Media Law Handbook for Eastern Africa

VOLUME 1

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Acknowledgements

It is not easy to write a book about media law in Eastern Africa because of the difficulty in accessing the laws. In a number of countries, consolidated laws are not published so one has to piece together the current state of the law based on a series of amendment acts. Law reports are not published, so copies of actual judgments have to be obtained from the courts. In many countries there is only one source of statutes or regulations: the government printer, with a single outlet in the capital. Not only is it tough for journalists in these countries to access laws, it is tough for an author to track them down.

This book would therefore not have been written without the very great assistance provided by lawyers in or from these countries. I am indeed greatly indebted to: Burundi, the name of the lawyer who assisted has been withheld at the lawyer's request due to safety concerns; Eritrea, Luwam Dirar; Ethiopia, the name of one of the lawyers who assisted has been withheld at the lawyer's request due to safety concerns and Luwam Dirar; Kenya, Eric Ngaira; Rwanda, Robert Mugabe; and Uganda, Catherine Anite.

Sadly, we could not find lawyers in Djibouti or Somalia who were able to provide us with materials that would have enabled us to include those countries in this book. Perhaps we will be able to do so in a later edition.

I am extremely grateful to Nani Jansen, Henry Maina and Brigitte Read for assistance in finding and getting in touch with the in-country lawyers.

I am not multi-lingual and so I relied heavily on my very able French translator, Laurent Badibanga, for the chapter on Burundi. Again, I am greatly indebted to him.

Finally, this project would not have happened without the Konrad-Adenauer-Stiftung (KAS) Media Programme sub-Saharan Africa, based in Johannesburg. We have been delighted (and a bit astounded) at the particularly warm reception that the two-volume *Media Law Handbook for Southern Africa* has received from journalists, academics, lawyers and media practitioners. Consequently, when KAS Media Africa's current director, Christian Echle, broached the possibility of a media law handbook for Eastern Africa, I leapt at the chance.

A number of people have been particularly helpful in getting the book published, and I would like to make mention, with thanks, of Douglas and Heath White for editorial

assistance on certain chapters, and Tracy Seider for her overall editing of this book and for getting it to print.

It has been rewarding and exhilarating to work with the KAS Media Programme, which is committed to democracy and to the rights to a free press and the free flow of information and ideas. I am extremely grateful to have been given the chance to explore current media law issues in this part of Africa.

Justine Limpitlaw

Foreword

True freedom of the media is based on a number of fundamentals: it is based on good training for young and upcoming journalists, and on business models that allow media houses and publishers to be independent. In addition, it is based on the more general recognition of freedom of expression within a society, and on the perception that a journalist's work is an important contribution towards better information and better democracy. However, without the political will to support this idea, all of the above would not be enough to defend freedom of the media.

The *Media Law Handbook for Eastern Africa* is a gauge of this political will. It outlines the laws that have been introduced to guarantee the freedom and independence of the media in the region; but it also clearly highlights where this effort has not been taken far enough and where the protection of free media is poor. This book - the first of its kind - gives an instant overview of relevant media laws in six Eastern African countries, making it a valuable resource for journalists, lawyers and civil society stakeholders alike. The handbook not only contains a comprehensive overview of applicable media laws (governing the print, online and broadcast media) for each country covered but also contains suggestions on possible law reforms to improve the protection of the media in the respective countries.

The Konrad-Adenauer-Stiftung's (KAS) Media Programme for sub-Saharan Africa has been working for over a decade on the regulatory framework for journalists in Africa. Through its ongoing work, KAS Media Africa has seen the critical role that media law plays in regulating the media and in creating a media environment, whether free or not free.

Sadly, far too many journalists in Eastern Africa do not have access to applicable media laws (statutes, regulations or case law) because these are not easily available. Volumes 1 and 2 of this handbook are designed to fill that gap and empower both media owners and journalists to deal with the legal aspects of their work.

A digital version of both volumes can be found online, including a French version of the Burundi chapter, as well as the two volumes of the *Media Law Handbook for Southern Africa*, which were published in 2012 and 2013 respectively. Go to www.kas.de/MediaLawAfrica to download them.

KAS is an independent non-profit organisation bearing the name of Germany's first post-World War II chancellor. In the spirit of Konrad Adenauer, KAS 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 to deepen democracy. For an overview of KAS activities, go to www.kas.de.

KAS views the media as an integral part of a modern democracy and as being essential for development. To this end, the media must be empowered and supported to fulfil their role as whistleblowers and watchdogs within society. But reporting on public and private sector misdeeds is not enough. The media must be a positive force, supporting human rights and shaping progressive ideas in an open society through informed and impartial reporting and analysis. A free, sustainable and competent press is a catalyst for literacy, modernisation, informed polities and participatory development. For more information on KAS Media Africa and its activities, go to www.kas.de/mediaafrica.

In supporting this project, KAS Media Africa has worked with the editor, Justine Limpitlaw, for many years. Her experience as a media lawyer who has worked in a number of African countries has stood her in excellent stead in understanding the legal environments in Eastern Africa. Working with lawyers and consultants on the ground in each country, Limpitlaw has put together a comprehensive work. We hope that journalists find this a useful resource. We also hope that media law activists and reformers find concrete guidance as to what changes ought to be made to deepen democratic media environments in Eastern Africa.

Christian Echle
Director, KAS Media Programme Sub-Saharan Africa

Abbreviations

General

ACHPR	African Commission on Human and Peoples' Rights
AU	African Union
COMESA	Common Market for Eastern and Southern Africa
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICT	Information and communications technology
KAS	Konrad-Adenauer-Stiftung
MP	Member of Parliament
NGO	Non-governmental organisation
PAP	Pan African Parliament
UN	United Nations
UNESCO	United Nations Education, Scientific and Cultural Organisation
WSIS	World Summit on the Information Society

Burundi

ABP	*Agence Burundaise de Presse*
AFP	*Agence France Presse*
NCC	National Council of Communication
OPB	Observatory of the Press in Burundi
RTNB	*Radio Television National de Burundi*
TRA	Telecommunications Regulatory Agency

Eritrea

CPJ	Committee to Protect Journalists
JSC	Judicial Service Commission
PFDJ	People's Front for Democracy and Justice

Ethiopia

HRC	Human Rights Commission
JAC	Judicial Administrative Council
EBA	Ethiopian Broadcasting Authority
EBC	Ethiopian Broadcasting Corporation

Contents

1 The role of the media and press freedom in society

In this chapter you will learn:

- ❑ Why freedom of expression is important
- ❑ Why freedom of expression is a foundational building block of democracy
- ❑ What freedom of expression means
- ❑ The relationship between freedom of expression and freedom of the media
- ❑ The role of the media in society
- ❑ Why the broadcast and digital media are so important, particularly in Eastern Africa

1 INTRODUCTION

In the day-to-day life of a busy journalist, publisher, broadcaster or media owner, it is easy to overlook the fundamental principles that are at stake when going about one's work. Newsroom or broadcasting studio constraints include deadlines, squeezed budgets, limited electronic and library resources, demanding managers, distribution difficulties and draconian media laws, to say nothing of news subjects who are often wary of journalists, if not outright hostile. This makes for a challenging work environment, and it is easy for journalists to lose sight of the big picture.

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

This handbook unpacks the internationally developed standards and best practice models of democratic media regulation. It examines best practice norms for democratic media (including in respect of online media) and democratic broadcasting regulations, as well as the standards for imposing restrictions upon, or otherwise

regulating, media content. Six East African countries are examined in this work. Each country's media laws are identified and analysed to assess their compliance with best practice standards.

2 WHY IS FREEDOM OF EXPRESSION IMPORTANT? CONSTITUTIVE RATIONALES

2.1 Overview

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

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

- *Constitutive rationales:* These are based on the recognition that freedom of expression matters because human beings matter, irrespective of whether or not their views are correct, true or valuable in any ultimate sense.

