and state-owned print and broadcast media were interviewed.

Refreshingly, interviewees were upbeat about the prospects for media freedom and media growth in Tanzania. They remarked that the media landscape was unrecognisable compared to the situation prior to 1992 – before the democratization process began. Interviewees spoke of the changes to the media as a whole that have been wrought by the introduction of private and community media, both print and electronic. A common refrain was that there was now a wider range of media, from government mouthpieces to scandal sheets. There is a discernible sense of pride in the strides that have been made since 1992 with a number of Tanzanian journalists comparing conditions favourably with those in neighbouring Kenya and Uganda.

One interviewee summed it up thus: “Generally...we do not go to jail and government does not do nasty things to us if we write something that upsets them.” Confirming this, another interviewee said, “If something is published or broadcast that is not correct, government has avenues to ... point this out and have the corrected information published or broadcast afterwards.”

Interviews revealed marked differences between the views of journalists working in Zanzibar compared with those working in mainland Tanzania. Zanzibar has a much lower level of media freedom than is enjoyed in mainland Tanzania. One journalist from the island said that the problem was not the state of the laws

guaranteeing media freedom, but rather with their implementation. Another said that low levels of literacy posed a real problem to media in Zanzibar. Mainland Tanzania's literacy rate is approximately 73% but is only about 62% and falling in Zanzibar.

Perspectives are mixed on the issue of protection of sources. Some interviewees were confident about their ability to keep sources of information confidential. They said that while government did question them about the identities of sources, journalists did not feel compelled to respond and government generally recognised the importance of this journalistic privilege. However, other interviewees, particularly those from Zanzibar, told a different story. One recalled journalists who were forced to reveal the names of their sources in order to protect their jobs.

Journalists described several on-going problems which evidence some real challenges to genuine media freedom in Tanzania today. These include:

- the explosive growth of the non-state media sector since 1992 has seen the employment of reporters with no real training and who lack even basic media skills. One interviewee said that some in-house journalism training took only three months. These problems coupled with newsroom "juniorisation" have resulted in a growing problem of unqualified reporters and shoddy journalism. Addressing this challenge is difficult given a lack of education and training facilities for journalists in Tanzania, other than the journalism school at the University of Dar es Salaam. Further, low pay received by journalists undermined their professionalism. It was pointed out that salaries of some journalists are between 300 000 and 500 000 shillings per month.
- Another worrying trend is the polarisation between state and non-state media. One interviewee remarked that journalists working for the state media are seen as spies by members of opposition parties. "They believe that the government sends them to collect information." According to reports, this situation has not improved with the approach of the 2005 elections.
- Most interviewees agreed that journalists lacked knowledge of the country's media laws. The fact that journalists do not understand the content or

implications of these laws means costly legal errors are often made out of ignorance. This lack of knowledge compounds the challenge of court reporting. At least one journalist pointed out that sometimes there is corruption and abuse of the law by judicial officers themselves.

- Interviewees spoke of incidents of serious harassment of journalists including arrests and beatings and also of lesser types of harassment such as threatening phone calls from government officials. Two incidents stood out (these are dealt with in more detail below in the print media section that follows). There appeared to be an understanding that when journalists were assaulted by law enforcers it may not be government officials that are doing the actual roughing up but they are the ones that often direct the police officers. “So we do not blame the police for this, we blame the officials,” one reporter said. Journalists also alluded that media houses still faced banning.
- An issue that was raised was the relative recentness of Tanzania’s multi-party democracy, which meant that political communication lacked sophistication and political parties were still wary of the press. “Some of the parties are still not ready to let matters concerning their party be discussed freely in public,” commented an interviewee.
- Perhaps the most common identified problem was the lack of legal mechanisms to provide access to government-held information. Nearly every interviewee spoke about an urgent need for access to information laws. “It is not easy for a journalist to publish what the government specifically doesn’t want the public to know,” said one. While there have been some information-provision initiatives (parliamentarians are now required to declare their income, property and shares and how they acquired it), there are no methods of checking the veracity of declarations or the proof of claims.

2.2 The print media sector

As set out above, Tanzania’s media experience a number of general problems – several of which impact on the print media too. Some variations on the general problems that became clear from the interviews include the following:

- a District Commissioner ordered the arrest of 11 journalists who were covering tribal clashes on the front line in a rural area in the north of the country. The

District Commissioner apparently invoked Colonial era laws to declare a “prohibited area” and then ordered the arrest of the journalists who were later released. Eventually the District Commissioner was forced to apologise. The journalists subsequently laid a complaint with the Media Council claiming one shilling in damages, the point being to deal with the principle of harassment. The matter has yet to be dealt with.

- in another incident, a number of journalists were beaten by prison warders as they covered the eviction of former Air Tanzania workers from their homes in an area which had been transferred to the prisons department. The area was declared a “prohibited area” and this was again used as a pretext for removing the journalists. The resulting uproar from journalists, media owners and other political parties led to charges being pressed against the prison warders but a case has yet to be finalised. There were also other consequences. For example, the government set up a committee to investigate the incident (but it has yet to complete its work). The incident also led to an interesting response by journalists who agreed not to cover the activities of the Department of Home Affairs (the ministry responsible for prisons and for the activities of prison warders) until the Minister resigned. While a number of journalists said that these actions had an important impact, the Minister is still in office.
- Another way in which the media is harassed is through the use of Tanzania’s outmoded incitement laws. For example, an independent Swahili daily newspaper, *Majira* was suspended for a week using the country’s incitement laws, after the paper reported on an alleged pay hike for government civil servants.

Journalists reported difficulties covering sensitive stories such as:

- **Corruption:** coverage of corruption remains difficult, even though it is an important and topical issue. Proving corruption was especially difficult, as was reporting on issues such as embezzlement, procurement problems and tender processes. However, one journalist was quite upbeat about corruption reporting saying that despite these obstacles sometimes the names of corrupt officials were published. However, she made it clear that this usually followed a careful process of selection and that sometimes names of wrongdoers were not made public.
- **Good Governance:** while it was clear that consideration for good governance, transparency and openness are on the increase, government is still sensitive

about stories that report on its deficiencies (such as government being overcharged or the poor quality of public services). Indeed a number of interviewees intimated that any criticism of the ruling party was considered “insensitive”.

- **Lack of Development:** A number of interviewees spoke about government’s hypersensitivity to stories that were critical of development and poverty alleviation. Activities of the finance department and overspending by government in general were also considered “sensitive”.
- **National Security:** Activities of the military and general issues of national security are clearly sensitive. In this regard, one journalist said that government consistently urged journalists to support and contribute to “national unity”, that is, to not report on divisive issues.
- **Health:** One journalist spoke about the fact that the Tanzanian government is sensitive about the fact that it is unable to dispense medicines and health care services across the country, particularly in rural areas.

2.3 The electronic media sector

In general, journalists were enthusiastic about the mushrooming of private and community broadcasters. It was considered indicative of increased levels of press freedom within Tanzania.

However, a number of journalists also identified that the broadcasting regulator is essentially, a government institution and that it lacks genuine independence.

Sources from the private electronic media identified a number of ways in which the state-owned media (including print media) is privileged, namely that the state-owned media is exempt from paying taxes, is subsidised by the state, and receives the lion’s share of government advertising, a major source of advertising in Tanzania. This maintains an unfair environment for the competitive operation of private media.

Another issue is that the state broadcaster operates on the orders of the government and is essentially a government mouthpiece. Journalists agreed that it lacked the essential characteristics of a proper public broadcaster. As one journalist put it, “Calling it a public broadcaster is just camouflage.” An interviewee who worked for state television echoed this. “The ruling party has a serious problem once you

start criticising government. As a government employee, you can't report against the government anywhere," he said.

3. The Constitution of the United Republic of Tanzania Act No 1 of 1977

Commencement date

25 of April 1977

Supremacy of the Constitution

The Tanzanian Constitution does not have an express provision that declares the Constitution as the supreme law of the land. The supremacy or otherwise of parts of the Tanzanian Constitution are dealt with in a number of discreet sections. For example, section 30(5) of the Constitution grants the High Court the power to declare laws enacted or action taken by government or any other authority which abridges the Basic Rights and Duties of Tanzanians (articles 12-29 of the Constitution) to be void. Alternatively the High Court may afford government an opportunity to rectify the defect within a particular period.

However, it appears that many of the piece-meal sections that enshrine constitutional supremacy may not be enforceable. For example, section 7(1) of the Constitution which is found in Part II (headed Fundamental Objectives and Directive Principles of State Policy) of Chapter One (The United Republic, Political Parties, the People and the Policy of Socialism and Self-Reliance) states it is the duty of government at all levels to observe the provisions of this part of Chapter One – that is, a part that deals in broad terms with issues such as the nature of the state and the objectives of the Constitution.

However, sub-section 7(2) specifically provides that the provisions of this part of Chapter One are not enforceable in a court of law and no court is competent to determine whether any action, law or judgment complied with the provisions of this part of Chapter One. Thus action that is against the founding principles of the state and objectives of the Constitution cannot be challenged on this ground.

There are a number of other instances, in which the provisions of, for example, the Bill of Rights in the Constitution, are in fact subordinate to other Tanzanian

laws. In our view therefore, the Tanzanian Constitution is not a good example of the entrenchment of rights and freedoms given the lack of enforceability and the fact that Constitutional rights are sometimes subject to ordinary laws that appear to characterise a number of provisions in the Constitution.

Establishment of an independent regulator

The Constitution does not make provision for the establishment of an independent regulatory authority for the communications sector.

Provisions impacting on the media

In 1984 a Bill of Rights was introduced in the Constitution, which includes the right to freedom of expression. Section 18(1) ostensibly grants every person the right to freedom of opinion and expression. The subsection also grants every person the right to seek, receive and impart or disseminate information and ideas through any media and also the right to freedom from interference with his or her communications.

However, the rights in section 18(1) must be performed “without prejudice” to the ordinary laws of the land that relate to expression issues. Thus the right to freedom of expression contained in the Constitution is subject to the ordinary laws and this undermines the right as it has to conform to ordinary legislation and not the other way around, as is normally the case in a Constitutional democracy. Section 18(2) of the Constitution does not contain an internal limitation (unlike section 18(1)) and grants every citizen the right to be informed at all times of various events in the country and in the world at large.

Another right that is important for the media is section 16(1) of the Constitution which grants every person the entitlement to respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect and protection of his residence and private communications. Actions for defamation or violations of privacy against journalists and media houses are often based on constitutional rights to dignity, reputation and/or privacy.

This right is important because it is sometimes weighed against the right to freedom of expression. Note that section 16(1) is subject to an internal limitation contained in section 16(2) that grants the state an unfettered discretion to effectively limit the right to privacy.

Limitation clause

As we have already shown, certain of the provisions of the Constitution contain their own internal limitations. However, section 30 of the Constitution contains a general limitation clause specifically aimed at limiting the human rights and freedoms contained in the Constitution.

Section 30(1) states that a person shall not exercise their human rights and freedoms in a manner that interferes with or curtails the rights and freedoms of other persons or the public interest. Further section 30(2) states that the provisions setting out human rights and freedoms do not invalidate any existing legislation or prohibit the enactment of any new legislation or any lawful act, which is aimed at:

- (a) ensuring that the rights and freedoms of other people or of the interests of the public are not prejudiced by the wrongful exercise of the freedoms or rights of individuals;
- (b) ensuring the defence, public safety, public order, public morality, public health, rural and urban development planning, the exploitation and utilisation of minerals... or any other interest for the purpose of enhancing the public benefit;
- (c) ensuring the execution of a judgment or order of a court given or made in any civil or criminal matter;
- (d) protecting the reputation, right and freedoms of others or the privacy of persons involved in any court proceedings, prohibiting the disclosure of confidential information, or safeguarding the dignity, authority and independence of the courts;
- (f) enabling any other thing to be done which promotes or preserves the national interest in general.

This limitation clause is likely to render the rights protected under the Constitution almost meaningless, as terms such as “for the purpose of enhancing the public benefit” and “the national interest in general” are vague and subjective. They allow for the very real possibility of abuse by the state.

Courts which have jurisdiction to decide constitutional matters

The provisions of the Constitution are also unclear regarding important jurisdiction issues.

Section 108(2) of the Constitution provides that generally the High Court has jurisdiction to decide all matters except where specifically precluded from doing so in the Constitution or any other law. Note that there are High Courts for both mainland Tanzania and for Zanzibar.

Section 117 makes provision for a single Court of Appeal in Tanzania to hear appeals from the High Court or from a magistrate with extended jurisdiction. Note the laws regarding its procedural processes can be made by law-makers in mainland Tanzania and in Zanzibar.

Section 125 establishes a Special Constitutional Court (“SCC”). In terms of section 126(1), the sole function of the SCC is to hear and give a conciliatory decision on any matter referred to it concerning the interpretation or application of the Constitution where such interpretation or its application is in dispute between the governments of mainland Tanzania and Zanzibar. Note that section 126(2) provides that the SCC shall not have the power to inquire into or to alter a decision of the High Court in respect of the election of members to Parliament or the Court of Appeal. Section 126(3) stresses that every conciliatory decision given by the SCC shall be final and there shall be no right of appeal to any forum.

Hierarchy of the Courts

The SCC is the highest Court of final instance in respect of matters involving the interpretation of the Constitution where such interpretation is in dispute between Tanzania and Zanzibar. Other than in respect of this issue, the Court of Appeal is the highest Court. Subordinate to these are the High Courts, and subordinate to the High Courts are the Magistrate’s Courts.

Appointment and removal of judges

In terms of section 127, half of the members of the SCC are appointed by the government of mainland Tanzania and the other half are appointed by the government of Zanzibar. The Constitution is silent as to exactly how many judges sit on the SCC. People who are eligible to be members of the SCC include: judges

who have served on the Court of Appeal or the High Court or people who are eligible to serve as judges in mainland Tanzania or Zanzibar.

In terms of section 118(2) of the Constitution, the President is vested with the power to appoint the Chief Justice who shall be the head of the Court of Appeal and of the Judiciary. Section 118(3) provides that the other Judges of Appeal are also appointed by the President after consultation with the Chief Justice. Section 118(1) provides that a full bench of the Court of Appeal consists of not less than five Judges of Appeal.

Regarding the High Courts, section 109(2) provides that the Principal Judge and other Judges are appointed by the President after consultation with the Judicial Service Commission (“the JSC”). The JSC is itself comprised of the Chief Justice, the Attorney-General, a Justice of the Court of Appeal appointed by the President in consultation with the Chief Justice; the Principal Judge of the High Court and two other members appointed by the President.

It is clear that the appointment of the judiciary is entirely in the hands of the executive and no participation by opposition party representatives takes place in selection or hearings.

In terms of section 127(3), it is important to note that members of the SCC are in fact appointed for one or more hearings only. An SCC member holds office until the determination of the dispute in relation to which he was appointed or his appointment is revoked (presumably by the appointing authority) or until he fails to perform his duties and a member due to illness or any other reason. We are of the view that these provisions are extremely vague and subjective and do not provide adequate protection for the independence of the judiciary.

In terms of section 120(2), a Justice of Appeal shall vacate his office upon attaining the age of 65 except where the President directs that he should not vacate office. Section 120(4) provides that a Justice of Appeal may be removed from office only for inability to perform the functions of his office in accordance with the procedure provided for in respect of the removal of High Court Judges.

In terms of section 110(5) a Judge of the High Court may be removed from office only for inability to perform the functions of his office or for misbehaviour. In

terms of section 110(6), if the President considers that the question of removal of a Judge needs to be investigated then the procedure shall be as follows;

- the President shall appoint a Special Tribunal which will consist of a Chairman and not less than two other members. The Chairman and at least half of the other members of such Special Tribunal need to be Judges of the High Court or the Court of Appeal;
- the Special Tribunal shall investigate the matter and make a report to the President;
- if the Special Tribunal recommends that the Judge be removed from office then the President shall remove the Judge from office.

Independence of the Judiciary

There is no provision in the Constitution that enshrines the independence of the judiciary. However, from a reading of Chapter Five of the Constitution, it is clear that judicial power is vested in the courts.

4. Legislation that governs the media

4.1 Overview

In Tanzania, it is important to be aware that media and broadcasting regulation are not “Union Matters” and therefore the governments of both mainland Tanzania and Zanzibar are entitled to pass laws for the regulation on these matters in their respective territories as they see fit. Thus for this part of the report, a reference to “Tanzania” is a reference to mainland Tanzania only. The principal pieces of legislation impacting on freedom of expression of the media are as follows:

- The Tanzania Communications Regulatory Authority Act No 12 of 2003 which establishes the Tanzania Communications Regulatory Authority for the purpose of the regulation of telecommunications, broadcasting and postal services.
- The Broadcasting Services Act No .6 of 1993 which makes provisions for the management and regulation of broadcasting and related matters.
- The Zanzibar Broadcasting Commission Act No 7 of 1997 which provides for

the establishment of Zanzibar Broadcasting Commission and for other matter related to it.

- The Registration of News Agents, Newspapers and Books Act No 5 of 1988 which provides for the registration and deposit of newspapers and related matters in Zanzibar.
- The Newspapers Act No 3 of 1976 which provides for the registration and regulation of newspapers and other matters relating to it.
- The Public Corporations Act, 1992, which makes provision for the creation, operations and management of state-owned corporations and in terms of which the state broadcasters operate;
- The Records and Archives Management Act No 3 of 2002. This legislation provides for the proper administration and management of public record and archives.
- The National Security Act No 3 of 1970 aims to make provisions relating to state security, to deal with espionage, sabotage, and other activities prejudicial to the interests of the Tanzania.
- The Tanzania Intelligence and Security Service Act No 15 of 1996 which establishes the Tanzania Intelligence and Security Service.
- The Penal Code, which establishes a code of criminal law.

4.2. The Tanzania Communications Regulatory Authority Act No 12 of 2003

Commencement date

23 May 2003

Purpose of the Act

The purpose of the Act is to establish the Tanzania Telecommunication Regulatory Authority (“TCRA”) to regulate telecommunications, broadcasting and the postal services.

Sector of the media governed by the Act

The Act applies to broadcasting among other things.

Key provisions:

Section 4(1) establishes TCRA. According to section 4(2), TCRA is a juristic entity with separate legal personality.

Section 7 establishes the Board of Directors (“the Board”) which is the governing body of TCRA. The board is composed of seven members: a Chairman and Vice-Chairman who shall be non-executive, four non-executive members, and the Director General who is appointed by the Minister responsible for Communications (“the Minister”). The Chairman and Vice-Chairman are appointed by the President (on the basis that if one is from mainland Tanzania, the other shall be from Zanzibar) and the Minister appoints the four non-executive members after consultation with the sector Minister (responsible for a regulated sector). Note that this is very confusing and it is not clear who the sector Minister is in this case.

Section 8 establishes a Nomination Committee (“the Committee”) tasked with inviting applications, scrutinising and short-listing persons from among those who apply, for appointment as members of Board and Director-General of TCRA (under section 9(1) of the TCRA Act. The committee is composed of the Permanent Secretary of the Ministry responsible for TRCA (who shall be the Chairman of the Committee), the Permanent Secretary for the time being responsible for public broadcasting and content matters, two other persons representing the private sector and one other person representing the public sector nominated by the Minister.

In terms of the section 12, the President may, acting upon the advice of the Minister after consultation with the relevant sector Minister, remove a member of the Board from office at any time if the member: is declared bankrupt, is convicted of a criminal offence, has a conflict of interest, is incapable of carrying out his duties or fails to attend at least two-thirds of all meetings of TCRA within a 12 month period.

Section 15 confers upon TCRA such powers to act as are conferred upon it by sector legislation, that is, any legislation related to the regulated sector, and regulated sector is in turn defined as including broadcasting, the allocation and management of radio spectrum and converging electronic technologies. This means that to ascertain the powers of the TCRA one has to have reference to the sector legislation, such as the Broadcasting Services Act.

In terms of section 35, all decisions of the TCRA are entered into the Public Register kept by the TCRA.

Section 32 sets out the functions of TCRA with regard to the Tanzania Broadcasting Services (“TBS”), the state broadcaster and these include:

- ensuring that there is a Charter between TBS and the Minister responsible for Public Broadcasting and Content Committee matters (“the Content Minister”) and that the Charter empowers TBS to become a public service broadcaster with universal service obligations; and
- prescribing categories of services to be provided by TBS which include: public, commercial, community broadcasting services and such other services as the Content Minister may determine. Note that this provision appears to give the state broadcaster the power to broadcast as a community or commercial service too. This is problematic because it blurs the important regulatory distinction that exists and ought to be maintained between state broadcasters, commercial (or privately held) broadcasters or community broadcasters - thereby making it difficult to assess the extent of state involvement in the electronic media generally

Section 47 empowers TCRA, in consultation with the Minister, to make rules with respect to a number of issues, including: a code of conduct, records to be kept and information supplied to TCRA

Part VIII of the Act contains provisions which enable TCRA to deal with complaints and to engage in dispute resolution.

Section 45 gives TCRA enforcement powers through the issuing of compliance orders. Further section 46(1) empowers TCRA to issue declarations in conformity with the Act or the sector legislation. The subject matter of the declarations is extremely wide, for example, it includes: particular services or classes of services, particular persons or classes of persons, particular activities in a regulated sector. The Minister must be consulted by TCRA prior to the making of any declaration.

The regulation of broadcasting in Tanzania is not carried out by TCRA alone and the Act provides for the appointment of a number of other bodies each with specific functions. These include (as is more fully set out below):

- the Content Committee
- the Internal Review Committee
- the TCRA Consumer Consultative Council

Part IV of the Act provides for the establishment of a Content Committee whose functions, in terms of sections 27, include:

- To advise the Sector Minister on broadcasting policy
- To monitor and regulate broadcast content
- To handle complaints from operators and consumers
- To monitor broadcasting ethics compliance
- To exercise the powers and carry out the functions that TCRA may determine, including:
 - Matters that concern the content of any broadcast
 - Promoting public awareness of broadcasting matters
- To make TCRA aware of different regional interests that need to be taken into account by the Authority when carrying out its functions.

In terms of section 26, the Content Minister establishes the Content Committee. Note again that this Minister is different from the Minister of Communications. The Content Committee is made up of no more than five members, including:

- the Vice-Chairman of TCRA who shall be the Chairman of the Content Committee
- four members appointed by the Content Minister after consultation with the Chairman of TCRA, who are appointed on the basis of their education, experience, skills and expertise and who do not have a conflict of interest. Note that in terms of section 28, these members may not be employees of TCRA or of any broadcasting organisation
- an expert or any other person co-opted by the Content Committee as it deems necessary.

In terms of section 33, TCRA is to appoint a Review Panel. The Review Panel has no function other than to serve as a pool of potential members for the Internal Review Committee, which, in terms of section 34 is appointed by TCRA whenever a person is aggrieved by a delegated decision made on behalf of TCRA.

The Minister establishes the TCRA Consumer Consultative Council in terms of section 37 and section 38 the functions of the TCRA Consumer Consultative Council are to, among other things, represent the interests of consumers, including regional and local consumers and to receive and disseminate information.

The TCRA is funded mainly by fees collected from the renewal and granting of licences and levies collected from regulated suppliers, in terms of section 49. In

terms of section 54, TCRA is permitted to set its own budget and inform the Minister by submitting a copy of the budget to him. The TCRA Consumer Consultative Council is funded mostly by appropriations by Parliament or appropriations by TCRA itself, in terms of section 39 and its budget is to be approved by the Minister.

Powers granted to the Minister or Director-General by the Act

The Minister plays a huge role in regard to appointments of the TCRA, various committees provided for in terms of the Act and to the making of declarations. Other powers granted to the Minister which have not been dealt with, are set out below.

Section 27(6), empowers the Minister to give the Content Committee directions of a general or specific nature and the Content Committee is required to comply with such direction.

The Minister is also empowered to make such regulations and rules as s/he considers necessary or desirable to give effect to the provisions of the Act which are not inconstant with the Act, in terms of section 47(1).

Provisions for media not controlled by the state

Unfortunately, the Act is not clear on exactly how the broadcasting sector is regulated in terms of the Act and the only broadcasting service specifically mentioned is TBS which is a state-owned broadcaster but which is authorised to provide commercial and community broadcasting services as well. It appears that the Act is an overall Act that must be read with the relevant sector legislation, such as broadcasting legislation.

Body which enforces compliance with the Act

TCRA enforces compliance with the Act by way of compliance orders issued in terms of section 45 of the Act.

Provisions limiting media ownership

Although there are no specific provisions affecting ownership of electronic media, the regulations, declarations and provisions (dealt with above) are sufficiently wide to encompass ownership issues.

Consequences of non-compliance with the Act

According to section 48(1), any person who contravenes or fails to comply with the provisions of the Act commits an offence and shall be liable on conviction to a fine, imprisonment or both.

4.3. The Broadcasting Services Act No 6 of 1993

Commencement date

15 November 1993

Purpose of the Act

The primary purpose of this Act is to make provisions for the management and regulation of broadcasting and for related matters. This is the sector legislation for broadcasting that the Tanzania Communications Regulatory Authority (“TCRA”) referred to above, implements.

Sector of the media governed by the Act

The Act applies to broadcasting service providers. Note that no mention of signal distribution is made in this Act.

Key provisions

Section 9 of the Act prohibits broadcasting services from being operated without a licence. However, it is important to note that TCRA can grant exemptions to any business or person from the provisions of the Act in terms of section 3(3).

Section 6 contains the functions that TCRA is required to perform when regulating the broadcasting industry in Tanzania. These include:

- issuing broadcasting licences
- regulating broadcasting activities
- maintaining a register of licensees
- being responsible for the standardisation, planning and management of the frequency spectrum
- any other function assigned to it by the President.

Section 10 of the Act sets out the procedure for applying for a broadcasting licence. TCRA determines the form and manner in which applications are to

be made and prescribes the required fee and deposit. At the time of writing these were:

- National - Subscription TV: 10 000 US dollars for the application fee and 100 000 US dollars for the deposit;
- National - Free TV: 1000 US dollars for the application fee and 4000 US dollars for the deposit;
- National - Free Sound: 1000 US dollars for the application fee and 2000 US dollars for the deposit;
- Regional- Subscription TV: 500 US dollars for the application fee and 2000 US dollars for the deposit;
- Regional - Free Sound: there is no application fee and you only pay 1000 US dollars for the deposit;
- District- Subscription TV : 100 US dollars for the application fee and 500 US dollars for the deposit;
- District – Free TV: 20 US dollars for the application fee and 100 US dollars for the deposit;
- District- Free Radio: 20 US dollars for the application fee and 100 US dollars for the deposit;
- Community – TV: 10 US dollars for the application fee and 100 US dollars for the deposit; and
- Community – Radio: 10 US dollars for the application fee and 100 US dollars for the deposit.

Note that non-commercial (religious groups) TV and radio stations shall pay 50% less of commercial broadcasters. The change on name for TV and radio cost 500 US dollar and the price for a licence renewal is the same as the deposit fee.

Representations to oppose the granting of a licence to an applicant are invited by the TCRA within fourteen days of a publication of notice of application.

In terms of section 11 of the Act, TCRA is vested with the power to grant a broadcasting licence on particular conditions once it is satisfied that a particular applicant meets the requirements of the Act and the considerations it is required to take into account in this regard are set out in section 10(3) and

include: technical expertise, financial resources, ownership suitability, spectrum availability, desirability of giving priority to community-based broadcasts and training considerations. Note that section 11 also provides for the amendment of broadcasting licences.

Section 12 provides for renewal of broadcasting licences after the expiry of their licence periods which may not exceed three years for a radio broadcasting licence and five years for a television broadcasting licence.

Section 13(2) of the Act allows the TCRA to impose other duties on broadcasters by notice in the Gazette, with the prior approval of the Minister.

Section 13(3) of the Act is effectively a Code of Conduct for broadcasters and contains a list of duties that broadcast licensees are required to comply with. These include:

- presenting news and current affairs factually, accurately and impartially
- presenting a wide range of programming to reflect Tanzanian and African expression
- to serve the needs of and reflect Tanzanian society
- to make maximum use of Tanzanian resources in the creation of programming
- to limit advertising to 30% of the total daily broadcast time
- to comply with the Code of Conduct for the Media Professions
- to keep and store video recordings of all programming for at least three months after broadcasting these
- to disclose the name of the producer at the end of a programme
- respecting copyright and other rights in respect of broadcast material.

Powers granted to the Minister or Director-General by the Act

In terms of section 4, the Minister responsible for Communications (“the Minister”) is empowered to carry on broadcasting services in Tanzania known as the Tanzania Broadcasting Services (“TBS”) which may be constituted in two branches, namely: Radio Tanzania and Tanzania Television. Clearly therefore, TBS is a state broadcaster as opposed to a public broadcaster and it is not simply overseen by the Minister, it is in fact provided by the Minister.

In terms of section 16, the Minister is empowered, on the advice of TCRA, to appoint persons to be inspectors for the purposes of the Act, that is, to inspect licences, premises and broadcasting apparatus.

In terms of section 27 of the Act the Minister may make regulations on a range of broadcasting related matters. These include the licences, which are to be issued in terms of the Act, the form and manner in which applications for licences are to be made and the keeping of books and records.

Provisions for the media not controlled by the state

The Act applies to all broadcasting and not just to that controlled by the state.

Body which enforces compliance with the Act

The TCRA and the courts enforce the Act.

Provisions limiting media ownership

The Act contains provisions limiting media ownership as follows:

Section 9(3) sets out considerations that TCRA has to take into account when deciding on whether to grant an application for a licence. Importantly these include the desirability of allowing a person to control more than one broadcasting service or more than one radio station, one television station and one registered newspaper which have common coverage/distribution areas.

In terms of section 10, broadcasting licences may be held only by a citizen of Tanzania, or by a company in which at least 51% of share holding is beneficially owned by a citizen or citizens of Tanzania. Thus foreign ownership in a corporate Tanzanian broadcasting licensee is limited to 49%.

Consequences of non-compliance with the Act

Section 24(1) sets out a list of offences, including broadcasting without a licence, failing to comply with licence conditions, providing false information and a range of other offences. In terms of section 24(1) a person who commits an offence is liable on a conviction to a fine, imprisonment or both.

4.4. The Zanzibar Broadcasting Commission Act No 7 of 1997

Commencement date

12 March 1998

Purpose of the Act

The purpose of the Act is to provide for the establishment of the Zanzibar Broadcasting Commission (“ZBC”), the regulatory body for the broadcasting sector in Zanzibar and for related matters.

Sector of the media governed by the Act

The Act applies to all broadcasting service providers in Zanzibar.

Key provisions

Section 5(1) of the Act establishes ZBC as an autonomous body corporate with separate legal personality.

Section 6 deals with the composition of ZBC and provides that the Commission is made up and appointed as follows:

- the Chairman, appointed by the President
- the Executive Secretary (who is the Chief Executive of Officer), appointed by the President
- between four and eight other members, appointed by the Minister responsible for Information (“the Minister”)
- a state attorney, appointed from the Attorney-General’s office.

Section 7 of the Act details the functions of the ZBC which include:

- issuing broadcasting licences
- regulating and supervising broadcasting activities
- maintaining a register of licensees, dealers (of broadcasting apparatus) and broadcasting stations (ie premises where a broadcasting service is carried on)
- being responsible for standardisation, planning and management of the frequency spectrum
- protecting the culture and traditions of Zanzibar
- inspecting broadcasters
- giving necessary directions to broadcasters
- performing any other function assigned to it by the President or by any other law.

Section 7(3) requires the ZBC to have a system of consultation, co-ordination and co-operation with other bodies having similar functions to it.

Section 11 prohibits any persons from operating a broadcasting service without a licence.

Section 12 provides for applications for a broadcasting licence. Section 12(2) sets out various procedural matters that must be complied with, including: the payment of the application fee and deposit, technical proposals and financial resources. Section 12(3) sets out the criteria the ZBC will use when deciding upon an application, including, expertise, frequency spectrum availability and local training.

Section 13 of the Act enables the ZBC to set licence conditions upon the grant of a licence.

Section 14 provides for renewal of broadcasting licences after the expiry of their licence periods that may not exceed three years for a radio broadcasting licence and five years for a television broadcasting licence.

Section 15(2) of the Act allows the ZBC to impose other duties on broadcasters by notice in the Gazette, with the prior approval of the Minister.

Section 15(3) of the Act is effectively a Code of Conduct for broadcasters and contains a list of duties that broadcast licensees are required to comply with. These include:

- presenting news and current affairs factually, accurately and impartially
- presenting a wide range of programming to reflect Zanzibari expression
- to serve the needs of and reflect Zanzibari society
- to make maximum use of Zanzibari (and other Islands) resources in the creation of programming
- to limit advertising to 30% of the total daily broadcast time
- to comply with the Code of Conduct for the Media Professions
- to keep and store video recordings of all programming for at least three months after broadcasting these
- to disclose the name of the producer at the end of a programme
- respecting copyright and other rights in respect of broadcast material.

Powers granted to the Minister or Director-General by the Act

The Minister is granted extensive powers with regard to broadcasting in terms of the Act.

In terms of section 4, the Minister is empowered to carry on broadcasting services in Zanzibar known as the Zanzibar Broadcasting Services (“ZBS”) which may be constituted in two branches, namely: Voice of Tanzania Zanzibar and Television Zanzibar. Clearly therefore, ZBS is a state broadcaster as opposed to a public broadcaster and it is not simply overseen by the Minister, it is in fact provided by the Minister.