- *Instrumental rationales:* These are based on the recognition that freedom of expression leads to something valuable – that having freedom of expression advances important goals.

2.2 CONSTITUTIVE RATIONALES FOR FREEDOM OF EXPRESSION

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

2.2.1 Equality

The international community has grappled with the notion of equality since the mid-20th century. The previous century had seen the almost worldwide recognition that slavery – the notion that one human being could be owned by and live in bondage to another human – was barbaric and an affront to humanity as a whole. In the latter half of the 20th century, reflections upon colonialism, apartheid, the Holocaust and

other crimes against humanity caused much of the community of nations to accept that all human beings, irrespective of age, gender, race, ethnicity, nationality, language, class or social origin, or religion, are inherently equal.

2.2.2 Dignity

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

2.2.3 Autonomy and personality

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

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

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

2.3.1 The Universal Declaration of Human Rights

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

Article 1 of the Universal Declaration of Human Rights states: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and

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

2.3.2 The International Covenant on Civil and Political Rights

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

2.3.3 The American Convention on Human Rights

The American Convention on Human Rights, which came into force in 1978, states in its preamble that it is recognised that: '[T]he essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality.'

2.3.4 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights, adopted by the Organisation of African Unity and later by the African Union (AU), entered into force in 1986 and contains a number of noteworthy statements that underpin the notion of human rights.

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

- Article 2 of the African Charter states that: '[e]very individual shall be entitled to the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.' The first clause in the first sentence in article 5 states that: '[e]very individual shall have the right to the respect of the dignity inherent in a human being ... .'

2.3.5 Treaty for the Common Market for Eastern and Southern Africa

The Treaty for the Common Market for Eastern and Southern Africa (COMESA)[1] was ratified in 1994 and contains a number of noteworthy statements underpinning human rights.[2] Although the COMESA Treaty is fundamentally concerned with regulating trade and economic development in the Eastern and Southern African regions, it is noteworthy that the importance of human rights is recognised:

Article 6 of the COMESA Treaty is headed 'Fundamental principles' and sub-article (e) provides that: '[T]he Member States agree to adhere to the following principles: … recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.'

2.3.6 COMESA Social Charter

COMESA has also developed a Social Charter,[3] which it adopted in February 2014. It comes into force only once 11 countries have ratified it. To date, only Mauritius has done so.[4] Nevertheless, the Social Charter is an important indication of the intentions of governments in the Eastern and Southern African regions. Article II of the Social Charter sets out its aims and objectives, and sub-article (d) thereof specifies that one of the principle aims and objectives of the Social Charter is to 'enable all individuals from the region to live in dignity and realize their full potential'.

International recognition of the basic dignity, equality and autonomy of all people has impacted strongly upon the formulation of fundamental rights, particularly with regard to freedom of expression.

Freedom of expression is seen as a foundational human right and is internationally protected (as discussed later in this chapter) precisely because the notions of equality, dignity and individual development or fulfilment require that when human beings talk or otherwise express themselves, what they are expressing or communicating is a reflection of *who they are*, and therefore worthy of respect and protection.

3 WHY IS FREEDOM OF EXPRESSION IMPORTANT? INSTRUMENTAL RATIONALES

3.1 Overview

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

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

3.2 The search for truth in the marketplace of ideas

The argument behind this rationale is that it is only through the ongoing and open expression of different ideas that we are able to test the 'truth' of any single idea.

This rationale is based on the recognition that freedom of expression is central to people's ability to:

- Develop, hone and refine their own ideas, opinions and views
- Reject, discard or replace ideas, opinions and views
- Convince others of their arguments, ideas, opinions and views
- Consider and assess others' arguments, ideas, opinions and views.

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

Only through free expression can one ensure that there will be competing ideas or views which human beings can adopt or reject for themselves. The enterprise of human development is based on ideas, viewpoints and arguments. For there to be progress, these need continually to be assessed, challenged, validated, refined or discarded. And this cannot happen fully without free expression.

3.3 Freedom of expression is critical to democracy

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

There are many aspects to this rationale, but the fundamental concept is that in order for democracy to be effective, the citizenry that votes in elections and engages in public processes with government must be informed and must have the right to participate freely in public discourse. COMESA has recognised this in its Treaty and in its Social Charter.

Article 6 of the COMESA Treaty is headed 'Fundamental principles' and sub-article (f) provides that: '[T]he Member States agree to adhere to the following principles:

accountability, economic justice and popular participation in development.' Similarly, Article III(c) of the Social Charter requires member states to 'promote Good Governance including participatory governance'.

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

4 FREEDOM OF EXPRESSION

4.1 Freedom of expression in various international human rights instruments

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

4.1.1 The Universal Declaration of Human Rights

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

Article 19 warrants some discussion because so many elements of the right to freedom of expression are contained in these few lines. Importantly, the right:

- Is granted to 'everyone'; there are no qualifiers, such as citizenry or age
- Is to 'freedom of opinion and expression'. In other words, not only is everyone entitled to hold their own opinions on any issue (clearly encompassing thoughts, ideas and beliefs), they are also entitled to express these
- Is to freedom of 'expression'. This is broader than speech as it encompasses non-verbal, written and non-written expression, such as dance, mime, art, photography and other non-verbal action

- Specifically includes the right to 'seek, receive and impart information and ideas'. This is a critical aspect of the right as it means that everyone has the right to obtain information. Thus, states that deny media freedom also trample upon the rights of their citizens to receive information freely

- Includes the right to seek information and ideas 'through any media'. This is a critically important statement for the press and media because it makes it clear that newspapers, radio, television and the internet, for example, are all clearly encompassed within the right

- Exists 'regardless of frontiers'. In other words, this is internationally recognised as a universal right that is not dependent upon, or determined by, national borders.

4.1.2 The International Covenant on Civil and Political Rights

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

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

Article 19 of the ICCPR warrants some discussion because it reveals certain important differences between its provisions and those of article 19 of the Universal Declaration. Some particularly noteworthy aspects are discussed below.

- Perhaps the most noteworthy aspect is that article 19 of the ICCPR, unlike the Universal Declaration, contains, in paragraph 3, a clear statement on how the right to freedom of expression may be restricted by states. We all know that rights may conflict with each other. Some examples of this are that the right to freedom of expression can be used unfairly to:

- Ruin a person's reputation through the publication of untrue defamatory statements and therefore infringe upon that person's right to dignity
- Justify the taking of intimate photographs of a person and therefore violate his or her right to privacy.

- The provisions of paragraph 3 in article 19 of the ICCPR acknowledge this clashing of rights and recognise the right of states to pass laws to restrict freedom of expression in certain limited circumstances – namely, where this is necessary to protect the rights or reputations of others, as well as to protect national security, public order, public health or morals.

- The use of the word 'necessary' is noteworthy. It means that unless freedom of expression is restricted, the protection of reputations, national security and public health will be endangered. This is a high standard to meet.

A number of regional international human rights instruments contain similar protections of the right to freedom of expression. Two examples of such regional instruments are highlighted and contrasted below – namely, the EU Convention for the Protection of Human Rights and Fundamental Freedoms, and the African Charter of Human and Peoples' Rights.

4.1.3 The EU Convention for the Protection of Human Rights and Fundamental Freedoms

The European Union (EU) Convention for the Protection of Human Rights and Fundamental Freedoms, which came into being in 1950, in article 10, protects freedom of expression. This article provides:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 10 of the EU Convention features two particularly noteworthy aspects regarding the formulation of the right to freedom of expression:

- In paragraph 1, it specifically provides that the right does not prevent states from requiring licences for broadcasting, television or cinema enterprises. In our view, licensing of the broadcast media is not, in and of itself, a threat to freedom of expression. Indeed, as broadcast media in Africa makes use of a scarce and finite natural resource, namely, the radio frequency spectrum (as opposed to cable broadcasting, which is not used widely in Africa), licensing is essential to avoid inevitable interference, which would result in no broadcast media being available to the public. However, it is, sadly, a feature of certain East African countries that licences to produce print media are required. It is noteworthy that the licensing of the print media is *not* included in article 10, paragraph 1 of the EU Convention.