Section 27 empowers the Minister:

- to require any licence holder to broadcast any announcement which the Minister considers to be in the interests of national security or the public interest
- to prohibit a licence holder from broadcasting any matter which, in the opinion of the Minister, would be contrary to national security or public interest.

In terms of section 18, the Minister is empowered, on the advice of ZBC, to appoint persons to be inspectors for the purposes of the Act, that is, to inspect licences, premises and broadcasting apparatus.

In terms of section 29, the Minister is vested with the power to make regulations on a range of broadcasting matters to give effect to the Act. These include the licences which are to be issued in terms of the Act, the form and manner in which applications for licences are to be made and the circumstances in which licences are to be issued and the form and terms and conditions of licences.

Provisions for media not controlled by the state

The Act applies to all broadcasters and not just to those controlled by the state.

Body which enforces compliance with the Act

ZBC and the courts are responsible for ensuring compliance with the Act.

Provisions limiting media ownership

There are a number of provisions regarding ownership limitations set out in

section 12. Section 12(1) provides that an application for a licence may be made only:

- by a Zanzibari or a Tanzanian
- a company registered in Zanzibar with a Government of Zanzibar shareholding of at least 20%
- by a company registered outside of Zanzibar which is controlled by Zanzibaris and in which the Government of Zanzibar has a shareholding of at least 30%.

The effect of this is that unless an individual owns a licence, any corporate entity holding a broadcasting licence will have at least 20% of its shares being held by the Government of Zanzibar. Clearly this has a significant impact on whether or not it can be said that there are genuine commercial or community broadcasting sectors in Zanzibar.

Section 12(3)(b) provides that when considering whether or not to grant a broadcasting licence to an applicant, ZBC must consider the desirability of allowing any person to control more than one broadcasting service.

Section 12(4) prohibits ZBC from granting both a radio and a television licence to the same person at the same time.

Consequences of non-compliance with the Act

Section 26(1) sets out a list of offences, including broadcasting without a licence, failing to comply with licence conditions, providing false information and a range of other offences. In terms of section 26(1) a person who commits an offence is liable upon conviction to a fine of not less than 5 million shillings and/or imprisonment for a period of up to 24 months.

Further, section 26(2) provides that in addition to any penalty imposed, a court may order the forfeiture to the government of any broadcasting apparatus or other material used in the commission of the offence.

4.5. Registration of News Agents, Newspapers and Books Act No 5 of 1988

Commencement date

30 October 1988

Purpose of the Act

The primary purpose of this Act is to provide for the registration, deposit and printing of newspapers and books in Zanzibar.

Sector of the media govern by the Act

The Act applies to the print media.

Key provisions

Part II of the Act deals with the registration of newspapers and contains a number of onerous provisions regarding the print media.

- Section 8 provides that before any newspaper is published or printed in Zanzibar, the publisher, editor and proprietor are required have sworn to an affidavit before a magistrate (and delivered it to the Registrar of Newsagents, Books and Newspapers (“the Registrar”)) containing the following information:
 - o the name of the newspaper
 - o a description of the building in which the newspaper is intended to be printed
 - o the names and places of residence of the proprietor, printer and publisher of the newspaper.
- In terms of section 9, a new affidavit is needed if there are amendments to the above.
- Importantly, in terms of section 7(1), the Act does not apply to the printing or publication of any government newspaper. Also, in terms section 7(2) the Minister responsible for information (“the Minister”) has the discretion to exempt any person or institution from the registration requirements.

Part III of the Act deals with the deposit of newspapers. In terms of section 14 of the Act, copies of newspapers published in Zanzibar shall on each day of publication be sent to the Registrar by registered post.

Part IV of the Act deals with bonds payable by a publisher prior to publication of a newspaper. In terms of section 18, it is prohibited for a person to publish a newspaper printed in Zanzibar unless the publisher has delivered to the Registrar a duly registered bond in the prescribed form and sum. In terms of section 18(2), the bond acts as a type of security and can be used for the payment of monetary penalties, libel damages or costs orders.

Part V contains general provisions relating to newspapers, including:

- In terms of section 25, the name and the address of the printer of a newspaper is required to be printed on the first or last page of the newspaper.
- In terms of section 26 of the Act, the printer of a newspaper needs to keep a copy thereof and produce same on demand of the Registrar or judicial officer.
- In terms of section 27, a police officer is vested with the power to seize a newspaper in cases of contravention (or reasonable suspicion thereof) of the Act.
- In terms of section 30, where the Minister is of the opinion that it is the public interest, the publication of a named newspaper may be suspended.
- In terms of section 31, the Minister can (on the advice of the Censorship Board) order a suspended newspaper to cease publication if in his opinion it is in the public interest or in the interests of peace and good order to do so.
- In terms of section 34, the President may prohibit the importation of any publication if he believes that the importation is contrary to the public interest.
- In terms of section 39, restrictions are imposed on the right to collect and distribute news and news materials. In Zanzibar, no person other than the holder of a written authorization issued by the Director responsible for information services (“the Director”) may engage in news collection. Further such an authorisation can be given only to a local news reporter, a freelance reporter, or a foreign newsagent. Note that the Minister has the power to revoke any authorisation issued by the Director, in terms of section 40.

Powers granted to the Minister or the Director-General by the Act

These are as set out above.

Provisions for media not controlled by the state

The Act applies only to private newspapers.

Body which enforces compliance with the Act

The courts enforce compliance with the Act.

Provisions limiting media ownership

None.

Consequences of non-compliance with the Act

- Anyone who contravenes sections 8 and 9 is liable upon conviction to a fine of between five and twenty thousand shillings and/or to imprisonment for a period of up to five years.”
- Anyone who contravenes sections 8 and 9 is liable upon conviction to a fine of between five and twenty thousand shillings and/or to imprisonment for a period of up to five years.
- Anyone who contravenes section 25 is liable upon conviction to a fine of between five and twenty thousand shillings and/or to imprisonment for a period of up to two years.
- Anyone who contravenes section 26 is liable upon conviction to a fine of between two and ten thousand shillings and/or to imprisonment for a period of up to two years.”

4.6. The Newspapers Act No 3 of 1976*Commencement date*

1 January 1976

Purpose of the Act

The purpose of the Act is to provide for the registration and regulation of newspapers and other matter related to it in Tanzania.

Sector of the media governed by the Act

The Act applies to the print media.

Key provisions

Part II of the Act deals with the registration of newspapers and contains a number of onerous provisions regarding the print media.

- Section 6 provides that before any newspaper is published or printed in Tanzania, the publisher, editor and proprietor are required to swear an affidavit before a magistrate (and delivered to the Registrar of Newspapers (“the Registrar”)) containing the following information:
 - o the name of the newspaper

- o a description of the building in which the newspaper is intended to be printed
 - o the names and places of residence of the proprietor, printer and publisher of the newspaper.
- In terms of section 7, a new affidavit is needed if there are amendments to the above.
- Importantly, in terms of section 5(1), the Act does not apply to any government newspaper. Also, in terms section 5(2) the Minister responsible for newspapers (“the Minister”) has the discretion to exempt any person or institution from the registration requirements.
- In terms of section 9 of the Act, copies of newspapers published in Tanzania shall on each day of publication be sent to the Registrar by a registered post.

Part III of the Act deals with bonds payable by a publisher prior to publication of a newspaper. In terms of section 13 it is prohibited for a person to publish a newspaper printed in Tanzania unless the publisher has delivered to the Registrar a duly registered bond in the prescribed form and sum. In terms of section 13(2), the bond acts as a type of security and can be used for the payment of monetary penalties, libel damages or costs orders.

Part IV contains general provisions relating to newspapers, including:

- In terms of section 18 of the Act, the printer of a newspaper needs to keep a copy thereof and produce the same on demand of the Registrar or a judicial officer.
- In terms of section 20, the name and the address of the printer of a newspaper is required to be printed on the first or last page of the newspaper.
- In terms of section 22, a police officer is vested with the power to seize a newspaper in cases of contravention (or reasonable suspicion thereof) of the Act.
- In terms of section 23, the Minister can cause all registered affidavits relating to a newspaper to be cancelled if the newspaper has not published for a period of three years. A bond registered or any guarantee given by the newspaper to which such affidavit relates shall be deemed to be void.
- In terms of section 25, the Minister can (on the advice of the Censorship Board) order a suspended newspaper to cease publication if in his opinion it is in the public interest or in the interest of peace and good order to do so.

Part V provide for offences against the Republic:

- In terms of section 27(1), if the President is of the opinion that the importation of any publication would be contrary to the public interest, he may prohibit the importation of such publication.
- Section 31 provides for a seditious intention. A seditious intention is defined as including an intention to bring into hatred or contempt or excite to dissatisfaction against the lawful authority of Tanzania, excite the inhabitants of Tanzania, raise dissatisfaction against the justice system and promote feelings of ill will. The section specifies that an act is not seditious if it intends to show that the government has been misled or mistaken on an issue.
- In terms of section 32(1)(c), any person who prints, publishes, imports or sells any seditious publication is guilty of an offence.
- In terms of section 36(1), any person who publishes a false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace is guilty of an offence.
- In terms of section 37(1), any person who, without lawful excuse, publishes any statement calculated to bring death or physical injury to any person or lead to the destruction or damage of any property is guilty of an offence.

Part VI provides for defamation.

- In terms of section 38 any person who unlawfully publishes any defamatory matter with intent to defame another person is guilty of an offence.
- In terms of section 39, defamatory matter is qualified as any material likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule.
- In terms of section 41, any publication of a defamatory matter concerning a person is unlawful unless the information is true and it was published for the public benefit. The publication of defamatory matter is also lawful if it falls within certain privileged grounds.
- The grounds for such privilege (found in section 42) are in the following circumstances:
 - o If the matter is published by the President, the government, or the National Assembly, or in any official document
 - o If the matter is published by order of the President or the government
 - o If the matter concerns a person subject to military discipline and is published by a person having authority over such person
 - o If the matter is published in the course of any judicial proceedings

- o If the person publishing the matter is legally bound to publish it.
- In terms of section 43, the publication of defamatory material is also privileged if it can be proved it was published in “good faith”. In terms section 44, a publication of defamatory matter shall not be deemed to have been made in good faith if it appears that:
 - o the content was untrue, and the publisher did not believe it to be true
 - o the content was untrue, and the publisher published it without taking reasonable care to ascertain whether it was true or false;
 - o the matter was published with intent to injure.

Powers granted to the Minister or the Director-General by the Act

These are as set out above. In addition, in terms of section 53, the Minister is empowered to make regulations to give effect to the Act.

Provisions for media not controlled by the state

The Act applies only to private newspapers.

Body which enforces compliance with the Act

The courts enforce compliance with this Act.

Provisions limiting media ownership

None

Consequences of non-compliance with the Act

Upon conviction, the Act provides for the imposition of fines not exceeding 20 000 shillings and/or a period of imprisonment not exceeding four years.

4.7. The Public Corporations Act, 1992

Commencement date

16 March, 1992

Purpose of the Act

The Act makes provision for the establishment, management and streamlining of public (note that this means state) corporations and provide for other matters incidental to or connected with those purposes.

Sector of the media governed by the Act

The Act applies to public corporations and therefore has a major affect on companies such as Radio Tanzania, TV Tanzania and state-owned newspapers like, Uhuru.

Key provisions

Part II provides for the establishment of public corporations. Sections 4(1) allows the President to establish a state corporation by Order.

Section 6 provides that where government is the sole shareholder of a corporation, the responsible Minister may give the Board of Directors of that company (such as the state broadcaster for example), directions of a general or specific character as to the performance its functions.

Part III is headed “Administration of Public Corporations”. It is provided in section 1 that every public corporation shall operate its business according to sound commercial principles. Thus, sound commercial principles means the attainment of a real rate of return on capital employed of at least 5% or such other figure approved by the Government. We are of the view that it is extremely odd to insist on a particular rate of return for a public corporation such as a state broadcaster. Requiring the state media to contribute particular profits to the fiscus can undermine a number of important social goals of broadcasting, such as ensuring appropriate amounts of local content and good quality news and current affairs programming.

Section 8(1) provides for the establishment of the Board of Directors, which shall be responsible for the policy, control, management, and commercial results of the affairs of the Public Corporation. In terms of section 8(2), the Board of Directors shall among other things:

- establish an efficient scheme of service for the staff of the public corporation.
- appoint other officers and employees of the corporation.
- exercise supervision over the management team of the public corporation.

In terms of section 9, where the government is the sole shareholder in a public corporation, the responsible Minister shall appoint the members of the Board. The board chair is appointed by the President on the advice of the responsible Minister.

In terms of section 14(1), every board of a public corporation shall submit to the Minister of Finance, the responsible Minister and the Presidential Parastatal Commission (“the Commission”), a draft statement of corporate strategy two months before the start of each financial year. In terms of section 14 (2), each statement of corporate strategy shall review performance against objectives for the two preceding years.

In terms of section 20(1), the responsible Minister shall review the business and affairs of all public corporations in respect of which s/he has responsibility.

Section 52 provides for the power of the President to make orders concerning any provisions of this Act.

Powers granted to the Minister or Director-General by the Act

Section 20(1) allows a responsible Minister to review the business and affairs of all public corporations in respect of which s/he has responsibility.

In terms of section 56, the Minister make regulations for giving effect or enabling effect to be given to the purposes and provisions of this Act.

In terms of section 57A the Minister may make provision providing for the dissolution of a public corporation.

Provisions for media not controlled by the state

None.

Body which enforces compliance with the Act

None

Provisions limiting media ownership

None

Consequences of non-compliance with the Act

None

4.8. The Records and Archives Management Act No 3 of 2002

Commencement date

1 August 2002

Purpose of the Act

This Act established a Records and the Archives Management Department (“the Department”) to administer and better manage Tanzania’s public records and archives. The Act is intended to assist public offices to create adequate records of their actions and transactions. The Act permits access to public records after thirty years and also empowers the Minister responsible for Records and Archives Management (“the Minister”) to acquire records from private organisations.

Sector of the media governed by the Act

The Act gives the public, including the media, access to certain public records after 30 years.

Key provisions

Section 9 makes heads of public offices responsible for creating and maintaining adequate documentation of their functions and activities through the establishment of good record-keeping practice.

Part IV makes provision for access to public records. Section 16 provides that public records shall be available for public inspection after the expiration of a period of thirty years from their creation unless a shorter or longer period has been prescribed by the Minister. A longer period than thirty years may be prescribed only when there is a need to restrict public access on the grounds of national security, maintenance of public order, safeguarding revenue, or protection of privacy of living individuals. Obviously Part IV of the Act is not particularly helpful and certainly does not constitute what is commonly known as “access to information” legislation given the time periods involved.

Section 26 empowers the Minister to acquire private records (upon the payment of full and fair compensation by the Government) where s/he is of the view that they are of national importance and that the public interest demands that they be acquired.

Powers granted to the Minister or Director-General by the Act

Section 28 empowers the Minister to make regulations in terms of the Act.

Provisions for media not controlled by the state

The Act is of general application.

Body which enforces compliance with Act

The courts are responsible for enforcing the Act.

Provisions limiting media ownership

None.

Consequences of non-compliance with the Act

Sections 21 and 22 respectively provide for various offences and penalties under the Act. The penalties for non-compliance include a fine, imprisonment or both.

4.9. The National Security Act No 3 of 1970*Commencement date*

30 March 1970

Purpose of the Act

The Act makes provisions relating to state security, to deal with espionage and other activities prejudicial to the interests of Tanzania.

Sector of the media governed by the Act

The Act is not media specific but it impacts on the media and makes reference to communications services.

Key provisions

Sections 3 to 11 of the Act prohibit any person from engaging in a range of activities. The ones that have particular relevance to the media include:

- approaching or entering a protected place (as declared by the President in term of the Protected Places and Areas Act)
- making any sketch, taking notes and publishing or communicating information which is intended to be useful to a foreign power or disaffected person
- communicating information for a purpose prejudicial to the interests of Tanzania

- communicating classified information.

Powers granted to the Minister or Director- General by the Act

Not applicable.

Provisions for the media not controlled by the state

The Act is of general application.

Body which enforces compliance with the Act

The courts are responsible for the enforcement of the Act.

Provisions limiting media ownership

None.

Consequences of non-compliance with the Act

Depending on the offence committed, the accused may be convicted to life in prison.

4.10. The Tanzania Intelligence and Security Service Act No 15 of 1996

Commencement date

10 March 1998

Purpose of the Act

This Act establishes a Tanzania Intelligence and Security Service.

Sector of the media governed by the Act

While the present Act is not media specific, section 16 does provide for the restriction of publications and broadcasting.

Key provisions

Section 16 of the Act provides for restrictions on published and broadcast information. It prohibits any person from publishing in a newspaper or broadcasting by radio or television or otherwise, the fact that any person (other than the Director-General of the Tanzania Intelligence and Security Service (“the Service”)) is a member of the Service or is connected in any way with a member of the Service.