- Article 10, paragraph 2 of the EU Convention sets out a fairly comprehensive list of allowed restrictions on freedom of expression by states. Importantly, these are subject to the overall test that such restrictions must be 'necessary in a democratic society'. The list of allowed restrictions is broader than that contained in the ICCPR, for example, and extends to confidential information and protecting the authority and impartiality of the judiciary.

4.1.4 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights' provisions on the rights to freedom of expression are weak. They do not provide anything like the protection of freedom of expression afforded by the global instruments such as the ICCPR or other regional instruments such as the EU Declaration. Article 9 of the African Charter states:

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

There are two particular aspects to article 9 of the African Charter that warrant further discussion:

- Unlike some other international human rights instruments, there is no express corresponding right to impart information in clause 1 of article 9.

- The right to express and disseminate opinions is fairly severely curtailed as this must be done 'within the law'. What is noteworthy about this restriction on the

right to freedom of expression is not that there are legal restrictions upon the right (as can be seen from the instruments discussed above, this is common) but that there are no requirements in article 9 that such laws be necessary to protect some other social good, such as the rights of others, public health or national security. Effectively, it could be argued that the African Charter elevates restrictions upon freedom of expression found in ordinary national laws – however passed and no matter what their content – above the right to freedom of expression. Needless to say, this is extremely disappointing.

However the African Court of Human and People's Rights[5] in 2014 handed down an important judgment on this issue and has interpreted this provision progressively to mean that 'the reasons for possible limitations must be based on legitimate public interest and the disadvantages of the limitation must be strictly proportionate to and absolutely necessary for the benefits to be gained'.[6] The effect of this is to require an in-depth consideration of the legitimacy of the legal restrictions imposed upon freedom of expression.

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

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

- The right is available to everyone – individuals as well as juristic persons, such as companies.
- The right to freedom of expression is broader than freedom of speech and includes non-verbal and/or non-written forms of expression.
- The right generally encompasses the right to receive as well as to impart information and ideas.
- The right includes the freedom of means of communication, demonstrating that there is no limitation on the medium that may be used to express ideas or opinions.
- Broadcasting licensing requirements do not constitute undue infringements on the right to freedom of expression.
- The right to freedom of expression is not absolute and states are entitled to limit it. However, such limitations must be necessary in a democracy to protect the rights of others or important societal interests, such as national security or public health.

5 THE RELATIONSHIP BETWEEN FREEDOM OF EXPRESSION AND FREEDOM OF THE MEDIA

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

> In order to be politically active, citizens require means to communicate with one another and to debate the type of government they desire for themselves. Civic discourse can take place in various forums, the most important of which are the public communications media, both print and electronic.[7]

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

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

6 THE ROLE OF THE MEDIA IN SOCIETY GENERALLY

6.1 Definition of the media

'The media' is not a monolithic entity but rather a broad term encompassing a variety of content provided to the public, or sectors of the public, over a range of platforms. There is no closed list of content provided by the media: news, politics, business, current affairs, entertainment, motoring, gardening, religion, home decor, fashion, food, celebrity and lifestyle are some of the many topics covered by the media. Furthermore, these topics are provided over a range of platforms. Traditionally, when one thought of the media one thought of newspapers, magazines, radio and television. This is no longer the case. The so-called 'new media' encompasses a range of platforms, including web-based platforms, such as internet sites, but also mobile platforms such as mobile television or the ability to listen to news headlines on your

mobile phone. Internet-based media can be merely electronic versions of what is available in the print media. For example, a newspaper's website will carry an electronic version of the newspaper for that day, or else such media can carry unique content not available in hard copy form. New media is changing the way citizens and the media relate. Social networking sites such as Twitter and Facebook, for example, have played a significant role as sources of news and information in repressive countries. The most significant examples are the recent uprisings in the Arab world and in Eastern Africa. The posting of video material and photographs on various internet sites has helped ensure that news and information about the region is becoming much more accessible not only to its citizens but to a worldwide audience.

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

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

6.2 General role of the press

Academic commentators have often characterised the media or the press as being 'a separate player on behalf of the public against the agencies of power', and that media organisations 'take a position between government agencies and the public'.[8] Clearly, this is true only to a certain extent as a number of media outlets (print, broadcasting or otherwise) are fundamentally part and parcel of government, and therefore cannot

and will not play any role that is not supportive of government. However, it is true that a strong and independent media, together with other organs of civil society, can play mutually reinforcing roles to exert pressure on governments to support democracy and socio-economic development.[9] Media commentator and academic Masudul Biswas has said that the major aim of the independent media is to make 'political participation meaningful'.[10]

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

In order to achieve the important aim of assisting to give democratic participation 'meaning', the press must fulfil a number of other roles. These are elaborated on next.

6.3 The press as public watchdog

6.3.1 Overview

The role of the press as 'watchdog' is a traditional characterisation of the role of the news media in particular. Biswas describes the media as 'a watchdog of the society [monitoring] the activities of public administrations and other institutions and practices that directly and indirectly affect the public'.[11]

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

6.3.2 Reporting on government

When one thinks of the press as watchdog, one thinks of the press as reporting on the happenings of government. In and of itself 'reporting on government' is a huge task. It involves reporting on the programmes and activities of the three branches of government:

- *The legislature:* Its activities include not only deliberating upon and passing legislation, but also important committee work, overseeing the executive's operations and being the body to which public authorities are generally accountable.

- *The executive:* Its activities include the day-to-day management of government. The activities of all ministries and government departments fall under the auspices of the executive, which is essentially the 'engine room' of governance in a country. The media needs to be able to report on all these ministries – finance, health, trade, education, sports and more.

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

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

- International bodies to which the country belongs, such as COMESA, the AU, the UN and the Commonwealth

- Public authorities, such as the central or reserve bank, the independent broadcasting authority, the public broadcaster, the independent electoral commission, the public protector or public ombudsman (if any)

- Parastatal companies, such as national airlines, electricity utilities, railways and telephony companies

- Different spheres of government, such as provincial government or local government, which is the most relevant to the daily lives of readers, viewers or listeners.

6.3.3 Reporting on economic development

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

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

6.3.4 Reporting on social issues

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

6.4 The press as detective

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

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

This 'press as detective' role is evidenced when the press is able to engage in fairly long-term, detailed, in-depth investigative journalism – the kind that is able to report to the public on large-scale systematic wrongdoing by public (or indeed private) officials, which may include nepotism, corruption, fraud or other kinds of criminality. These exposés often rely on more than one journalist and require the backup of the media company as a whole (be it broadcasting or print) to provide the necessary resources for the investigative exercise.

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

6.5 The press as public educator

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

In support of secondary education, print media outlets sometimes include supplementary educational materials for school-goers. Similarly, broadcasters can and do

broadcast historical, scientific or even mathematical programmes also aimed at school-goers.

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

6.6 The press as democracy and good governance advocate

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

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

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

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

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

- Clean administration versus corruption and nepotism
- Appropriate use of public resources versus mismanagement and waste
- Proper policing and public safety versus public violence, particularly if meted out by the security or intelligence forces
- Economic and social development versus growing poverty and unemployment
- Generally increasing living standards versus glaring inequality and wealth disparities
- Responsive and public-oriented public services versus bloated and self-serving bureaucracies
- Transparency, openness and accountability versus secrecy, neglect and repression.