Powers granted to the Minister or Director- General by the Act

Section 22 gives the Minister responsible for intelligence and security (“the Minister”) the power to make regulations after consulting with the Director General with the consent of the President. It is important to note that regulations made by the Minister under this Act are published only to members of the Intelligence and Security Service, in terms of section 22(2).

Provisions for media not controlled by the State

The present legislation is not media specific.

Body which enforces compliance with the Act

The Court is empowered to enforce the Act

Provisions limiting media ownership

None

Consequences of non-compliance with the Act

Depending on the offence committed, a fine of up to 500 000 shillings and/or a period of imprisonment not exceeding 36 months may be imposed upon a person who is found guilty of contravening the Act.

4.11. The Penal Code*Commencement date*

28 September 1945

Purpose of the Act

The primary purpose of the Penal Code (“the Code”) is to establish a code of criminal law, including the setting out of a number of crimes, in Tanzania. Some provisions of the Act have an impact on the media sector.

Sector of the media governed by the Act

The Code is of general application and most of its provisions are not specifically targeted at the media.

Key provisions

Section 55 makes provision for a seditious intention. According to section 55(1), a seditious intention is among other things, an intention to bring into hatred or

contempt the administration of justice or Tanzania's lawful authority or to raise discontent or dissatisfaction among the country's inhabitants.

However, in terms of section 55(2) a publication is not seditious if its intended purpose is to:

- show that the government is mistaken or has been misled
- point out errors or defects in government
- persuade any inhabitants to attempt to procure the alteration of any matter through unlawful means
- point out matters which produce feelings of ill-will with a view to their removal.

In terms of section 89(1)(a) of the Code the use of abusive and insulting language likely to cause a breach of peace is an offence.

Section 114 deals with contempt of court and two of the provisions have relevance for the media:

- In terms of section 114(1)(b) of the Code any person who refuses without lawful excuse to answer a question in a judicial proceeding is guilty of an offence. In the absence of a recognised qualified privilege for journalists, this section might be used to force the media to reveal their sources.
- In terms of section 114(1)(d) of the Code any person who publishes writing which is capable of prejudicing any person in favour of or against any parties to the proceeding or lower the authority of any person before whom that proceeding is being heard is guilty of an offence. This provision includes both aspects of contempt of court, namely, the sub judice rule and the "scandalising the court" rule.

Section 175 of the Code makes it an offence to have in one's possession for the purposes of distribution any obscene writing, printed matter or photograph.

Powers granted to the Minister or Director General by the Act

There is no specific power given to the Minister in respect of the media in this Act.

Provisions for media not controlled by the state

The Penal Code is of general application. Therefore, it applies to all media.

Body which enforces compliance with the Act

The courts enforce the Code.

Provisions limiting media ownership

None

Consequences of non-compliance with Act

The consequences for non-compliance with the Act's various provisions are:

- no penalty is provided for an offence in terms of section 55 (sedition).
- the penalty for an offence in terms of section 89 (abusive language) is imprisonment for a period of between six months and two years.
- the penalty for an offence in terms of section 114 (contempt of court) is a fine not exceeding 500 shillings or imprisonment for a period of six months.
- the penalty for an offence in terms of section 175 (obscene material) is a fine of 200 000 shillings or imprisonment for a period of two years.

5. Regulations

5.1 The Broadcasting Services Regulations

Commencement date

1 January 1994

Purpose of the regulations

To regulate the broadcasting sector, and in particular, the licensing of broadcasting services.

Sector of the media affected by the regulations

The Regulations apply only to the broadcasting sector.

Key provisions

In brief, the regulations provide for the licensing process for broadcasting services (both radio and television) as follows:

- Sections 3 and 4 provide for the making of broadcasting licence applications to the Tanzania Communications Regulatory Authority ("TCRA"). Applications

are to be made in the prescribed manner and the costs thereof are for the applicant's account.

- In terms of section 5(2) of the regulations, TCRA is required to be satisfied that the applicant is a fit and proper person to hold a licence and is not disqualified, an assessment based upon the written information supplied by the applicant in response the questions set out in the application form. Note that at any time after receiving the application and before making the award, the TCRA may request the applicant to furnish additional information to his application.
- In terms of section 6(1) a licensee is required to pay licence fees to the TCRA, in accordance with the tariff then in force, once the licence has been granted. Note that in terms of section 11(3) the Minister responsible for information and broadcasting ("the Minister") may exempt any licensee from paying fees or any other dues to TCRA.
- Section 10 provides that any person aggrieved by a TCRA decision on the grant or refusal of an application may appeal to the Minister.

The regulations also contain various schedules, annexes and appendices. The important ones for broadcasters are as follows:

- Schedule 1 contains pro forma licence conditions for a broadcasting licensee (radio or television), including:
 - o Sections 3-5 which deal with the payment of licence and other fees.
 - o Section 6 which provides that the broadcaster must comply with the requirements of the Broadcasting Services Act ("the Act") and then goes on to set out a number of content related requirements, including:
 - § nothing which offends against good taste and decency or constitutes incitement to crime should be broadcast
 - § that news be accurate and impartial
 - § that matters regarding political or industrial controversy be presented with due impartiality
 - § that due care be exercised with regard to the broadcasting of religious programming
 - § that there be no subliminal programming
 - § that the licensee not express its opinion on matters of political or industrial controversy or that relate to current policy
 - § the use of official languages only unless approved by the TCRA

- o Section 7 requires that news be of a high standard and that both national and international news be covered.
- o Section 8 contains various provisions regarding educational programming requirements.
- o Section 9 deals with political party broadcasts.
- o Section 10 deals with subtitling for the deaf.
- o Section 11 provides that listed events (sporting or other events of national interest as identified by the TCRA) may not be broadcast pay-per-view subject to certain exceptions.
- o Section 12 contains a number of provisions regulating advertisements, including, prohibiting advertisements of a political or industrial dispute nature or which do not comply with the advertising directions given to the broadcaster by the TCRA.
- o Section 13 deals with the technical standards the broadcaster is required to maintain.
- o Section 14 deals with the appropriate use of a licensee's spare frequency capacity.
- o Section 15 sets out the information, documentation and records that the licensee is required to furnish TCRA with on an on-going basis.
- o Section 16 provides for the process for applying for the renewal of the licence.
- o Section 17 requires fair competition practises from the licensee.
- o Section 18 sets out audience research that the licensee is required to perform.
- o Section 19 requires the licensee to comply with any ownership restrictions imposed by TCRA.
- o Section 20 provides for the non-transferability of the licence without TCRA's prior consent.
- o Section 21 contains provisions regarding the station name to be used by the broadcaster as approved by the TCRA.
- o Section 22 requires the licensee to comply with any directions given by the TCRA and requires it to implement procedures for dealing with these.
- o Section 23 requires the licensee to broadcast announcements or refrain from broadcasting programming in accordance with the national security provisions in section 25 of the Act.
- o Section 24 provides for free airtime for advertising TCRA's role and functions.

- o Section 25 contains a number of provisions requiring licensees to adopt procedures for the handling of complaints by the public.
 - o Section 26 contains provisions requiring licensees to publish a record of complaints made against their programming dealt with by TCRA's Broadcasting Monitoring and Complaints Committee.
 - o Section 27 contains provisions requiring licensees to comply with directions made by TCRA's Broadcasting Technical Committee.
 - o Section 28 sets out ways in which licence conditions may be amended by TCRA and these include with the consent of the licensee or with the licensee having an opportunity to make representations thereon.
 - o Section 29 requires licensees to promote gender and racial equality in the workplace.
 - o Section 32 sets out the process for dealing with a failure to comply with the licence conditions and the imposition of various possible sanctions including: the broadcast of a correction, an apology or both; the payment of a financial penalty and reducing the licensee's licence period.
 - o Section 33 sets out the process to revoke a broadcasting licence.
- Annex 1 to the Regulations is to be read with the licence conditions set out in Schedule 1 to the Regulations and these contain additional detailed provisions regarding the content to be broadcast by a licensee. These include:
 - o A requirement that the licensee provide a statement on programme policy
 - o Technical standards
 - o Diversity of programming requirements
 - o Educational programming requirements, including minutes to be broadcast
 - o News programming requirements, including minutes to be broadcast
 - o Factual programming requirements, including minutes to be broadcast
 - o Children's and women's programming requirements, including minutes to be broadcast
 - o Religious programming requirements, including minutes to be broadcast
 - o Entertainment programming requirements, including minutes to be broadcast
 - o African origin programming requirements
 - o Advertisement requirements, including daily limitations thereon
 - o Local production requirements
 - o Subtitling requirements to assist the deaf and an audio description service to assist the blind (obviously applicable only to television)

- o Training requirements of employees
- o Contribution to general radio and television development as required by the TCRA
- o Research requirements
- o Licensed coverage area (note: subject to a maximum of 25% of the country)
- o Broadcasting stations requirements, including name, antenna specifications etc.

The regulations also contain a number of Appendices which are the various relevant application forms.

Body which enforces compliance with the regulations

TCRA enforces compliance with the regulations.

Consequences of non-compliance

These are as set out in section 32 and 33 of the Schedule 1 to the regulations. These range from broadcasting a correction or apology to revocation of the licence.

6. Media codes of conduct

Media Council: Journalists Code of Ethics

Commencement date

Not provided.

Purpose of the code

The code of conduct has been adopted by the Media Council of Tanzania (“the Media Council”), a voluntary non-statutory body whose stated task is to ensure the highest professional standards of journalists. The Media Council represents both the print and the broadcast media.

Sector of the media affected by the code

This code is of general application and is applicable to members in the state-owned media, private media and local freelance journalists.

Key provisions

We set out below a summary of the key provisions of the code, identifying the issues that the code is concerned with:

- Article 1: The Right to Truth: requires journalists to adhere to the truth and to make adequate enquiries and engage in fact-checking to provide the public with accurate unbiased news.
- Article 2: Professional Integrity: requires journalists to refuse to accept bribes meant to influence professional performance.
- Article 3: Non-Disclosure of Source: requires journalists not to disclose a source of information given in confidence.
- Article 4: Social Responsibility: requires journalists to be mindful of the needs of the public and to put matters of public and national interest ahead of other interests.
- Article 5: Respect of Human Dignity: requires journalists to:
 - o avoid violating individual privacy and human dignity except for reasons of provable public interest
 - o avoid defamation in general
 - o work for human rights and freedom.
- Article 6: Discrimination: requires journalists to avoid engaging in practises which discriminate on the basis of race, religion, origin or sex.
- Article 7: Identity and the Underdog: requires journalists not to:
 - o subject to ridicule weaker members of society including, children, the aged, the bereaved and the underprivileged
 - o identify the victim of a sexual assault unless the person is dead or has given his or her consent
- Article 8: Facts and Comments: requires journalists to:
 - o draw a clear line between comments and facts
 - o avoid plagiarism and give credit to sources used
- Article 9: Sensationalism: requires journalists to guard against highlighting incidents out of context
- Article 10: Correction and Right of Reply: requires journalists to:
 - o make warranted corrections promptly and with due prominence
 - o publish apologies whenever appropriate
 - o grant opportunities of reply to disputed published reports
- Article 11: Working Together: requires journalists to work together to safeguard the code

Body which enforces compliance with the code

The Media Council plays a role in mediating disputes as to whether or not the code has been complied with. Remedies that the Media Council of Tanzania may find is for the media to publish or broadcast a correction, an apology or a retraction. The award of monetary damages is rare and has only applied in extreme cases.

Consequences of non-compliance

None provided for.

Media Code of Conduct for Election Reporting 2000*Commencement date*

5 July 2000

Purpose of the code

The purpose of the code was to make provision for a code of conduct for a range of media players, including, journalists, media owners, state and private media and the media in general during the 2000 elections.

Sector of the media affected by the code

The code has general application to all types of media and certain of its provisions apply specifically to the state and to private media.

Key provisions

- Section 1: Objectivity: requires journalists to provide fair, balanced and impartial reporting, including covering all sides of an issue and granting the right of reply
- Section 2: Truth: requires journalists to seek the truth when reporting on elections
- Section 3: Respond to Needs of Voters: requires journalists to provide voter information and education
- Section 4: Providing Relevant Information: requires journalists to provide voters with information that will help them to make informed choices
- Section 5: Encourage Free Speech: requires journalists to allow voters to express their opinions
- Section 6: Hate Speech and Incitement: requires journalists expose and take a stand against hate speech while still reporting on hate speech that is likely to

incite or provoke a breach of the peace

- Section 7: Promote Democratic Values: requires reporters to promote values such as the rule of good law, accountability and good governance
- Section 8: Commitment by Media Owners: requires media owners to develop capacity in election coverage and to give higher priority to election matters
- Section 9: State Media Obligations: requires the state media to present election information to the public and should provide equal space and time to all political parties and platforms
- Section 10: Private Media obligations: requires the private media to avoid being influenced by owners, government, advertisers or patrons or any other organisation.
- Section 11: Investigate Issues: requires the media to investigate and expose election issues to level the socio-political playing fields.
- Section 12: Media Obligations to Political Parties: requires the media to:
 - provide equitable and regular political party coverage
 - promote the candidature of women and other disadvantaged groups
- Section 13: Advertorials: requires the media to identify advertorials and charge equal rates to political parties
- Section 14: Refraining from Publishing: requires the media to refrain from publishing advertorials that violate the Constitution or the Electoral Code of Conduct
- Section 15: Media and the Election Act: requires the media to adhere to the Election Act.
- Section 16: Media Obligations to Electoral Authorities: requires the media to publish election information that is complete and accurate and provide fair election coverage
- Section 17: Alternative Views: requires journalists to seek and publish alternative views from stakeholders during the election process
- Section 18: Media and Civil Society: requires the media to work in partnership with civil society in providing civic and voter education, training and monitoring
- Section 19: Gifts: requires journalists reporting on elections not to be compromised by gifts or special treatment
- Section 20: Incumbency: requires the media not to favour incumbent candidates
- Section 21: Opinion Polls: requires the media to provide all available information to help them interpret trends and make informed decisions when publishing opinion polls
- Section 22: Gender: requires journalists to:

- o refrain from coverage that is biased and reinforces prejudices against women
- o encourage women contestants by raising public awareness of the importance of women's participation in public life and by rebuking all moves to suppress them.

Body which enforces compliance with the code

Not provided for.

Consequences of non-compliance

None.

7. Court cases

Overview

The most important Court of Appeal cases that we surveyed that impact on freedom of expression in Tanzania both relate to the law of defamation. They are:

1. Peter Ng'homango vs Gerson M.K. Mwangwa and the Attorney General. Civil Appeal No. 10 of 1998. Civil case No 1 of 1993 which set out a number of key principles in regard to the law of defamation, including, that one cannot even consider whether or not certain words were defamatory if there was no publication and that if a statement is true it is not defamatory at all.
2. Tanganyika Standard (N) LTD & Another v Rugarabamu Archard Mwombeki [1987] T.L.R. 40 which sets out the relevant considerations that need to be taken into account in deciding on the amount of damages payable in a case of defamation.

7.1 Peter Ng'homango vs Gerson M.K. Mwangwa and the Attorney General, Civil Appeal No. 10 of 1998. (Unreported)

Date of judgement

18 November 1997

Sector of the media affected by the judgement

The judgment dealt with defamation in the context of private communication but nevertheless the principles apply to all media.

Key legal principles established

First, that one cannot consider whether or not certain words were defamatory if there was no publication.

Second, that if a statement is not false or untrue then it is not defamatory at all.

Third, that it is for the plaintiff to prove, on a balance of probabilities, that a statement published is untrue.

Finally, that it is for the defendant to successfully raise defences to defamation such as truth, justification or privilege.

Court handing down the judgement

The Court of Appeal of Tanzania

Key provisions of the judgement

The appellant, Peter Ng'homongo, a tutor at the Mpwapwa Teachers' College, was working under the first respondent, Gerson M.K. Mwangi who was the principal. The second respondent was the Attorney General, representing the appellant's employer, the Government of Tanzania, specifically the Department of Education. While at the college, Ng'homongo involved himself with the students' choir and he conducted it when performing in public.

The first respondent, as the principal of the college, did not appreciate such activities by the appellant. On about five occasions, the first respondent made certain remarks about the appellant's choir activities that prompted the appellant to file an action for defamation. The appellant was partially successful, he was awarded 13 000 000 shillings as general damages but nothing by way of special damages. He was aggrieved by this and appealed.

The appellant had 11 grounds of appeal of which only one was successful, namely that the respondent was responsible for the publication of a letter containing defamatory remarks. The judge made his statements on the four key legal principles set out above in the course of discussing the grounds of appeal.

7.2 Tanganyika Standard (N) LTD and Another v Rugarabamu Archard Mwombeki [1987] T.L.R. 40

Date of judgement

28 July 1987

Sector of the media affected by the judgement

The judgment dealt with defamation generally so the principles established apply to all media.

Key legal principles established

Relevant considerations that need to be taken into account in deciding on the amount of damages payable in this case of defamation include:

- the circulation of the newspaper in which the libel was published
- the refusal by the publisher to tender an apology for libel despite repeated invitations to do so
- the loss of prospective business by the plaintiff
- the difference in plaintiff's income before and after the publication of the libel

Court handing down the judgement

Court of Appeal of Tanzania

Key provisions of the judgement

This was an appeal and cross appeal arising from a judgment of the High Court finding for the respondent in an action for libel and awarding him damages in the amount of 200,000 shillings. The appellant alleged the amount was excessive but this was rejected as the Court held that the amount of damages is justified where the trial judge takes into account all pertinent and relevant considerations. The respondent cross appealed on the inadequacy of the award, given the rate of inflation since the institution of the action. The Court rejected the cross appeal too, holding that where a judge has not based an award on the shilling value in any year, he must properly be taken to have based the award on the shilling value at the time he was making the award. In the course of giving judgment the Court set out the key legal principles referred to above.

****Endnotes**

¹ - *US Department of State, Bureau of African Affairs, January 2005; Background note Tanzania*

(<http://www.stae.gov/r/pa/ei/bgn/2843.htm>)

- *Mbendi Information for Africa: Tanzania –Overview, available on*

(<http://www.mbendi.co.za/land/af/ta/p0005.htm>)

- *The World Factbook: Tanzania available on*

(<http://www.cia.gov/cia/publications/factbook/geos/tz.html>)

***** Codes of Practice**

A media code of conduct for election reporting in Zanzibar, 2005; Guideline and Principles for Broadcast Coverage of Elections in Zanzibar, 2005 and a Media code of conduct for election reporting in Tanzania, 2005 can be found at

<http://www.kasmedia.org/tanmedia.htm>

The codes of conduct were ratified at Mazsons Hotel, Shangani, Zanzibar and Livingstone Hotel, Bagamoyo during media stakeholders' meetings funded by the United Nations' Development Programme and facilitated by MISA-Tanzania, The Tanzanian Media Women's Association and the United Nations' Association of Tanzania. .

Democratic Republic of Congo

1. Introduction

1.1. Political landscape¹

The Democratic Republic of Congo (“DRC”) has an estimated population of 54.4 million people.

The history of DRC has been characterised by dictatorship and civil war and attendant upon these has been rampant corruption and gross human rights violations.

During the 20th Century colonial era, the Belgian Congo (as it was known then) was a colony of Belgium. It gained political independence on 30 June 1960, although Belgium continued to exercise practical control over its economy. At the time of independence, the Movement National Congolais won the majority of seats in Parliament and the Prime Minister was Patrice Lumumba. A few months after independence, the country faced two simultaneous crises, an army mutiny and the secession by its mineral-rich province, Katanga, led by Moïse Tshombe, the then-governor of Katanga.

In 1961 Prime Minister Lumumba was killed – it appears by troops loyal to Army Chief Joseph Mobutu (who changed his name to Mobutu Sese Seko after 1965).

The next few years were characterised by unremitting civil war. On 24 November 1965 Mobutu seized power in a military coup. He renamed the country Zaire and became one of Africa’s most notorious dictators. Every institution in Zaire

was run by the Mouvement Populaire de la Revolution (“MPR”), Mobutu’s political party which every citizen was required to join.

During its 32 year dictatorial reign, Mobutu’s government was characterised by brutality and patronage. Essentially he took the wealth of the country as his own and dispensed patronage accordingly. Mobutu enjoyed the protection and support of the West during the Cold War because he was seen as being anti-Soviet. However, the end of the Cold War saw an end to that support.

The early 1990s saw a flowering of democracies in Africa, as democratic governments replaced post-Colonial despotic regimes and the continent responded to the end of the Cold War. At the same time, the effects of the Genocide in Rwanda were felt in neighbouring Zaire. In 1997, Rwandan troops invaded Zaire to flush out extremist Hutu militias. This boosted anti-Mobutu rebels, who quickly captured the capital, Kinshasa. In failing health, Mobutu fled into exile in Morocco where he died shortly thereafter. Anti-Mobutu rebel-leader, Laurent Kabila was installed as the President on 17 May 1997 and he renamed the country DRC.

A growing rift between Kabila and his former allies sparked a new rebellion. In January 2001, after the assassination of Laurent Kabila, his son Joseph Kabila, who had previously been the head of the army, became President.

The DRC is characterised by continued armed conflicts between various forces including: the Kinshasa government, local insurgents, non-Congolese warlords (including perpetrators of the 1994 Rwandan genocide) and foreign powers (noticeably Rwanda, Uganda, Angola and Zimbabwe). Currently, less than half of the country is under government control.

In order to address the conflict in DRC, the South African government initiated the inter-Congolese dialogue between various political groupings. After many delays, the inter-Congolese dialogue finally began in earnest in Sun City in February 2002. This resulted in the signing by all the parties of a Peace Agreement (“the Peace Agreement”) on 16 December 2002 which aimed at a ceasefire, a unified transitional government and the holding of democratic elections.

The transitional government was inaugurated on June 30, 2003 (with Joseph Kabila as the President). However, the ceasefire has not been effective and there have been only certain steps taken to ensure the holding of democratic elections. Essentially the country is only partially ruled by the transitional government.

Presently, there are five main political groupings and alliances in DRC which continue to control territory captured during the armed conflict and which participate in the transitional government. There are also a number of other smaller parties, many of which were involved in the inter-Congolese dialogue and are represented in the transitional government.

DRC has very little experience of democracy. It has held multiparty legislative elections only once in its history, in 1965, and has never held multiparty presidential elections.

According to the terms and conditions of the Peace Agreement, presidential and national elections were due to be held in June 2005. However, these elections were postponed by President Joseph Kabila, much to the dissatisfaction of DRC's population, and have yet to be rescheduled.

The Peace Agreement makes provision, after the holding of elections, for the establishment of a 500-seat National Assembly to act as the legislative body and a 120-seat Senate which is to act as a mediator in any conflict that might arise. The National Assembly is responsible for drafting national laws as well as a new Constitution for DRC.

From an economic point of view, DRC is rich in natural resources. Historically, the mining of copper, cobalt, zinc and other base metals, gold, diamonds, and petroleum extraction accounted for about 75% of the totals export revenues, and about 25% of the country's Gross Domestic Product ("GDP"). GDP in 2002 was US \$ 5.7 billion. Agriculture accounted for 53% of GDP in 2002, industry - 18.8% and serviced - 24.9%.

A draft constitution was approved by the constitutional commission appointed by Laurent Kabila in 1998, but was never ratified through a national referendum as planned. The transitional period is governed by the transitional Constitution

which was agreed upon by the participants in the inter-Congolese dialogue and signed by President Joseph Kabila on 5 April 2003.

DRC's transitional Constitution provides for freedom of expression and, explicitly, for the freedom of the press.

1.2. The mass media market in DRC

DRC is not yet a functioning national entity and remains politically fragmented by continuing armed conflicts. Not surprisingly, the situation of the media reflects this. Thus interviewees were able to talk about the media in a particular city or area, such as Kinshasa or Lubumbashi, but were unable to say what the situation was in other parts of the country.

It appears that there are approximately 175 privately-owned newspapers in DRC. It is difficult to ascertain whether or not there are more newspapers than this given the difficulty of accessing regional information mentioned above. Newspapers are mainly produced in Kinshasa. There are also a number of newspapers, such as *Mjumbe*, in Lubumbashi, and some newspapers in other provincial cities. Of the Kinshasa-based private newspapers, at least eight are published daily, including: *L'analyst*, *Boyoma*, *Elima*, *Le Palmares*, *Le Potentiel*, *L'ouragan*, *L'avenir* and *Le soft*. Of these, *Le Palmares*, *L'avenir* and *L'Observateur* receive subsidies from the government.

Other newspapers that appear regularly are published between once and three times a week. While the number of newspapers appears impressive, few are self-sustaining. Most private newspapers rely on external financing, often from political parties and individual politicians. Newspapers tend to consist of editorial commentary and analysis rather than factual descriptions of events. It appears that many are highly critical of the government.

There is no overtly government-controlled newspaper. However, the editors of two newspapers, *L'Avenir* and *L'Ouragon*, worked, respectively, in the Office of the Presidency and the Ministry of Justice. Further, *Le Forum* and *Le Palmares* have close ties to the security forces. There is also a government-owned news agency, *Agence Congolaise de Presse*.

There are approximately 25 private television broadcasters in DRC and a state television broadcaster. The main broadcaster is *Radio-Television National Congolaise* (RTNC), a state-controlled television and radio broadcaster. The RTNC is not independent from the government; it is an entity which is part of government, financed from the State budget and whose Director General is appointed by Presidential decree. RTNC's journalists are State employees and are paid as such. RTNC operates two television services, namely, the RTNC service, which is the only free-to-air television service covering the entire national territory and *La Television Congolaise* which is broadcast in Kinshasa. Aside from RTNC, there is *Canal Horizon*, a subscription television broadcaster based in France and *DSTV* a subscription television broadcaster based in South Africa.

There are a number of private free-to-air broadcasters operating in DRC. *RadioTelevision Kin Malebo* (RTKM), *RT RAGA*, *Canal Kin 1*, *Canal Kin 2*, and *Tropicana TV* are private broadcasters licensed to operate only in Kinshasa. In the Mbuji-mayi region, *Antenne A* and *KHRT* are authorised to broadcast. Additionally DRC has *Patelsat* in Goma and *ZenithTV* in Lubumbashi. The programming of most of the private broadcasters is European and American. Nearly half of all private broadcasters in DRC are religious (Christian) stations broadcasting content that consists of preaching and the performance of gospel music. Note that while private, including religious, broadcasters are allowed to broadcast news, news bulletins are often short and rarely discuss politics.

As is the case in many African countries, radio remains an important medium of information in DRC. There are approximately 122 non-Government radio stations in DRC (most of them are commercial, community and religious stations). *La Voix du Congo*, is the name of the radio station operated by the State, under the auspices of the RTNC. It is broadcast countrywide in French, Swahili, Lingala, Tshiluba and Kikongo but note that it consists of twelve separate services, operating in the different provinces. In some areas, community radio stations are the only broadcast medium that remote rural populations have access to. The usefulness of community radio was undermined when the Minister of Information and Press, on the 18 January 2005, banned all the community radio stations in DRC from broadcasting news. Clearly this defeats a core goal of community radio - to inform the public about political and other relevant issues.

The BBC and Voice of America can be heard in Kinshasa via Raga FM, a private radio station. Kinshasa listeners can also listen to Radio France Internationale's broadcasts from neighbouring Congo Brazzaville.

2. Experience of Journalists in DRC

2.1 Overview

Generally speaking journalists in DRC were keen to be interviewed although a few did request confidentiality. It appears that the current governmental weaknesses have led to an increase in media outlets but that this cannot realistically be characterised as a flowering of media freedom in DRC – rather what is happening is that the media has been able to take advantage of the space created by relative political chaos to engage in reporting that was simply unimaginable under the Mobutu dictatorship with its strong centralised security apparatus that controlled the country. In any event there was an eagerness to speak out against the kind of repressive governance, particularly of the press, that characterised DRC for so long.

Most of the journalists interviewed stressed that under former dictator Mobutu, there was no freedom of press and frequent torture, abuse and killing of journalists by government forces. Most journalists said that under Laurent Kabila, while there were still abuses these were not at the level experienced during the Mobutu regime. However, liberalisation of the media laws has not been an orderly process. Some important laws allowing for press freedom were in fact enacted while the Mobutu regime was still in power. However, these were never implemented and the press suffered under tremendous levels of repression. Now, while there is a definite increase in the level of press freedom in DRC, it is not clear if this results from a genuine commitment to press freedom by the current government or whether, as we have indicated, this has emerged organically from the chaos of the post-Mobutu era and is therefore tenuous.

While the current media freedom situation in DRC is better than it has been for many decades, DRC still does not enjoy a free press environment. Currently there are still numerous cases of illegal arrests, threats of journalists banning and/or suspension of media houses and even the torture and killing of journalists.

Journalists maintain that the current regime is extremely abusive towards the press and that there is no media freedom as such.

Journalists are also of the view that there are greater levels of freedom of expression in Kinshasa than in the rest of the country. Some journalists put this down to the presence of international organisations and non-governmental organisations, including the United Nations and representatives of foreign countries, in Kinshasa.

Journalists welcomed the development of media representative bodies. In this regard, L'Organisation des Media Congolais ("OMEC") - the Organisation of Congolese Media and L'Union National de la Presse Congolaise ("UNPC") - the National Union of the Congolese Press, are playing important roles in the organisation, regulation and protection of journalists. They do this by, among other things, investigating the arrests of journalists and ensuring that proper procedures are followed. One of OMEC's other important roles is to monitor the implementation of its code of conduct by media houses and journalists. Hence, OMEC can receive and evaluate complaints from members of the public. The outcome of an assessment made by OMEC is subsequently forwarded to the UNPC which has enforcement powers, including the revocation of a journalist's permit.

Journalists, particularly in the electronic media sector, were also concerned about conflicting jurisdictions of various ministries with powers of aspects of the media, whether print or electronic. In this regard, the laws give various roles to the Ministry of Information and Press, the Ministry of Posts, Telephony and Telecommunication and the Ministry of Home Affairs. This state of affairs creates much confusion in the sector. The situation is apparently due to the existing political instability as well as to the weakness of the existing legal and regulatory frameworks.

As is set out more fully below, the law undermines the internationally-accepted right of journalists to protect their sources. This basic right is ostensibly formally recognised in law, although the legislation in question undermines this right by providing that exceptions to this right are as provided for in law. Further, in court proceedings, journalists can be forced to reveal their sources. Interestingly however, interviewees were generally of the view that they are able to protect their sources of information. However, a number said that this required journalists to stand up against various pressures and threats. One interviewee told of a journalist who

disappeared after publishing an article which was critical of the government and refusing to divulge his sources. His dead body was subsequently found.

It is noteworthy that a number of interviewees agreed that the current climate in the DRC was conducive to the development of certain unprofessional practises, such as recklessly publishing defamatory and untrue statements, for reasons that are set out below.

Congolese journalists interviewed identified the following issues that characterise the challenges facing the media sector in DRC:

- the lack of training in the sector. There is only one specialised training college for journalists in Kinshasa. Besides this there are some courses that relate to communications issues at certain of the country's universities. Most working journalists, however, are trained on the job and serve a two-year training period. The lack of training impacts negatively on journalists' ability to skilfully gather and disseminate information. Journalists are sometimes arrested as a result of writing defamatory articles unintentionally;
- the lack of awareness about the state of media law in DRC. The laws in DRC are not publicised effectively. The publication of laws, both statutory and judgments is haphazard and the laws are mostly unavailable. OMEC has published a booklet on journalists' rights and obligations and this has been circulated in an attempt to improve the situation. Another issue that contributes to the lack of awareness is that there is not a general culture of keeping up to date with legal developments and trying to actively seek out and understand the applicable media laws;
- the underpayment of journalists. Most journalists in DRC are underpaid to such an extent that many waver in the performance of their professional and ethical function. This lack of economic independence means that journalists fall victim to being used in a variety of non-professional ways. According to some interviewees, the situation is so chaotic that a new phenomenon called "coupage" has recently developed within the media. This phenomenon consists of journalists being bribed in exchange for writing untrue information about individuals for the purpose of undermining their reputations. OMEC is currently trying to address the "coupage" situation through disciplinary mechanisms

although it is clear that journalists' poor salaries reflect a wider societal problem of poverty;

- harassment and abuse by security forces. A number of interviewees spoke about the high number of illegal arrests and other abuses of journalists by DRC security forces. Interestingly, the interviewees all spoke of an on-going problem of DRC's security forces, including the police and army, being used by powerful individuals (whether that power derives from political office or financial resources) to threaten, harass and generally silence the media. Journalists characterise this situation as "the rule of the most powerful"; and
- lack of access to government-held information. A number of interviewees spoke about the great difficulties that journalists have in trying to access government-held information. They said that one of the key reasons for their difficulties is that the government of DRC does not accept press criticism of its actions and policies. Because of this generalised hostility to critical reporting, the government in turn refuses to provide information which it fears might lead to such critical reporting – thus perpetuating the lack of transparent governance.