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

Similarly, some policies of international bodies, such as the International Monetary Fund, the World Bank and the World Trade Organization, can and sometimes do cause significant hardship for developing countries. An advocacy press ought to be able to point out to citizens what, for example, a fair trade regime in relation to the country's exports and imports ought to look like.

6.7 The press as catalyst for democracy and development

If the press is able to perform only its most basic function – that is, reporting on matters of public interest – it nevertheless acts as a promoter of transparency, openness and accountability. Governments (particularly repressive ones) and private sector actors dislike negative press coverage. Of course, a government may try to respond to negative press coverage by clamping down on press freedom through legal and

illegal means, but this is not a sustainable long-term response and usually only serves to hasten the erosion of public confidence in, and support for, the government.

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

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

> as a tool for national consolidation, development, and authoritarian control ... The reach of the mass media was extended to rural areas, supposedly to promote development and technical diffusion, but in actuality the media was used as a tool of state control and propaganda (citations omitted).[12]

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

The stronger the media becomes in a particular country, the better it is able to fulfil its various roles as watchdog, detective, educator, good governance advocate, and even catalyst for democracy and development. The more the press is able to fulfil these roles, the more the public is informed about public interest issues. The more the public is so informed, the more it is able to hold public power accountable and relate to government (through the ballot box, or in consultations or other interactions), the private sector and even civil society in a manner that is informed. The government of an informed citizenry is often able to engage in focused decision-making as there is a free flow of information and ideas that the government can access to improve its operations.

Then-president of the World Bank, James Wolfensohn, said in the Foreword to a 2002 World Bank report:

> A key ingredient of an effective development strategy is knowledge transmission and enhanced transparency. To reduce poverty, we must liberate access to information and improve the quality of information. People with more information are empowered to make better choices. For these reasons I have long argued that a free press is not a luxury. It is at the core of equitable development. The media can expose corruption. They can keep a check on public policy by throwing a spotlight on government action. They let people voice diverse opinions on governance and reform and help build public consensus to bring about change.[13]

7 IMPORTANCE OF THE BROADCAST MEDIA

When thinking about the press and the media, people often focus on the print media – essentially, newspapers. In Africa, and particularly in Eastern Africa, this makes little sense for four key reasons:

- With few exceptions, newspapers are often distributed only in the larger cities and towns. In other words, they are not available in many rural areas.

- Relatively speaking, newspapers are expensive. Many countries in Eastern Africa have extremely high rates of poverty. The little money people have is far more likely to be spent on food and essentials rather than newspapers, which are out of date within a day or so.

- Newspapers in the region tend to be published in English, French or Swahili – the languages of many governments. However, a country's broadcasting landscape can be characterised by a number of radio stations broadcasting in different local languages, enabling listeners to access news and information in their home languages.

- Most important is the issue of adult literacy: if people cannot read they obviously cannot access the content contained in the print media. Literacy rates in Eastern Africa vary widely. Kenya is recognised as being in the top 10 of African countries, with a literacy rate of over 85%; but two Eastern African countries, Somalia and Ethiopia, are in the bottom 10 of African countries, with literacy rates of 37.8% and 42.7% respectively.[14]

In sub-Saharan Africa, the percentage of the population with access to newspapers is 48% (falling to 29% in rural areas).[15] Eastern African figures are likely to be lower given the lower literacy rates in the region.

In the context of low levels of literacy, the broadcast and digital media – which pro-

vide content visually and/or through the spoken word – are extremely important. Of the options provided by the broadcast media, most people access news and information via radio rather than television. This is due to three main reasons:

- Terrestrial television transmission or signal distribution facilities and infrastructure are extremely expensive to roll out. Terrestrial television is therefore often limited to urban areas. Radio or sound transmission facilities are far less expensive, so radio coverage is invariably greater than television coverage. For example, in sub-Saharan Africa as a whole, overall radio penetration stands at 93% of the population (dropping to 92% in rural areas) while overall television penetration stands at 49% of the population (dropping to 28% in rural areas).[16]

- In countries with erratic electricity supply or in areas where electricity is not available, watching television is simply not possible; although sometimes people make do by connecting television sets to car batteries or generators and suchlike. As radio sets can be battery operated or even wind-up, the technology is far more suitable to conditions of no, limited or erratic electricity supply. This is a critical issue in Eastern Africa where rates of access to a dependable supply of electricity are very low. Although up-to-date figures are hard to come by, examples of the percentage of the population with access to electricity in the Eastern African countries we are looking at are: Eritrea, with the highest percentage at 32%; Burundi, with the lowest percentage at 5%; and countries in between including – Ethiopia – 24%, Kenya – 20%, Rwanda – 21%, and Uganda – 15%. Obviously, electricity is unevenly distributed with the rural electrification rate being much lower than the urban electrification rate. Besides Eritrea and Ethiopia, the percentage of rural populations in the Eastern African countries dealt with in this handbook with access to electricity is in the single digits.[17]

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

Clearly, broadcasting, and particularly radio, is the medium through which most people in Eastern Africa access news and information. Historically, broadcasting has been a neglected area in the context of press freedom battles in Africa, particularly in Eastern Africa. It is only fairly recently (in the past five years or so) that state monopolies over the airwaves (both radio and television) have been scrapped and a more pluralistic broadcast media has begun to emerge.

An important development in terms of Eastern Africa's access to news and information has been the rise of the smart or feature phone, which has enabled

people to gain access to the internet and to access national, regional and international news and information directly via their handsets. Although internet penetration in Africa remains low at about 26%, this is increasing rapidly, particularly in urban areas. Sadly, Eastern Africa lags behind the rest of the continent. Internet penetration remains particularly low in the region, with the percentage of the population with access to the internet ranging from a high of 69.6% in Kenya to a low of 1% in Eritrea. Other countries' rates include: Burundi – 4.9%; Ethiopia – 3.7%; Rwanda – 25.4%; and Uganda – 32.1%.[18] Nevertheless, online media activity is on the rise across the continent.

This handbook contributes to a free media movement by setting out (in Chapter 2) what democratic media and broadcasting regulatory environments look like, as well as by analysing the media law regulatory environment in each country to test whether or not it meets international best practice standards.

NOTES

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14 Figures for this paragraph obtained from: http://theafricaneconomist.com/ranking-of-african-countries-by-literacy-rate-zimbabwe-no-1/#.VbnX_vmqqkp, last accessed 30 July 2015.
15 http://www.balancingact-africa.com/docs/reports/SSA-Media-Landscape.pdf, p 25, last accessed 30 October 2016.
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17 http://www.worldenergyoutlook.org/resources/energydevelopment/energyaccessdatabase/, last accessed 10 May 2016.
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2 Hallmarks of a democratic media environment

In this chapter you will learn:

- ❑ The 13 international instruments that contain the key principles of democratic media regulation
- ❑ The ten key principles of democratic media regulation:
    - Freedom of the press and other media
    - Independent media
    - Diversity and pluralism in the media
    - Professional media
    - Protecting journalists' sources
    - Access to information
    - Commitment to transparency and accountability
    - Commitment to public debate and discussion
    - Availability of local content
    - Ensuring that states do not use their advertising power to influence content
- ❑ The eight key principles of democratic broadcasting regulation:
    - National frameworks for the regulation of broadcasting must be set down in law
    - Independent regulation of broadcasting
    - Pluralistic broadcasting environment with a three-tier system for broadcasting: public, commercial and community
    - Public as opposed to state broadcasting services
    - Availability and nature of community broadcasting services
    - Equitable, fair and transparent processes for licensing
    - Universal access to broadcasting services and equitable access to broadcasting signal distribution and other infrastructure
    - Regulating broadcasting content in the public interest

1 INTRODUCTION

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

This chapter identifies 13 instruments, charters, protocols, resolutions or declarations adopted either by international bodies (such as the UN, the AU and COMESA) or at significant conferences held under the auspices of international bodies (such as the United Nations Education, Scientific and Cultural Organisation [UNESCO]) or civil society bodies focusing on the media (such as Article 19, which is an international non-governmental organisation [NGO] focusing on press freedom issues). The 13 instruments – many of which have a particular focus on Africa – deal with, among other things, various aspects of democratic media regulation. Ten key principles of general democratic media regulation and eight key principles of democratic broadcasting regulation have been identified from these instruments.