2.2 The print media sector

In our interviews with print media journalists it became clear that besides the general challenges facing the media sector in DRC as a whole identified above, there are also a number of sensitive issues. These issues are the ones that are difficult to report on and often involve a degree of personal danger for the journalists trying to cover them. They include:

- actions of the military and security forces generally. Many journalists spoke of the difficulty on reporting on the effectiveness and the organisation of the army in DRC. The government of DRC is composed of numerous former rebel groups. One of the major challenges facing the current government is the unification of these different armed rebel groups into one unified Congolese army. Journalists fear reporting on the somewhat chaotic state of DRC military because of the enormous power wielded by the military and its potential to embark on stiff reprisals against journalists. Similarly, many journalists spoke of the sensitivity around reporting on legally questionable actions by DRC security forces generally. Again, this is because of a generalised perception among the interviewees that the security forces operate on the instructions of

powerful political bosses who, again, would be able to take reprisal measures against investigative journalists engaging in reporting that was perceived to be against their interests;

- poor levels of governance in DRC. Many interviewees said that the lack of proper governance in DRC was a sensitive issue and that those journalists who did focus on the mismanagement of the country by its rulers were often subjected to harassment and threats;
- corruption. Allied to the issue of poor governance is the seemingly perennially sensitive issue of corruption. All interviewees spoke of the fact that it takes great journalistic courage to publicise cases of corruption by governmental officials. While there is general acknowledgement of the inappropriateness of the extreme wealth routinely amassed by politicians in DRC, this is again a sensitive topic for journalists to comment on, particularly in light of the difficulty of proving that such wealth indeed proceeds from illegal or corrupt conduct. Interestingly a number of interviewees also spoke about the high levels of corruption in the judiciary (including among prosecutors and other court officers) and how the outcome of a case is often dependent upon the amounts of money changing hands between litigants and judicial officers, thereby completely compromising the notion of a fair trial. Journalists said that they were afraid to report on this type of corruption because of the fairly close relationship that exists between the court officers and members of the security forces who are in a position to exact reprisals against journalists;
- the nationality of the President. Interviewees said there is speculation that President Joseph Kabila is not the son of Laurent Kabila and is also not in fact Congolese but is Rwandan. Given the on-going military and political hostility between DRC and Rwanda, this topic is extremely sensitive and the press is afraid to cover it. Indeed most of the journalists interviewed were extremely unwilling to be drawn on this issue and appeared to be afraid of talking about it even in vague terms. The fact that this is an on-going political issue is evidenced by the fact that the state media, the RTNC, recently broadcast an interview with a mid-wife from the President's alleged home village, in which she confirmed seeing "the president coming into this world". Clearly the RTNC felt the need to respond to the on-going speculation about the President's nationality; and

- alleged cannibalism by members of one of the rebel groups. One of the current Deputy Presidents of DRC is a former rebel leader whose group, the MLC, was widely reported to have responsible for acts of cannibalism in the eastern DRC. Interviewees said that journalists were extremely careful about reporting on the issue in the media as they feared reprisals by the Deputy President in question.

2.3 The electronic media sector

The number of radio and television stations is an indication of the growing levels of relative media freedom in DRC. Further, the coming into existence of La Haute Autorite des Media (the High Authority of the Media) (“the HAM”) as the regulator of both the print and broadcasting sectors of the media was widely welcomed by media practitioners.

However, a number of interviewees, particularly those in the non-state electronic media, expressed concern about a number of characteristics of the electronic media sector in DRC that undermine the existence of real media freedom in relation to broadcasting. These include:

- the low levels of the powers exercised by the HAM given that it is constantly undermined by the three Ministerial Departments that jointly control the sector;
- the fact that the government has the power to temporarily shut down television or radio stations at any time. That the government is prepared to use this power is evidenced by the case of *Raga Television* which was suddenly closed down in July 2005 for broadcasting a protest against the government held on the anniversary of the independence of DRC, during which protest ten protesters were killed and many were wounded; and
- the lack of new equipment adapted to new technologies that negatively impact on their performance.

There appears to be no genuine movement for the state broadcaster to be transformed into a public broadcaster. However, one senior journalist at the RTNC, the state broadcaster, said that the working environment at the state broadcaster had changed significantly in recent times. The previous government regimes gave journalists directions as to what was to be broadcast and he said that this is far less

prevalent now. The journalist told how the current working environment within the company allowed them to be independent to a certain extent. He said “this is not the ideal situation but it far better than before”. The interviewee was quite confident about the possibility of having a public broadcaster arising out of the diverse political pressures within government itself.

3. The Transitional Constitution of 2003

Commencement date

5 April 2003

Supremacy of the Constitution

Sections 1 of DRC’s transitional Constitution (“the Constitution”) provides that the Constitution and the national Peace Agreement (discussed above) constitute the sole source of power during the transition in DRC and that powers are to be exercised in the manner required by the Peace Agreement and the Constitution. It is clear that the Peace Agreement is accorded a high degree of constitutional status - the Constitution was developed out of the Peace Agreement and reflects many of its terms in its provisions.

In terms of section 2, any law that is inconsistent with the Constitution shall be null and void to the extent of the inconsistency as established by the Supreme Court. However, this supremacy is undermined by a number of the provisions in the Constitution itself which often put constitutional provisions on the same footing as ordinary laws.

Establishment of an independent regulator

Section 154 of the Constitution sets out a list of Institutions Supporting Democracy including the Independent Electoral Commission, the National Monitor of Human Rights and the Commission of Ethics and the Fight Against Corruption. Importantly, one of these is the High Authority of Media (“the HAM”). Section 156 of the Constitution provides that all institutions supporting democracy shall be independent in their functioning and in their interactions with other institutions of the state. The section further provides that these institutions shall be considered to be juristic entities with separate legal personalities.

Provisions impacting on the media

Part III of the Constitution is headed “Liberties, Fundamental Rights and Duties of Citizens”. It contains a number of provisions that impact upon the media. We shall deal with them in turn.

Section 27 grants everyone the right to freedom of expression. A clause in the section specifically provides that this implies the freedom to express opinions and feelings by way of speech, writing and images. However, the right provided for in section 27 is subject to respect for public order, the rights of others and good morals.

Section 28 provides that freedom of press is guaranteed. However, one of the clauses in this section provides that law determines the manner in which the right is to be exercised. However, restrictions on the freedom of the press can be made only on the following grounds: public order, respect of the rights of others and good morals.

Section 29 guarantees everyone the right to freedom of information. The section also guarantees freedom to disseminate information by radio, television, the print media or any other means of communication. A further clause in this section also provides that state media (electronic and print) are public services that all political parties and other social movements require an equal and equitable access thereto. Importantly, a clause provides that the state media is to be governed by a law which is to guarantee its objectivity, impartiality and diversity of opinion with respect to the receipt and dissemination of information.

The Constitution does not possess a general limitations clause. Restrictions are set out in the text of each clause dealing with fundamental rights as it is set out above.

Courts which have jurisdiction to decide on constitutional matters

Section 150 confers sole jurisdiction in respect of constitutional matters upon La Cour Supreme de Justice (“the Supreme Court of Justice”). The Supreme Court of Justice is the only court in DRC that has the power to hear a matter involving the interpretation of the Constitution or the constitutionality of any law or actions having the force of law.

Hierarchy of the courts

The Supreme Court of Justice is the final Court of Appeal in the DRC on all matters including non-constitutional matters decided by the La Cour d'Appel ("Court of Appeal") or by Les Cours Militaires ("Military Courts") and it also has original jurisdiction to deal with constitutional matters.

Below the Supreme Court of Justice is the Court of Appeal which hears appeals against decisions taken by the Le Tribunal de Grande Instance ("High Court"). The Court of Appeal also has original jurisdiction to deal with certain matters set out in legislation.

Below the Court of Appeal is the High Court which has original jurisdiction to deal with matters set out in legislation.

Below the High Court are the Les Tribunaux de Paix ("magistrate courts"). There is also a separate set of courts, namely the Military Courts, which enforce military law and offences committed by members of the military.

Appointment and removal of judges

Section 77 of the Constitution provides that the President of the Republic appoints and removes judges in accordance with a recommendation made by the High Council of Magistracy, after informing the government. The High Council of Magistracy is a body that is entirely appointed by the President in accordance with the Peace Agreement, in terms of section 76. The Peace Agreement provides in section 3 a. that the High Council of Magistracy is the disciplinary body of judges and is also responsible for protecting its independence.

The impact of this provision is that the appointment of judges is effectively controlled by the executive branch of government (as it also appoints the body responsible for "disciplining" the judiciary) and the legislature has a minimal role, indeed it is merely informed of the appointment or removal of a judge.

However, there are other provisions in the Constitution which provide for different procedures for particular judges. In terms of section 152 of the Constitution, the judges of the Supreme Court of Justice are appointed in accordance with legislation. Section 153 provides for the appointment of the Judge President of the Supreme Court of Justice in accordance with a mechanism defined by the parties to the Peace Agreement.

Currently, the applicable appointments legislation is a Mobutu-era ordinance, Ordinance 88-056 of 29 September 1988 (“the Ordinance”) pertaining to the status, appointment and removal of judges. Section 3 of the Ordinance provides that judges are appointed by the President.

Independence of the judiciary

Section 147 provides that the judiciary is independent from the executive and the legislature. The section stipulates that the President, with the assistance of High Council of Magistracy, must protect the independence of the judiciary. When exercising their functions, judges shall be subject only to the law. We are of the view that this section does not adequately protect the judiciary because, as has been discussed above, the appointment and removal processes for members of the judiciary are entirely controlled by the executive.

4. Legislation that governs the media

We are of the view that the legislative and regulatory situation regarding the media in DRC is chaotic. The statutes are often internally inconsistent and incoherent and also are not consistent when read with each other. Further, the provisions of the laws do not and have not mirrored the facts on the ground. We also think it important to note that the amounts of the various financial penalties, i.e. fines imposed in various laws vary considerably because of the chronic currency fluctuations that beset DRC and which are exacerbated by rampant inflation.

As is set out below, many of the applicable media laws were made during the Mobutu era and although they contained provisions ostensibly protecting media freedom, in practise there was no media freedom in DRC. The principal statutes which impact on media freedom in the DRC include:

- Law No 04/017 of 30 of July 2004 which provides for the High Authority of Media.
- Law No 96-002 of 22 June 1996 which establishes a detailed framework for licensing the print and broadcast media and other matters.
- Ministerial decree 04/MIP/020/96 of 26 November 1996 pertaining to the implementation of the law No 96-002 of 22 June 1996.

- Law No 81-050 of 2 April 1981 which establishes La Radio Television National Congolese: the state broadcaster.
- Law No 81-052 of 2 April 1981 which provides for the creation of the National News Agency: Agence Congo Presse.
- Ministerial decree 04/MIP/006/97 of 28 February 1997 which creates the monitoring commission for public and private broadcasting stations.
- Ordinance 23-113 of 25 April 1956: Official Press Permits
- Ordinance 81- 012 of 2 April 1881: Accreditation of journalists in the DRC
- The Penal Code, which establish the code of criminal law; Decree of 30 January 1940.

4.1. Law No 04/017 of 30 of July 2004: Providing for the High Authority of Media

Commencement date

28 August 2003

Purpose of the Act

The Law provides for the organisation, functioning and powers of the High Authority of Media (“the HAM”), the body which operates a register of licensed media providers in the print and broadcast media.

Sector of the media governed by the state

The Law pertains to the print and broadcasting media.

Key provisions

In terms of section 1 of the Law, the HAM is established as a juristic entity with a separate legal personality. Section 4 provides that the HAM is independent from other institutions supporting democracy (as provided for in section 154 of the Constitution) and any other public institution of the republic.

Section 15 provides that any person wishing to operate a broadcast service or a print media service is required to obtain a licence from the Minister of Information and Press (“the Minister”) and is required to register with the HAM. The Law is silent as to how such registration is to take place.

Further, section 20, provides the Minister and the Minister of Posts, Telephony and Telecommunication are required to consult with the HAM when making regulations regarding broadcasting facilities and equipment.

According to section 22 of the Law, the HAM operates through three bodies namely, the Plenary Assembly, the Bureau and Special Commissions.

The Plenary Assembly is the decision making body of the HAM and is composed of 21 members. In terms of section 23, eight members are appointed by the different entities that signed the Peace Agreement. The 13 other members (including at least eight women) are appointed by various bodies, in consultation with the HAM, as follows:

- The seven non-media representatives represent: the Order of Advocates, the Judiciary (appointed by the High Council of the Magistracy), Sociology, Morality, Cultural Associations, Parent Associations and Associations of Psychologists.
- The six media representatives represent: the Media Professionals' Trade Union, the Association for the Protection of Rights and Freedoms of Journalists, Editors' of Newspapers, the Advertising Profession, State and Private Broadcasting Companies and Journalistic Training Institutions.

Appointments are based on criteria such as competence, experience and high morality. Gender and provincial-representivity are also factors that are taken into account when appointments are made, to ensure diversity within the HAM.

The Plenary Assembly can decide on any issue in relation to the purpose of the HAM and approve tasks assigned to the Bureau and the Special Commissions. In terms of section 27, members of the HAM are appointed only for the transitional period in conformity with section 159 of the Constitution.

The role of the Bureau is to execute decisions taken by the Plenary Assembly as mentioned above. Essentially, the Bureau is also the managing organ of the HAM. In terms of section 31, the Bureau is composed of eight members, namely the Chairman, three vice-Chairmen, a spokesperson and three other assistants appointed by entities who are part of the Peace Agreement.

In terms of section 32, the Chairman of the HAM is selected from La Societe Civile- Force Vive, the official civil society grouping in DRC, and has the status of a Minister in accordance with section 158 of the Constitution. Unfortunately, the Law is silent on how the other seven members of the Bureau are appointed.

Specialised Commissions are created to perform specific functions in relation to the purpose of the HAM according to section 33.

Section 34 allows the HAM to employ freely consultants or any other experts. The HAM is also authorized to employ its own staff without the authority of the government being required.

According to section 37, the HAM is mainly funded from the state budget. However, it can in addition, receive donations from any other organisations that promote democracy as well as any other partner, provided it advises the government accordingly. The HAM is allowed to set its own budget and submit it for approval to the Minister.

While HAM is required, constitutionally, to be independent, the power to licence print and broadcast media operators resides entirely with the Minister in terms of and the Law contains no provisions as to how this is to be done.

Section 5 of the Law contains a general statement providing for the existence of media freedom in DRC. The section further provides that a journalist or any media professional cannot be denied access to any source of information or be intimidated in any manner when exercising his or her profession, provided he or she is complying with applicable laws. As is clear from previous sections in this chapter, journalists in DRC are not experiencing the protections guaranteed by these provisions.

Powers Granted to the Minister or Director General by the Act

The Minister of Information and Press has the power to grant print and broadcasting licences as is set out above. The Minister and the Minister of Posts, Telephony and Telecommunications are jointly granted the power to make regulations in relation to broadcasting facilities equipment, after consultation with the HAM in terms of section 20.

Provisions for media not controlled by the state

The Law applies to both state and private media.

Body which enforces compliance with the Act

The courts of law and HAM enforce compliance with the Law.

Provisions limiting media ownership

Section 8 provides that no more than 40% of shares in a broadcasting or print media company can be owned by a foreign person or company.

Section 8 further provides that any person who possesses 51% or more of the shares in a broadcasting or print media company is not allowed to acquire more than 49% of the shares in another broadcasting or print media company. The effect of this is that a person may control only one broadcasting or print media company in DRC.

Consequences of non-compliance with Act

The provisions of the Law are drastic in relation to non-compliance. In terms of section 49, the HAM may recommend to the Minister the cancellation of licence in cases of:

- self modification of the schedule of obligations imposed to the licensee;
- illegal changes made in regard to the format;
- contravention in regard to financial requirements; and
- the broadcast of programmes or the publication of materials that contradict the objectives of the transitional period.

If the Minister of Information and Press does not follow the HAM's recommendation, section 49 provides that the HAM may apply to the administrative section of the Supreme Court of Justice to have the licence cancelled.

In terms of section 52, any transgression of the Code of Conduct can result in a fine and/or the suspension of broadcasting or print media services for a period not exceeding three months.

In terms of section 54, 1000 francs is the prescribed fine upon conviction for failing to disclose important information applying for the licence.

In terms of section 57 a fine to up to 10 000 francs is prescribed where a broadcaster: broadcasts without being registered with the HAM, uses a frequency not assigned to it, or broadcasts not in accordance with technical specifications. A fine of up to 20 000 francs is prescribed if interference is caused to any other broadcaster's signal.

4.2 Law No 96-002 of 22 June 1996: Providing for the licensing and registration of the print and broadcast media

Commencement date

22 June 1996

Purpose of the Act

The Law defines a journalist and set out journalists' rights and obligations. According to section 2 of the Law, any person whose main source of income is derived from the gathering, the editing, the production and the dissemination of information or programmes by way of a media platform. In terms of this definition, even a sound or image technician working for a media company could be defined as a "journalist".

Broadly speaking, the Law sets out a number of provisions which appear to protect important aspects of freedom of the press and freedom of expression but which contain a number of severely limiting restrictions thereon. Further, the Law contains a number of provisions which require the licensing of newspapers and broadcast companies and the registration of print media distributors. The Law also obligates the print and broadcast media to correct false information broadcast or published. The Law provides for various "press offences" and penalties therefore.

Sector of the media governed by the Act

The Law applies to broadcasting and the print media.

Key provisions

In terms of section 1, the Law applies to all journalists as well as to print and broadcast media enterprises.

The Law sets out journalists' and the media's rights and obligations generally as follows:

- Section 8 provides that every one has the right to freedom of opinion and expression, including the right to be informed, to inform, to hold opinions, to express feelings and to communicate without hindrance, irrespective of the medium used. While this sounds like a significant degree of legislative protection of the right to freedom of expression, the right is entirely undermined by the broad and general restrictions contained in the section, namely, that the rights are subject to the law, public order, the rights of others and morality.
- Section 9 provides that in relation to broadcasting, any type of restriction to the freedom of expression should be considered as an exception. However it is important to note that the same section entirely undermines the right by providing for broad and general restrictions on the right, namely, that these are subject to the law, public order, the rights of others and morality.
- Section 10 specifically provides that the print and broadcast media must publish or broadcast in accordance with public order, morality and the honour and dignity of others.

Section 11 provides that a journalist is free to access all sources of information. This section provides that a journalist can be forced to reveal his sources only in cases provided for by the law. This obviously is a serious and extremely broad limitation that negates the right of journalists to protect their sources.

Section 13, specifically provides that the state has the obligation to implement the right to information. In terms of this section, any state-owned media platform is considered to be a public service which, by law, is required to function independently from the Minister of Information and Press (“the Minister”).

In terms of section 14, the establishment of print or broadcast media companies or agencies is free. This must be done in accordance with the law.

In terms of section 16, a print or broadcast media company is given three years after being licensed to commence broadcast failing which it forfeits its licence.

Section 18 provides that the government may subsidise private print and broadcast media companies upon request provided that 50% of their content is cultural, educational and social.

In terms of sections 20 and 21, any print or broadcast media company that sells advertisement space shall comply with applicable law and regulation and all advertisements should clearly bear the title “publicite (advert)” and need to be clearly distinguished from any other content broadcast or published.

The Law contains detailed provisions set out in Part II that deal with the print media specifically. These include: the licensing of the print media, print media companies’ obligations, the establishment and function of state print media companies, the public’s right of reply and correction and the registration of print media distributors. They are as set out in more detail as follows:

- Section 22 provides that every print media company is required to submit an application for a licence to the Minister containing the following information:
 - o the title or name of the newspaper;
 - o place of publication;
 - o particulars of the owner and the director of publication;
 - o physical address of the company;
 - o proof of citizenship of the head of the publication and/or the owner of the enterprise.
 - o certificate of good morality of the applicant (obtained from the police);
 - o the police clearance of the owner and/or head of the publication; and
 - o documents proving that the owner or the head of the publication is a journalist.
- Section 23 provides that in the case of a joint-venture company established with a foreign partner, the DRC company must hold the majority of shares. This appears to limit foreign-ownership in the print media to 49% in terms of this Law.
- Section 26 specifically provides that where a publisher happens to be a member of parliament or the senate and enjoys parliamentary privilege, the company shall appoint a deputy who does not enjoy parliamentary immunity. All legal duties of the head shall shift to the deputy.
- In terms of section 27, a personal name shall not be the title or heading of a publication.

- In terms of section 28, when an offence is committed in respect of content published, the persons liable therefor are as set out in the following order: the author of the article, the head of the publication, then the editor of the publication. Section 29 goes on to provide that in a case where the head of a publication is also the owner of the publication, he or she will bear criminal and civil liability for offences. However if the head of a publication is not the owner thereof, the head and the owner will bear only civil liability for offences.
- In terms of section 31, the name of the head of the publication as well as the name of the printer shall be mentioned on each publication.
- In terms of section 32, names of all editorial staff shall be published.
- Section 33 provides that where there has been a violation of sections 26, 31 and 32, the owner or, failing him, the head of the publication shall be liable to a fine ranging from 100 to 1000 times the price of the newspaper.
- In terms of section 34, the head of a publication is under the obligation to submit copies of each publication to the Department of Home Affairs and to the Minister. An additional copy shall also be submitted to the Department of Justice if the publication addresses youth issues.
- Section 36 provides that the state print media shall be independent, neutral and shall take into account the principle of equality. The state print media is required not to compromise the objectivity and the thoroughness required of the media.
- Section 37 provides for the right to reply. It provides that every one who has been directly or indirectly mentioned (in manner that identifies him or her) by a newspaper has the right of reply or of rectification. This shall be done free of charge subject to additional conditions that may be provided for by law. Note that in terms of section 38, the reply shall not be longer than the initial published article. Section 42 provides that in case of a refusal of a right of reply or of rectification, the head of publication will be subject to a fine up to 500 times the price of the newspaper.
- In terms of section 44, only the High Court has the authority to ban a newspaper from publishing if an offence is committed.

- In terms of section 45, the sale or distribution of newspapers is said to be able to be freely done. However, this is subject to vaguely worded restrictions, namely that due respect be given to public order and also note that persons who sell or distribute newspapers are required to register with the HAM in terms of section 46.
- Section 48 prohibits the sale of foreign publications in DRC which are inconsistent with public morals.

The Law contains detailed provisions set out in Part III of the Law that deal with the broadcast media specifically. These include: broadcast companies' obligations, the establishment and functioning of state broadcasting companies, the licensing of broadcasters, content regulation, and the public's right of reply and correction. They are as set out in more detail as follows:

- Section 51 provides that broadcasters shall operate freely. However this is subject to certain vaguely worded limitations. Every one has the right to receive and impart broadcasting provided that due respect is given to public order, the rights of others and morality.
- Section 53 provides that the state broadcaster shall be pluralist and shall not be monopolized by one person or group.
- Section 54 provides that the state broadcasting service shall be organised nationally and provincially. Thus, in each province, an autonomous public body, subsidised by the state, for the purpose of providing broadcasting services shall be created.
- In terms of section 56, it is an offence to broadcast sound or television content without a licence granted by the Minister.
- Section 57 requires the applicant to submit the following information when application is made for a sound or television broadcasting licence:
 - o the name of the station;
 - o name, date of birth and the physical address of the owner and the head of broadcaster;
 - o the physical address of the company;
 - o a copy of the police clearances of the director of programming or the head of the company;

- o certificate of good morality of the director of programming or the head of the company;
 - o a licence granted by the Ministry of Posts, Telephony and Telecommunication for the installation of equipment;
 - o the company registration number; and
 - o a schedule of programmes intended to be broadcast;
- In terms of section 61, foreigners are allowed to minority stakes have interests in broadcasting companies in the DRC subject to the reciprocity principle by their country of origin.
- In terms of section 62, every broadcasting company shall have a director of programming with the necessary qualifications in the field.
- In the event of an offence having been committed arising out of the broadcast of a particular programme, liability is as follows:
 - o in terms of section 63 where the director of programming is also the owner of the company, he or she will be liable together with the producer of the programme concerned;
 - o in terms of section 64, where the director of programming is not also the owner of the company, both of them will be liable.
- In terms of section 66, all private broadcasters are required to broadcast 50% local content in their programming. No mention is made of local content obligations for community or state broadcasters.
- Section 67 provides for the right to reply. A person who has been defamed has the right of reply using the same medium. In terms of section 68, the reply shall not take more time than the initial broadcast. It is an offence for a broadcasting company to deny a right to reply and various penalties are provided for in section 83. In terms of section 69, the right of reply is free of charge. In terms of section 70, the reply shall be made within 15 days from the date of the initial broadcast.
- Section 71 provides that every state official whose actions have been incorrectly broadcast, shall have the right to correct the information. A broadcasting

company refusing to broadcast such a correction shall be punished in terms of section 83. Note that in terms of section 72, the correction shall be broadcasted immediately upon request.

Part IV of the Law is headed Penalties and provides for the punishment of a range of activities by the print and broadcast media. These are:

- Section 76 which provides that where a broadcaster or print media publisher broadcasts or publishes speech, words, writing, printing, drawing, or a script or, image in public place and incites the public to commit an offence, such broadcaster or print media publisher will be liable as an accomplice thereto, provided that an offence is in fact committed. These offences include:
 - o to incite a member of the public to commit stealing, killing, public destruction;
 - o to destabilise national security;
 - o to incite members of the public to hatred, violence, ethnicity, or racism;
 - o to commit an offence against the head of state by means mentioned above; and
 - o incite members of the army or security services to:
 - § discourage of members of the army and the population with the intention to endanger the nation; and
 - § directly or indirectly, deliver to any foreign forces secret documents, information or formulae.
- Section 79, which contains a list of prohibitions on the broadcast or publication of certain content, namely:
 - o the content of any court application before such proceedings have taken place;
 - o evidence in respect of a pending court matter;
 - o deliberations of court proceedings as well as deliberations of the High Council of Magistracy without prior approval;
 - o photograph of a crime without prior approval of the court;
 - o proceedings of court without prior approval of the court; and
 - o the name of a rape victim or publishing information that may lead to the identification of a rape victim.

- In terms of section 80, anyone who enjoys Parliamentary immunity cannot be sued for defamation or any other offence committed through a speech made during Parliamentary proceedings or in court.
- In terms of section 85, in an emergency, the HAM may prohibit the broadcast of certain programmes and shall provide an explanatory report thereon within 48 hours to the High Court. Section 86 provides for a right of Appeal against such a decision by HAM to be excised within 15 days.

Powers granted to the Minister and the Director General by the Act

In terms of section 34, the head of a publication is under an obligation to submit a copy of each publication to the Minister, the Minister of Home Affairs and an additional copy shall be submitted to the Minister of Justice where the publication addresses youth issues.

In terms of section 56, the Minister is given the power to grant broadcasting licences. Similarly, in terms of section 22, the Minister is given the power to licence the print media.

In terms of section 57 a licence granted by the Ministry of Posts, Telephony and Telecommunication is required for the installation of broadcasting equipment.

Provisions for media not controlled by the State

The Law applies to all broadcasting and print media, whether state-owned or not.

Body which enforces compliance with the Act

The HAM and the High Court enforce compliance with the Law.

Provisions limiting media ownership

Section 23 provides that in the case of a joint-venture print media company established with a foreign partner, the DRC company must hold the majority of shares. This appears to limit foreign-ownership in the print media to 49% in terms of this Law.

Similarly, in terms of section 61, foreigners are allowed to have a minority shareholding in a broadcasting company in the DRC subject to the reciprocity with their country of origin.

Consequences of non-compliance with the Act

Part IV of the Law provides for penalties in cases of non-compliance with the Law. These are as follows:

- Section 73 provides that definitions and descriptions of offences shall be determined by the Penal Code in accordance with the Law. Note that where an offence is committed by the broadcast and/or print media this shall be specifically a press offence punishable in terms of the Law, in terms of sections 74 and 75.
- In terms of section 81, any person who commits any offence under section 79 or commits any other “press offence” not directly mentioned in the Law, shall be subjected to an imprisonment of no more than 15 days and a fine of 2 000 000 francs if the offence does not require heavier punishment (note that such heavier punishment is not set out in the Law).
- In terms of section 82, anyone whose programming or publication contradicts the law, public order and good morality will be punished accordingly. Unfortunately, such punishment is not specified. A broadcasting licence may be revoked by the High Court in cases where it repeatedly commits the same offence.
- In terms of section 83, the Minister may:
 - o seize documents, videos and any other records;
 - o prohibit the transmission of certain programmes;
 - o ban a broadcast station for a period not exceeding three months in the case of:
 - o a refusal to broadcast or publish a response or a rectification;
 - and
 - o where prohibited video material is broadcast.
- In terms of section 87, every broadcasting company which does not comply with the Law shall be prohibited to broadcast or to publish in the DRC.

4.3. Ministerial decree 04/MIP/020/96 of 26 November 1996: Providing for the implementation of the law No 96-002 (Licencing and Registration of Print and Broadcast Media) of 22 June 1996

Commencement date

26 November 1996.

Purpose of the Act

To provide for the implementation of the law No 96-002 of 22 June 1996 (“Law No 96-002”) discussed immediately above.

Sector of the media governed by the Act

Although Law No 96-002 applies to both print and broadcast media, this Decree deals only with implementation of the provisions relating to the broadcast media.

Key provisions

Section 1 of the Decree provides for the existence of a licensing office in the office of the Minister of Information and Press (“the Minister”) for the licensing of sound and television services.

Section 2 of the Decree provides that the licensing office shall operate in accordance with section 57 of the Law No 96-002. The section requires all licensees (that is private and state broadcasters) to operate in accordance with the schedule of obligations annexed to the Decree. The important substantive obligations imposed in the annexure to the Decree are as follows:

·Paragraph 3, which imposes programming obligations, namely:

- broadcasters are answerable for their programming content. Education, information and entertainment are required to be part of the programming of a station;
- broadcasters need to avoid content that is contrary to the law, the public interest, good morals as well as national security. Political issues shall be addressed with impartiality;
- private stations are free to rebroadcast programmes originally broadcast on state media;
- the local content requirement imposed upon all private broadcasters is 50%. Interestingly the paragraph also said that private broadcasters must observe

- copyright laws for the remaining 50%;
- private broadcasters are not allowed to broadcast political debates or any other form of political discussions or statements unless this is done in conformity with the law;
- the broadcast of Parliamentary proceedings shall be done according to rules governing Parliament;
- the interests of the youth in general shall be protected. In this regard it is prohibited to broadcast adult movies before 22h00. Further audience advisories such as that a film is rated “adults only” is required; and
- records of broadcast programmes shall be kept by licensees for at least for 30 days.
- Paragraph 4 provides that broadcasters are required to respect the copyright laws. In addition:
 - o licensees are required to promote and support local product through their programming;
 - o a broadcaster can directly transmit a foreign programme only if it relates to education, sport, religion or science;
 - o broadcasters that receive their programming through satellite are answerable for their content;
 - o while an institution called SONECA administers and protects copyright in DRC, where a conflict arises out of an alleged infringement of copyright, the matter shall be brought before the courts; and
 - o a broadcaster who infringes a foreign company’s copyright shall be required to pay damages.
- Paragraph 5: deals with obligations in respect of advertising. These are:
 - o Arrangements regulating the time allocation of advertisements shall be subject to a contract between parties (with due respect to the applicable laws and regulations);
 - o fees for advertisements on private broadcasters shall not be less than fees charged by the state broadcaster; and
 - o all advertising products are subject to the approval of the National Commission of Control and Monitoring of Advertisements (“the Advertising Commission”) which is a body that monitors and approves advertising;

- Paragraph 6 provides that a licensee is required to pay a prescribed monthly licence fee.

Section 3 provides that every advertisement needs the prior approval of the National Advertising Commission.

Section 4 provides that an administrative fee in relation to the licensing process is to be fixed by the Minister.

Powers granted to the Minister or Director-General by the Act

The Minister prescribes the monthly licence fee payable by a licensee.

Body which enforces compliance with the Act

The Decree is enforced by the HAM and the Court of law.

Provisions for media not controlled by the state

The Decree applies to the private and public broadcast sectors.

Consequences of non-compliance

In terms of paragraph 6 of the Annexure to the Decree, in cases of non compliance with the Decree, a licence may be revoked.

4.4. Law No 81-050 of 2 April 1981: Establishes La Radio Television National Congolese: the state broadcaster

Commencement date

15 April 1981

Purpose of the Act

The purpose of the Law is to establish and define the powers and functions of the state broadcaster, La Radio Television National Congolese (“RTNC”).

Sector of the media governed by the Act

The Law applies to RTNC, the state broadcaster.

Key provisions

Section 1 provides for the creation of an autonomous public institution called RTNC.

In terms of section 2, RTNC shall be based in Kinshasa and is required to provide services in each province.

Section 3 provides that RTNC is obliged to:

- Provide a sound and television broadcasting service which is considered to be a public service;
- inform, train and educate the Congolese population; and
- create and promote film production and any other associated activities.

In terms of section 18, RTNC is allowed to set its own budget and thereafter submit it to the Minister of Information and Press (“the Minister”) for approval.

Section 8 provides for the board of RTNC, which is composed of nine members, namely: the Chairman; two general secretaries; a delegate from the Ministry of Information and Press; a delegate from the Ministry of Public Enterprises; and a delegate from a Parents’ Association. The section further provides that the board holds office for five years.

In terms of section 10, the board is responsible for the management and control of RTNC and for meeting the objectives of RTNC.

In terms of section 11, the Group Chief Executive Officer shall implement decisions taken by the board and supervise the daily business of the company.

Section 30 provides for the Minister to exercise monitoring powers in respect of RTNC. The Minister’s monitoring power can be exercised at any time and includes the monitoring of:

- all decisions taken by the board;
- deliberations of the board;
- contracts;
- acquisition or sale of properties; and
- the budget.

The section further provides that the Minister is also vested with the power to question the timing and legality of any decision taken by the Board.

Powers granted to the Minister and the Director- General by the Act

Section 30 empowers the Minister to monitor RTNC as is set out above.

Section 32 requires the President of the Republic together with the Minister of Public Enterprises to approve all acquisitions and disposals by the RTNC.