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

2 KEY INTERNATIONAL INSTRUMENTS THAT ESTABLISH DEMOCRATIC MEDIA AND BROADCASTING REGULATORY PRINCIPLES

This section examines 13 instruments, charters, protocols or declarations to determine what the international community has agreed are the best practice principles that underpin democratic media and broadcasting regulatory environments.

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

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

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

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

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

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

- **The African Democracy Charter:** The African Charter on Democracy, Elections and Governance was adopted by the AU in 2007. It is not yet in force as an insufficient number of countries have ratified it. Nevertheless, the African Democracy Charter contains a number of important statements on the media, even if these are only aspirational.

- **The African Principles of Freedom of Expression Declaration:** The Declaration of Principles on Freedom of Expression in Africa was adopted in 2002 by the African Commission on Human and Peoples' Rights (ACHPR), a body established under the auspices of the AU.

- **The COMESA Social Charter:** COMESA adopted its Social Charter[1] in February 2014. It comes into force only once 11 countries have ratified it. To date only Mauritius has done so.[2] Nevertheless, the Social Charter is an important indication of the intentions of regional governments in Eastern and Southern Africa on social issues.

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

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

- **Midrand Declaration:** The Midrand Declaration on Press Freedom in Africa was adopted by the Pan African Parliament (PAP) in 2013 and launched the PAP's campaign on Press Freedom for Development and Governance: Need for Reform, in all five regions in Africa and called upon the AU member states to use the Model Law on Access to Information drafted by the ACHPR.

- **Resolution on Press Freedom for Development and Governance: Need For Reform:** This resolution was adopted by the PAP in 2012. Among other things it urges AU member states to: contribute positively in reform efforts that relate to media freedom; repeal laws that oppress journalists; and adopt the Model Law on Access to Information drafted by the ACHPR.

- **Resolution 169:** Resolution 169 on Repealing Criminal Defamation Laws in Africa was adopted by the ACHPR in 2010. Resolution 169 calls on state parties to the African Charter on Human and Peoples' Rights to repeal criminal defamation laws or insult laws which impede freedom of speech.

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

- **The Windhoek Declaration:** The Windhoek Declaration on Promoting an Independent and Pluralistic Press was adopted in 1991 by participants at a UN-UNESCO seminar on promoting an independent and pluralistic African press, and was thereafter endorsed by UNESCO's General Conference. The Windhoek Declaration is an important international statement of principle on press freedom and the date of its adoption, 3 May, is now the annual World Press Freedom Day.

- **The WSIS Geneva Principles:** The WSIS Geneva Principles were adopted in Geneva in 2003 at the World Summit on the Information Society (WSIS), held by the UN in conjunction with the International Telecommunications Union. While the WSIS Geneva Principles cover mainly issues concerning universal access to

information and communications technology (ICT), they do contain some important statements on the media more generally.

3 THE 10 KEY PRINCIPLES OF DEMOCRATIC MEDIA REGULATION

3.1 Principle 1: Freedom of the press and other media

3.1.1 Relevant provisions in international instruments

- Article 1 of the Windhoek Declaration states that 'the establishment, maintenance and fostering of [a] ... free press is essential to the development and maintenance of democracy in a nation, and for economic development'.

- Article VIII(1.) of the African Principles of Freedom of Expression Declaration states that '[a]ny registration system for the print media shall not impose substantive restrictions on the right to freedom of expression'.

- Article X(2.) of the African Principles of Freedom of Expression Declaration states that '[t]he right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions'.

- Principle 55 of the WSIS Geneva Principles states in its relevant part that 'the principle ... of freedom of the press ... [is] essential to the Information Society'.

- Article 2(10) of the African Democracy Charter states in its relevant part that one of its objectives is to '[p]romote the establishment of the necessary conditions to foster ... freedom of the press'.

- Article 27(8) of the African Democracy Charter provides in its relevant part that '[i]n order to advance political, economic and social governance, states shall commit themselves to ... [p]romoting freedom of expression, in particular freedom of the press ...'.

- Paragraph (v) of the Resolution on Press Freedom for Development and Governance: Need for Reform commits the PAP to 'lobbying for the amendment of laws that restrict media freedom in many African countries'.

- In paragraph (vi) of the Resolution on Press Freedom for Development and Governance: Need for Reform, the PAP 'requests its members to contribute positively in reform efforts that relate to media freedom in their respective countries'.

- In paragraph (viii) of the Resolution on Press Freedom for Development and Governance: Need for Reform, the PAP 'urges AU member states to repeal the laws that oppress journalists'.

- The Declaration of Table Mountain declares, among other things, that 'African states must recognise the indivisibility of press freedom and their responsibility to respect their commitments to African and international protocols upholding the freedom ... and safety of the press'.

- The UNESCO Media Development Indicators provide that states must guarantee freedom of expression in law and must respect it in practice. This requires, among other things:
  - National laws or constitutional guarantees on freedom of expression
  - Bodies that guarantee the concrete application of the right to freedom of expression.

3.1.2 Summary

- A free press is essential for democracy.

- A free press is essential for economic and social development.

- A free press is essential to the information society.

- Governments must uphold the freedom and safety of the press.

- States must have national laws or constitutions guaranteeing the right to freedom of expression.

- Press registration provisions cannot impose substantive restrictions on publication.

3.1.3 Comment

- There is widespread international recognition that freedom of the press has tangible benefits for society, and that real economic and social development, or indeed democracy, is not possible without it.

- Also important is recognition of the need for legal, particularly constitutional, guarantees of freedom of expression.

- There are a number of kinds of laws in Eastern Africa that clearly inhibit freedom

of the press and of expression, these include criminal defamation laws, insult laws, and laws that impose restrictions on the publication of certain kinds of information.

3.2 Principle 2: An independent media

3.2.1 Relevant provisions in international instruments

- Article 1 of the Windhoek Declaration states that 'the establishment, maintenance and fostering of an independent ... press is essential to the development and maintenance of democracy in a nation, and for economic development'.

- In article 2 of the Windhoek Declaration, an 'independent press' is defined as 'a press independent from governmental, political or economic control or from control of materials and infrastructure essential for the production and dissemination of newspapers, magazines and periodicals'.

- Article 7 of Part I of the African Charter on Broadcasting states that '[s]tates should promote an economic environment that facilitates the development of independent production and diversity in broadcasting'.

- Article VIII(2.) of the African Principles of Freedom of Expression Declaration provides that '[a]ny print media published by a public authority should be protected adequately against undue political interference'.

- Article VIII(4.) of the African Principles of Freedom of Expression Declaration states that '[m]edia owners and media professionals shall be encouraged to reach agreements to guarantee editorial independence and to prevent commercial considerations from unduly influencing media content'.

- Principle 55 of the WSIS Geneva Principles states in its relevant part that 'the principle ... of independence ... of media ... [is] essential to the Information Society'.

- The Declaration of Table Mountain declares, among other things, that 'African states must recognise the indivisibility of press freedom and their responsibility to respect their commitments to African and international protocols upholding the ... independence ... of the press'.

3.2.2 Summary

- Independence means being free from governmental, political and economic control or commercial interference; essentially it means having editorial independence.

- An independent media is essential for democracy.
- An independent media is essential for economic development.
- An independent media is essential for the information society.
- Governments, media owners and publishers must act to secure the independence of the media.
- In respect of the broadcast media, independent production is an important aspect of independence.
- Media published by public authorities must be adequately protected against undue political interference.

3.2.3 Comment

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

3.3 Principle 3: Diversity and pluralism in the media

3.3.1 Relevant provisions in international instruments

- Article 1 of the Windhoek Declaration states that 'the establishment, maintenance and fostering of [a] ... pluralistic ... press is essential to the development and maintenance of democracy in a nation, and for economic development'.
- Article 2 of the Windhoek Declaration defines a 'pluralistic press' as 'the end of monopolies of any kind and the existence of the greatest possible number of

newspapers, magazines and periodicals reflecting the widest possible range of opinion within the community'.

- Article III of the African Principles of Freedom of Expression Declaration states that '[f]reedom of expression imposes an obligation on the authorities to take positive measures to promote diversity, which include, among other things: availability and promotion of a range of information and ideas to the public; and pluralistic access to the media and other means of communication ...'.

- Article V(1.) of the African Principles of Freedom of Expression Declaration provides that '[s]tates shall encourage a diverse ... private media sector. A state monopoly over broadcasting is not compatible with the right to freedom of expression'.

- Article XIV(3.) of the African Principles of Freedom of Expression Declaration states that '[s]tates should adopt effective measures to avoid undue concentration of media ownership, although such measures shall not be so stringent that they inhibit the development of the media sector as a whole'.

- Principle 55 of the WSIS Geneva Principles states in its relevant part that 'the principle ... of pluralism and diversity of media ... [is] essential to the Information Society ... Diversity of media ownership should be encouraged, in conformity with national law ...'.

3.3.2 Summary

- A diverse and pluralistic media environment is one in which there are no monopolies and in which there is a variety of media (whether print or electronic) reflecting the widest possible range of opinions.

- A diverse and pluralistic media is essential for democracy.

- A diverse and pluralistic media is essential for economic development.

- A diverse and pluralistic media environment provides a range of media options to both urban and rural people.

- Governments must act to ensure pluralistic media environments, and broadcasting regulatory regimes should provide for a diversity of broadcasting services.

- Governments must pass cross-ownership legislation to avoid market dominance by a single player across different media platforms.

- Undue concentration of media ownership should be avoided without damaging development of the media sector as a whole.

3.3.3 Comment

- There is widespread international recognition that a pluralistic media has tangible benefits for society, and that real economic and social development, or indeed democracy, is not possible without it.

- The international community recognises that diversity is not just a matter of having different types of media available in a country, but also its availability in both rural and urban areas. In addition, it stresses the need for diversity within broadcasting and different categories of broadcasting services (public, commercial and community).

- The international media recognises that diversity of media ownership is key to ensuring not only diversity of services but also diversity of viewpoints. Consequently, it is important that there are laws to regulate media ownership diversity – that is, laws to prohibit undue media ownership concentration, particularly in respect of cross-ownership (for example, of print and broadcast media). However, this regulation cannot be done in such a way as to damage the development of the media sector as a whole. For example, if a country limits a media company to holding only one or two small media outlets, it might unwittingly be stifling investment in its media sector. There is a fine balancing act to be performed by governments in this regard: ensuring that media companies can grow sufficiently to encourage investment and growth in the industry as a whole, without stifling diversity through allowing the development of media monopolies.

3.4 Principle 4: Professional media

3.4.1 Relevant provisions in international instruments

- Article 12 of the Windhoek Declaration describes the establishment of independent, representative associations, syndicates or trade unions of journalists, and associations of editors and publishers as 'a matter of priority in all the countries in Africa where such bodies do not now exist'.

- Article 13 of the Windhoek Declaration states that national media and labour relations laws of African countries should be drafted so as 'to ensure that representative associations can exist and fulfil their important tasks in defence of press freedom'.

- Article 16(ii) of the Windhoek Declaration calls for detailed research to be done by the international community on 'the training of journalists and managers and the availability of professional training institutions and courses', clearly indicating a concern for the issue.

- Article IX(3.) of the African Principles of Freedom of Expression Declaration states that '[e]ffective self-regulation is the best system for promoting high standards in the media'.

- Article X(1.) of the African Principles of Freedom of Expression Declaration states that '[m]edia practitioners shall be free to organise themselves into unions and associations'.

- Article 27(8) of the African Democracy Charter provides in its relevant part that '[i]n order to advance political, economic and social governance, states shall commit themselves to ... fostering a professional media'.

- In paragraph (xi) of the Resolution on Press Freedom for Development and Governance: Need for Reform, the PAP 'urges AU member states to improve working conditions for journalists and for creating a conducive environment for the media'.

- In paragraph (xiv) of the Resolution on Press Freedom for Development and Governance: Need for Reform, the PAP resolves to 'encourage the formation of strong and independent professional media associations in AU member states'.

- In paragraph (xvii) of the Resolution on Press Freedom for Development and Governance: Need for Reform, the PAP resolves to 'encourage media institutions in AU member states to develop self-regulating policies that can assist journalists to carry out their duties in a professional manner'.

3.4.2 Summary

- A professional media is essential to political, economic and social good governance.

- A professional media is essential to the defence of press freedom.

- A professional media requires independent associations of media owners, publishers, and journalists, including trade unions.

- A professional media requires institutions and courses aimed at specialised training for journalists and other media professionals.

- A professional media requires specialist journalists.

- A professional media requires self-regulation through the development and enforcement of codes of ethics and good practice for journalists.

3.4.3 Comment

- It is noteworthy that so many international statements deal with the question of the need for a professional media, and state that a professional media is essential to good governance, whether political, social or economic, and for the defence of press freedom itself.

- Professionalism requires appropriate specialist training and expertise, which in turn raises the issue of the need for training institutions and courses for journalists.

- Professionalism is also, crucially, an issue of self-identification with professionalisation by the media industry itself. This industry professionalisation requires two important areas of development, namely:
  - The need for media workers, owners and publishers to form representative industry bodies
  - The need for these bodies to develop self-regulatory standards or codes of ethics and practice.

3.5 Principle 5: Protecting confidentiality of sources

3.5.1 Relevant provisions in international instruments

- Principle 18 of the Johannesburg Principles states that '[p]rotection of national security may not be used as a reason to compel a journalist to reveal a confidential source'.

- Article XIV(2.) of the African Principles of Freedom of Expression Declaration provides that '[m]edia practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance' with the following principles:
  - The identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence.

- The information or similar information leading to the same result cannot be obtained elsewhere.
- The public interest in disclosure outweighs the harm to freedom of expression.
- Disclosure has been ordered by a court, after a full hearing.

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

3.5.2 Summary

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

3.5.3 Comment

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

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

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

3.6 Principle 6: Access to information

3.6.1 Relevant provisions in international instruments

- Article 1 of Part I of the African Charter on Broadcasting states that the 'legal framework for broadcasting should include a clear statement of the principles

underpinning broadcast regulation including ... the free flow of information and ideas ...'.

- Part of Principle 11 of the Johannesburg Principles states that '[e]veryone has the right to obtain information from public authorities, including information relating to national security'.

- Principle 13 of the Johannesburg Principles states that '[i]n all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration'.

- Part of Principle 14 of the Johannesburg Principles states that '[t]he state is obliged to adopt appropriate measures to give effect to the right to obtain information'.

- Article IV(1.) of the African Principles of Freedom of Expression Declaration states that '[p]ublic bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law'.

- Article XII(2.) of the African Principles of Freedom of Expression Declaration states that 'privacy laws shall not inhibit the dissemination of information of public interest'.

- Paragraph 2 of the Midrand Declaration calls upon member states to adopt the ACHPR's Model Law on Access to Information when adopting or reviewing access to information laws.

- Principle 55 of the WSIS Geneva Principles states in its relevant part that 'the principle ... of ... freedom of information ... [is] essential to the Information Society. Freedom to seek, receive, impart and use information for the creation, accumulation and dissemination of knowledge are important to the Information Society'.