Provisions for media not controlled by the State

None

Body which enforces compliance with the Act

None

Provisions limiting media ownership

None

Consequences of non-compliance with the Act

None

4.5 Law No 81-052 of 2 April 1981: Providing for the creation of the National News Agency: Agence Congo Presse (“ACP”)

Commencement date

15 April 1981

Purpose of the Act

The purpose of the Decree is to provide for the establishment of ACP, the National News Agency.

Sector of the media governed by the Act

The Decree deals with the establishment of a state news agency, the ACP, which has implications for all print and broadcast media.

Key provisions

In terms of section 2, ACP is based in Kinshasa and may open offices in each province with the President’s approval.

Sections 3 and 4 of the Decree set out the broad objects of the ACP. These include:

- seeking information that is precise, complete and accurate both within national and overseas territories;
- selling such information to media companies;
- researching and developing content to be used by the print and broadcast media

having in mind the need to enhance the international image of DRC;

- meeting international standards;
- educating the population and thereby contributing to the development of the country by means of information;
- making information available to the public regularly and without interruption;
- avoiding any type of interference (including ideological, political and economic) when performing its functions.

In term of section 5, ACP is funded by means of:

- the sale of documents and information to its clients;
- a state subsidy; and
- any other donation approved by the President.

In terms of section 9, the board of ACP is composed of nine members. These are appointed by the President. There is a great deal of latitude for direct Presidential control in respect of the ACP. Key examples of this include:

- ACP's budget is required to be approved by the President in terms of section 13;
- Section 23 which expressly states that the ACP is subject to the direct control of the President;
- Acquisitions and disposals of assets by the ACP require the President's approval in terms of section 24.

Powers granted to the Minister or Director-General by the Act

The President (as is set out above) exercises a number of important powers.

Provisions for media not controlled by the state

None

Body which enforces compliance with the Act

None

Provisions limiting media ownership

None

Consequences of non-compliance with the Act

None

4.6. Ministerial decree 04/MIP/006/97 of 28 February 1997: Providing for the establishment of the Monitoring Commission for state and private broadcasting stations

Commencement date

28 February 1997

Purpose of the Act

The purpose of the Decree is to create a Ministerial body for the purpose of monitoring state and private broadcasters.

Sector of the media governed by the Act

The Decree applies to state and private broadcasters.

Key provisions

Section 1 creates a Monitoring Commission (“the Commission”) in the office of the Minister of Information and Press (“the Minister”).

Section 2 sets out the objects of the Commission and these include:

- the evaluation of licence applications made by broadcasting companies;
- ensuring licensees’ compliance with the applicable laws and regulations; and
- submitting to the Minister suggested punishments in cases of non-compliance with the applicable laws and regulations in accordance with the relevant offences provisions.

In terms of section 3, the Commission is composed of the Secretary General of the Ministry of Information and Press who shall be the Chair; a councillor in charge of legal issues; a councillor in charge of broadcasting; a councillor in charge of the print media; a councillor in charge of technical issues; and the director of broadcasting in the Ministry of Information and Press who shall be the Secretary. The Decree does expressly provide for who in fact appoints the members of the Commission, however it does appear that it is the Minister who performs this function.

In terms of section 4, all broadcasting enterprises are required to pay 10% of all advertising revenue to the Commission as part of an administrative fee.

Powers granted to the Minister or the Director General by the Act

None specifically but note that the Commission is located within the Ministry of Information and Press and is therefore an arm of the Ministry.

Provisions for media not controlled by the state

The Commission regulates aspects of operations of all broadcast media, including private media.

Body which enforces compliance with the Act

In terms of section 5 of the Decree, the Secretary-General of the Ministry of Information and Press is charged with the execution of the Decree.

Provisions limiting media ownership

None

Consequences of non-compliance with the Act

None

4.7 Ordinance 23-113 of 25 April 1956: Providing for official press permits*Commencement date*

25 April 1956

Purpose of the Act

The purpose of the Ordinance is to provide for official press permits for media practitioners. This is a Colonial-era Law.

Sector of the media governed by the Act

The Ordinance applies to both print and broadcasting media.

Key provisions

Section 1 provides that individual and car permits shall be issued to journalists and their vehicles for easy access to places for the purpose of gathering and disseminating information. These permits shall be used nationally and shall be issued by the Minister of Information and Press (“the Minister”).

Section 2 provides that applications for permits shall be submitted to the Minister in the prescribed format. A single application may be made for different kinds of permits.

Section 3 provides for individual permits. An individual permit can only be issued, upon the prior application made by a newspaper company, a media house, a governmental media organisation and a media organisation. Foreign journalists are allowed to obtain the individual permits under similar conditions. Applications made directly by journalists which bypass a company can be considered only in exceptional cases or circumstances.

Section 4 provides that the application shall be accompanied with all the relevant particulars including:

- the function of the applicant;
- the type of the work performed; and
- a justification as to why the individual permit should be granted.

Section 5 provides that the individual permit shall allow the holder to access all necessary places for the purpose of his work. Note that this is subject to the maintenance of public order.

Section 6 provides that an individual permit shall be valid for a period not exceeding three years and is not transferable. The Minister can cancel an individual permit at any time.

Section 7 provides for a car permit. The holder of an individual permit is qualified to obtain a car permit.

Section 8 provides that rules applicable for the purpose of obtaining an individual permit apply to a car permit. The car permit is automatically cancelled when an individual permit is cancelled.

Section 9 provides for a journalist's badge. Any holder of an individual permit may apply for a badge. The advantage of a badge is that it is easy to carry and easy to identify by security services, thus allowing for quicker access. Section 12 provides that a badge will be cancelled automatically once an individual permit is cancelled.

Section 13 provides for a “press car” sign. Only a holder of a car permit can make application for a “press car” sign in the prescribed manner. Section 14 provides that “press car” sign is valid until 31 December of the year in which it is issued. Section 15 provides that the intended purpose of a car sign is to allow easy access to journalists.

Section 17 provides for special permit. In a situation justified by the public order, the Minister may issue a special permit. Section 18 provides that these permits are exceptional and shall be limited in time and shall be dissimilar from any other permit mentioned above.

Section 19 provides that each governor of a province is allowed to issue exceptional permits that shall be used only within the relevant province.

Powers granted to the Minister or Director-General by the Act

The Minister grants a range of national official press permits as is set out above.

Provision for media not controlled by the state

This Ordinance applies to all media.

Body which enforces compliance with the Act.

None

Consequences of non- compliance

None

4.8 Ordinance 81- 012 of 2 April 1981: Accreditation of journalists in the DRC

Commencement date

2 April 1981

Purpose of the Act

The purpose of the Ordinance is to provide for the accreditation of journalists in DRC.

Sector of the media governed by the Act

The Ordinance applies to the print and the broadcasting sectors.

Key provisions

Section 1 in Part I provides that the regulation applies to all professional journalists in DRC.

Part III provides for the issuing of press cards. In terms of section 5, every person fulfilling conditions provided for in section 2 (which define professional journalists) may obtain a press card from the National Union of Press in DRC (“UNPC”), an industry self-regulatory body. A journalist in training does not qualify to receive a press card. A specific press card is issued to journalists-in-training and the employer company therefor must make application.

Section 6 provides that a press card may be cancelled if:

- a journalist ceases to be employed by a company and is not employed by another company within a year;
- an independent journalist ceases to practice as such for more than a year;
- a journalist contravenes the code of conduct; and
- it was fraudulently obtained.

Part IV contains detailed provisions regarding the recruitment of journalists. Section 7 provides that recruitment is based on a test (who sets this and what it examines is not provided for in the law itself). Existing professional journalists and graduates from a school of journalism Persons are not required to take the test. It is prohibited for a media house to employ, on a full time basis, anyone other than a professional or trainee journalist for the task of gathering and disseminating information. The total number of trainee journalists in a media house shall not exceed one third of the total number of professional journalists in the company. All vacancies are to be published or otherwise made public. Applicants shall have at least a high school certificate.

Section 8 provides that trainee journalists shall be trained for not less than two years. A shorter period of one year may be allowed for a person holding a diploma in journalism.

Section 10 provides that conditions of employment within a media company shall depend on the management of the company.

Part X provides for provides for rights, duties and conflicts of interest. Section 40 provides that a journalist shall act with integrity and dignity. Section 41 provides that every journalist is required to personally perform all obligations imposed on him or her in relation to his work. A journalist is accountable to his or her superiors. It is prohibited for a journalist to demand gifts directly or indirectly of anyone and journalists are also prohibited from accepting gifts from any institutions.

Section 42 provides that a journalist shall observe the code of conduct applicable to the profession. Section 43 provides that a media company employing a journalist has the duty to protect the journalist in cases where he or she is under threat. Additionally, the company is also required to make good any damage suffered by the journalist during the exercise of his or her functions as a journalist.

Powers granted to the Minister or Director-General by the Act

None.

Provisions for media not controlled by the state

This Ordinance applies to all media.

Body which enforces compliance with the Act

As this Ordinance makes provision for industry self-regulation. Media companies enforce compliance with the Act while the UNPC issues the press accreditations.

Consequences of non-compliance with the Act

Part IX provides for disciplinary measures to be enforced by the media companies themselves. In terms of Section 36, depending on the nature of the infraction, a journalist can receive a warning, a suspension or dismissal.

4.9 The Penal Code, Decree of 30 January 1940.

Commencement date

30 January 1940

Purpose of the Act

The primary purpose of the Penal Code is to establish the code of criminal law In the DRC. Note that this is a Colonial-era law.

Sector of the media affected by the Act

The Decree is not specifically targeted at the media sector but some of its provisions impact on the media directly.

Key provisions

In terms of section 73, no person may reveal official secrets except in cases where the laws require this to be done or where the person is required to provide evidence during a court proceeding. Imprisonment for up to 6 months and/or a fine not exceeding 5000 francs may be imposed to anyone who reveals official secrets.

Sections 74, 75 and 77 of the Code, contain various prohibitions on defamatory statements and insults against other persons. The penalties, upon conviction, range from imprisonment for periods of between 8 days and five years and/or fines ranging from 25 to 1000 francs.

Section 76 prohibits the making of defamatory accusations either verbally or in writing to a judicial authority, a civil servant or their subordinates. Imprisonment of a maximum period of five years and/or a fine of between 25 to 1000 francs may be imposed upon conviction.

Section 150h makes it an offence to contribute to a publication or to distribute any information which does not contain the true name and domicile of the author or the printer. The penalty upon conviction is imprisonment of up to two months and/or a fine of not more than 2000 francs. This is subject to an exception, that is, that the punishment will not apply if the source of the information is widely known. Section 150i provides that if anyone involved in the publication mentioned above reveals the true name and/or domicile of the author or the printer, that person will not be prosecuted.

Sections 199bis, and 199ter contain various prohibitions on spreading false information likely to alarm, worry or excite the population against the authorities, or on causing unrest. If convicted a person is liable to imprisonment of up to a year and/or a fine of 500 francs.

Powers granted to the Minister or Director General by the Act

None

Provisions for media not controlled by the state

The reach of the Decree is broad enough to extend to both state and privately owned media.

Body which enforces compliance with the Act

Compliance with the Decree is enforced by the courts.

Provisions limiting media ownership

None

Consequences of non-compliance with Act

There are as detailed above.

5. Regulations

We were not provided with copies of any regulations.

6. Media Codes of Conduct

In DRC there are two applicable codes of Conduct. The Code of Deontology and Ethics for Journalists in DRC, a general code of conduct which has been adopted, is set out below. Recently, a code specifically for the upcoming elections for which a date has yet to be set has also been adopted. Unfortunately, it has yet to be published and was not available at the time of writing.

Code of Deontology and Ethics for Journalists in DRC

Overview

The Code reflects the commitment of DRC's journalists to the Munich Declaration providing for rights and duties of journalists in gathering, reporting and commenting events. Journalists in DRC gathered together in a National Congress of the Press which took place in March 2004 and adopted the Code which defines rights and duties of journalists.

Commencement date

4 March 2004

Purpose of the Code

The purpose of the Code is to establish standards of conduct that journalist shall subscribe to.

Sector of media affected by the code

All media, including the print and broadcast media.

*Key provisions***A. Duties of journalists**

This section sets out the duties of journalists and these include:

- section 1: acting freely in collecting, processing and disseminating information, opinions, commentaries and criticisms.
- section 2: demonstrating equity, thoroughness, honesty, a sense of responsibility, independence, and decency in relation to facts concerning individual in the society.
- section 3: dealing with any matter fairly, and presenting any controversial issue in a balanced manner.
- section 4: taking total responsibility for any published or broadcast material undersigned or authorised to be published or broadcast by him or her.
- section 5: which bans insults, defamation, allegations, alteration of documents, twisting of facts and misrepresentations. The section additionally bans the incitement of hatred (ethnic, religious, regional, and racial) and any other form of support of negative values in the media.
- section 6: seeking the prevalence of the truth by not altering or modifying information from its original source.
- section 7: which prohibits journalists from receiving gifts from sources of information.
- section 8: identifying all source of information, assessing them objectively, and protecting those requiring confidentiality. Note that this includes making the necessary attributions to other journalists where appropriate.
- section 9: which enjoins journalists not to transform other peoples' opinions (in any manner including changing the wording and tone).
- section 10: which requires journalists to rectify as soon as practicable any incorrect information and publish the accurate version of the information. The

right of reply shall also apply if necessary.

- Section 11: which provides that journalists ought to respect human dignity, privacy, public institutions, public authority, public order and good morals. Note that we are of the view that certain of the matters listed in this section are unlikely to further the interests of press freedom, this is particularly so of the injunction to respect public authority and public order.
- Section 12: which provides that a journalist shall promote the national culture, a sense of responsibility in its publication, tolerance, the diversity of opinions as well as universal values such as peace, equality, human rights, and social progress.
- Section 13 which requires that journalists make use of wisdom and maturity in presenting news that might endanger the society as a whole.
- Section 14: requires a journalist to be loyal in respect his colleagues. The section additionally demands a journalist to implement all decisions or directives taken by the association of journalists.
- Section 15: prohibits a journalist from publishing rectifications of materials that he or she never published.

B. Rights of journalists

This section sets out the rights of journalists and these include:

- Section 16: Protection of sources of information.
- Section 17: Freedom of access of every possible source of information as well as freedom to freely gather information regarding matters of public interest. It is provided that any opposition to a journalist's request for information by a private or public institution shall be reasonably and clearly justified.
- Section 18: A journalist is entitled to refute any ideas contrary to the editorial policy of his organisation. Thus, a journalist cannot be forced to express an opinion contrary to his conviction, his reputation, or any other moral interest.
- Section 19: The editorial team must be informed about every important decision that might affect the enterprise. The editorial team needs also to be consulted on any final decision or any other resolution that has a direct impact on the editorial team as well any important appointment and dismissal in the enterprise.
- Section 20: Considering his functions and responsibilities, a journalist needs a consistent salary allowing him to be socially and economically independent.

Body which enforces compliance with the code

None

Consequences of non-compliance

None

7. Court Cases

Court cases were not made available to us as they are not accessible. Case law in DRC is not reported.

One noteworthy issue regarding the courts is the issue of an exceptional juridical body, namely, La Court d'Ordre Militaire, Military Order Court, established in August 1997 by Laurent Kabila. Note that it was abolished in 2004. Initially it was established to try only military crimes, crimes committed by soldiers, crimes involving fire arms or endangering state security. However, the authority given to the Military Order Court was wide enough to adjudicate any civil and/or military matter. The Military Order Court has tried a number of political offences and civil crimes as well as press offences, often handing down severe punishments, including the death penalty after summary trials. The Military Order Court has often punished journalists or other member of the public deemed to be embarrassing to the system.

**** Endnotes**

¹- *Institute for Security Studies, "DRC": history and politics:* ([http://iss.co.za/AF/profiles/DR Congo/politics.html](http://iss.co.za/AF/profiles/DR%20Congo/politics.html).)

- *U.S Department of State, human right report DRC Freedom of speech and press* : (http://www.state.gov/www/global/human_rights/1999hrp_report/congodr.html)

- *ARCO Hebdo No 11/05 du 09 Fevrier 2005 page 1 sur 18; tel09243 99 348: email arco_hebdo@yahoo.fr ;avenue Kitona ,immeuble langelo troisieme etage kishasa Gombe. ARCO is an association of community broadcasters in the DRC.*

-*BBC news, Country profile:DRC:*

(http://news.bbc.co.uk/1/hi/world/Africa/country_profiles/1076399)

- *Article19; Democratic Republic of Congo; Developing a new strategy of freedom of expression. November 2000.* (<http://www.article19.org/docimages/844.htm>)

- *Democratic Republic of Congo Press Overview 2000:* (http://64.233.183.104/custom?=cache:OdqbquhiOcJ:www.ijn.net.org/FE_Article/AseetSho)

- *DRC Media Environment Assessment Report: International Media Support-Report-December 2003.* (<http://64.233.16.104/search?q=cach:A66hDlaAJSMJ:www.i-m.dk/pc/Congo%2520A.>)