- Article 2(10) of the African Democracy Charter sets out certain of the African Democracy Charter's objectives, the relevant part of which states that one of its objectives is to '[p]romote the establishment of the necessary conditions to foster ... access to information ...'.

- In paragraph (ix) of the Resolution on Press Freedom for Development and Governance: Need for Reform, the PAP resolves to 'encourage AU member states to adopt the Model Law on Access to Information drafted by the ACHPR'.

3.6.2 Summary

- Access to information is essential to the free flow of information and ideas.
- Freedom to receive information is essential to the information society.
- Public bodies hold information as custodians of the public good. Therefore everyone has the right of access to information held by public bodies.
- Governments must foster access to information by:
  - Respecting the principle of public access to information
  - Passing laws formally recognising the right to access information held by public bodies
  - Publishing categories of information available
  - Managing records effectively.
- While national laws can impose limitations on the right to access publicly held information, privacy laws cannot inhibit the dissemination of information in the public interest.

3.6.3 Comment

- The importance of the right of access to information is becoming increasingly widely recognised, particularly in the information age. Many countries have elevated this to a constitutional right, and many more have passed laws containing detailed provisions in support of the right of access to information held by the state and private bodies in certain circumstances.

3.7 Principle 7: Commitment to transparency and accountability

3.7.1 Relevant provisions in international instruments

- Article 2(10) of the African Democracy Charter sets out certain objectives, the relevant part of which states that one of its objectives is to '[p]romote the establishment of the necessary conditions to foster transparency, ... and accountability in the management of public affairs'.
- Article 3(8) of the African Democracy Charter requires states to implement the charter in accordance with the principle of '[t]ransparency and fairness in the management of public affairs'.

- Article 12(1) of the African Democracy Charter requires states to '[p]romote good governance by ensuring transparent and accountable administration'.

- Article 32(1) of the African Democracy Charter requires states to 'strive to institutionalise good political governance through '[a]ccountable, efficient and effective public administration'.

- Article 33(2) of the African Democracy Charter requires states to institutionalise good economic and corporate governance through '[p]romoting transparency in public finance management'.

3.7.2 Summary

- Transparency and accountability promotes good governance, whether political, economic or corporate.

- The news media is essential for good governance.

- The news media is vital to increasing transparency and accountability in decision-making processes.

- The news media is vital to communicating the principles of good governance to the citizenry.

- Governments must respect the functioning of the news media in relation to transparency and accountability.

- Governments must foster the principles of transparency and accountability in their operations and in public affairs generally.

3.7.3 Comment

- It is particularly noteworthy that the international instruments, declarations and statements deal with the issue of transparency and accountability by linking the relationship between the role of the news media, and the transparency and accountability of government.

- Governments are notorious for proclaiming a commitment to accountability and transparency while denying the news media appropriate scope within which to operate. A democratic media regulatory environment is one which recognises that the news media is essential to a government's ability to communicate with the

public. Indeed, unless the news media operates in an environment in which it (and the public's right to transparency) is respected, real accountability by government to the public for its actions is all but impossible. This is because being transparent means that the public is able to see what government is doing and know why it is doing it. The public is generally informed about government decisions, actions and programmes through the media. Thus, if the media is shunned and shut out by government or, worse, actively prevented from obtaining or publicising information about governmental activities, the public is similarly shunned, shut out and prevented from being informed. Once the public is unable to know what government is doing, it becomes impossible for the public to hold government to account for its actions.

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

3.8 Principle 8: Commitment to public debate and discussion

3.8.1 Relevant provisions in international instruments

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

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

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

- Article 27(2) of the African Democracy Charter requires states to commit to, among other things, '[f]ostering popular participation'.

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

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

3.8.2 Summary

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

3.8.3 Comment

- Governments are notorious for proclaiming a commitment to public debate, discussion and participation while denying the news media appropriate scope within which to operate. A democratic media regulatory environment is one which recognises that the news media is essential to a government's ability to communicate with the public. Indeed, unless the news media operates in an environment in which it (and the public's right to debate and discuss issues) is respected, real public participation and debate is impossible.
- It is accepted that public debate and discussion is essential for public participation, which is itself essential to democracy, and social and economic development. However, the way in which the public is informed about government decisions, actions and programmes is through the media. If the media is shunned and shut out by government or, worse, actively prevented from obtaining or publicising information about governmental activities, the public is similarly shunned, shut out and prevented from being informed. Once the public is unable to know what the government is doing, it becomes impossible for the public to participate meaningfully in public debates and discussions.
- The relationship of trust, mandate, representivity and responsibility that ought to exist between the government and the governed is largely held together by the mediating nature of the media. The media acts as a public information valve, reporting on government's activities and actions, and reflecting public sentiments and opinions thereon back to government. The media is therefore the key vehicle through which society conducts its 'public discussions'.

- Another important way of fostering citizen participation in these public debates is to ensure that government is able to interact with the public electronically. The increasing availability of the internet and mobile technology allows for 'citizen-journalists' to play an increasingly important role in public debate and discussion.

3.9 Principle 9: Availability of local content

3.9.1 Relevant provisions in international instruments

- Article III of the African Principles of Freedom of Expression Declaration states that '[f]reedom of expression imposes an obligation on the authorities to take positive measures to promote diversity, which include among other things ... the promotion and protection of African voices, including through media in local languages ...'.

- Principle 53 of the WSIS Geneva Principles states in its relevant part that '[t]he creation, dissemination and preservation of content in diverse languages and formats must be accorded high priority in building an inclusive Information Society ... the development of local content suited to domestic or regional needs will encourage social and economic development and will stimulate participation of all stakeholders, including people living in rural, remote and marginal areas'.

- Article IV 1. g) of the COMESA Social Charter requires member states to cooperate with each other to develop 'radio and television programmes on matters that will promote cultural development in the region'.

- Article XV b) of the COMESA Social Charter requires member states to 'encourage the production of local cultural and cultural-related programs and to enhance their dissemination through information and communication technology'.

3.9.2 Summary

- Availability of content in a variety of languages is essential for building an inclusive information society.

- Local content is essential to the development of local culture.

- Developing local content encourages social and economic development, including in rural areas.

- Local content should be available in all media, both print and electronic.

3.9.3 Comment

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

- Owing to widespread poverty and other developmental challenges, governments often do not prioritise the development of local cultures.

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

3.10.1 Relevant provisions in international instruments

- Article XIV(2.) of the African Principles of Freedom of Expression Declaration provides that '[s]tates shall not use their power over the placement of public advertising as a means to interfere with media content'.

- Principle 28.1 of the Access to the Airwaves Principles provides in its relevant part that '[a]ccess to State resources, including the placement of State advertisements, should always be provided in a fair and non-discriminatory manner ...'.

3.10.2 Comment

- This principle is of critical practical importance to a range of fundamental principles, including freedom of the press and independence of the media.

- This principle recognises that in many poor and underdeveloped countries in Africa, particularly those with small or weak private sectors, governments wield enormous power because of their advertising spend capabilities.

- If a newspaper or broadcaster is dependent upon state advertising to remain

operational, it might do almost anything to secure the continuation of such revenue streams to ensure its economic survival.

- It is critical for the media (public or private) to be protected from undue influence in terms of the content of the publication or broadcaster as a result of the state's advertising muscle.

- The state should not be entitled to use its advertising spend to reward compliant media or to punish what it sees as hostile media. If this happens, freedom of the press is undermined, the public's right to be informed is jeopardised and society as a whole risks moving away from democracy.

4 THE EIGHT KEY PRINCIPLES OF DEMOCRATIC BROADCASTING REGULATION

The previous section examined a range of international instruments in order to understand the 10 key principles of democratic media regulation. These looked at the media generally, both the print and broadcast media.

This section discusses certain of the international instruments, charters, protocols and declarations that focus exclusively on the broadcast media in order to discern the internationally recognised hallmarks of democratic broadcasting regulation.

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

4.1.1 Relevant provisions in international instruments

- Article 1 of the African Charter on Broadcasting provides in its relevant part that '[t]he legal framework for broadcasting must include a clear statement of the principles underpinning broadcast regulation, including promoting respect for freedom of expression ... and the free flow of information and ideas'.

- Principle 14 of the Access to the Airwaves Principles provides in its relevant part that '[t]he powers and responsibilities of regulatory bodies, for example in relation to licensing or complaints, should be set out clearly in the legislation which establishes them ... These powers and responsibilities should be framed in such a way that regulatory bodies have some scope to ensure that the broadcasting sector functions in a fair, pluralistic and smooth manner and to set standards and rules in their areas of competence ...'.

- Principle 17.1 of the Access to the Airwaves Principles provides in its relevant part

that '... [t]he framework for funding [of regulatory bodies] should be set out clearly in law ...'.

4.1.2 Summary

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

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

4.1.3 Comment

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

4.2 Principle 2: Independent regulation of broadcasting

4.2.1 Relevant provisions in international instruments

- Article 2 of Part I of the African Charter on Broadcasting states that '[a]ll formal powers in the areas of broadcast ... regulation should be exercised by public authorities which are protected against interference, particularly of a political or economic nature, by, among other things, an appointments process for members which is open, transparent, involves the participation of civil society, and is not controlled by any political party'.
- Article V(2.) of the African Principles of Freedom of Expression Declaration states in its relevant parts that 'the broadcast regulatory system shall encourage private and community broadcasting' and that an 'independent regulatory body shall be responsible for issuing broadcasting licences and for ensuring observance of licence conditions ...'.
- Article VII of the African Principles of Freedom of Expression Declaration provides:

1. Any public authority that exercises powers in the areas of broadcast ... regulation should be independent and adequately protected against interference, particularly of a political or economic nature.
2. The appointments process for members of a regulatory body should be open and transparent, should involve the participation of civil society, and shall not be controlled by any particular political party.
3. Any public authority that exercises power in the areas of broadcast ... should be formally accountable to the public through a multi-party body.

- Principle 11 of the Access to the Airwaves Principles provides in its relevant part that '[t]he independence of regulatory bodies ... should be specifically and explicitly provided for in the legislation which establishes them and, if possible, also in the constitution'.

- Principle 12 of the Access to the Airwaves Principles provides in its relevant part that '... [r]egulatoy bodies should be required to ... act in the public interest at all times'.

- Principle 13.2 of the Access to the Airwaves Principles provides in its relevant part that '[o]nly individuals who have relevant expertise and/or experience should be eligible for appointment [to governing bodies of public entities which exercise powers in the areas of broadcast regulation]. Membership overall should be required to be reasonably representative of society as a whole'.

- Principle 17.2 of the Access to the Airwaves Principles provides in its relevant part that '[f]unding processes should never be used to influence decision-making by regulatory bodies'.

4.2.2 Summary

- Broadcasting must be regulated (including the granting and enforcement of broadcasting licences) by independent public authorities.

- The independence of the broadcasting regulator must be guaranteed in national legislation and, if possible, in the constitution.

- Characteristics of an independent public broadcasting authority:
  - The members thereof are appointed in an open and transparent process characterised by public participation and it is not controlled by a single political party.
  - It is formally accountable to the public through a multi-party body such as a parliament.

- It acts in the public interest.
- It is not subject to any political or commercial interference.
- It is not influenced by funding processes.

- Governments must protect the independence of broadcasting regulatory bodies.

- Members of an independent broadcasting authority must have relevant expertise and/or experience and must be reasonably representative of society as a whole.

4.2.3 Comment

- It is particularly noteworthy that there are many African-focused international statements on the importance of having independent regulation of broadcasting. This is no doubt due to recognition of the role that broadcasting plays in poor, mainly rural, countries with high rates of illiteracy. Newspapers are often not available outside of urban areas, and when they are available they are often relatively expensive and usually not published in local languages. Furthermore, the availability and cost of print media are irrelevant if the 'audience' cannot read. Broadcasting, particularly radio, is often the only mass means of communication in Africa due to the problems of poverty, illiteracy and lack of print media distribution outside of urban areas.

- Owing to the centrality of broadcasting in assisting African people to access news and current affairs, it is recognised that political control and manipulation of broadcasting services can severely limit citizens' rights, such as the rights to press freedom, an independent media and access to information.

- Independent broadcasting regulation is therefore in the public interest.

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

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

4.3.1 Relevant provisions in international instruments

- Article1(1) of Part I of the African Charter on Broadcasting provides in its relevant part that '[t]he legal framework for broadcasting must include a clear statement of the

principles underpinning broadcast regulation, including ... diversity ... as well as a three-tier system for broadcasting: public service, commercial and community'.

- Article V.1 of the African Principles of Freedom of Expression Declaration provides in its relevant part that '[s]tates shall encourage a diverse, independent private broadcasting sector ...'.

- Article V.2 of the African Principles of Freedom of Expression Declaration provides in its relevant part that '[t]he broadcast regulatory system shall encourage private and community broadcasting in accordance with the following principles ... there shall be equitable allocation of frequencies between private broadcasting uses, both commercial and community'.

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

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

4.3.2 Summary

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

- There must be an equitable allocation of frequencies between the different types of broadcasters.

- States must pass laws to prevent market dominance, particularly in the area of cross-media ownership. States may pass laws regulating the extent of foreign ownership but these must take into account the developmental needs of the sector and the requirements of economic viability.

4.3.3 Comment

- Regulating media ownership and control is a critical aspect of ensuring plurality

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

4.4 Principle 4: Public as opposed to state broadcasting services

4.4.1 Relevant provisions in international instruments

- Article 1 of Part I of the African Charter on Broadcasting states that the 'legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation including ... a three-tier system for broadcasting: public service, commercial and community'.

- Article 1 of Part II of the African Charter on Broadcasting states that '[a]ll State and government controlled broadcasters should be transformed into public service broadcasters, that are accountable to all strata of the people as represented by an independent board, and that serve the overall public interest, avoiding one-sided reporting and programming in regard to religion, political belief, culture, race and gender'.

- Article 2 of Part II of the African Charter on Broadcasting states in its relevant part that 'public service broadcasters should, like broadcasting ... regulators, be governed by bodies which are protected from interference'.

- Article 3 of Part II of the African Charter on Broadcasting states in its relevant part that 'the public service mandate of public service broadcasters should be clearly defined'.

- Article 4 of Part II of the African Charter on Broadcasting states in its relevant part that '[t]he editorial independence of public service broadcasters should be guaranteed'.

- Article 5 of Part II of the African Charter on Broadcasting states in its relevant part that '[p]ublic service broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets'.

- Article 6 of Part II the African Charter on Broadcasting states in its relevant part that '[w]ithout detracting from editorial control over news and current affairs

content and in order to promote the development of independent productions and to enhance diversity in programming, public service broadcasters should be required to broadcast minimum quotas of material by independent producers'.

- Article VI of the African Principles of Freedom of Expression Declaration provides in its relevant part the following principles governing public service broadcasters:
  - Public broadcasters should be governed by a board which is protected from interference, particularly of a political or economic nature.
  - Editorial independence of public service broadcasters should be guaranteed.
  - Public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets.
  - Public broadcasters should strive to ensure that their transmission system covers the whole territory of the country.
  - The public service mandate of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.

- Principle 35.1 of the Access to the Airwaves Principles provides in its relevant part that '[p]ublic broadcasters should be overseen by an independent body, such as a Board of Governors'. In particular, independence should be guaranteed and protected in law:
  - Specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution
  - By a clear legislative statement of goals, powers and responsibilities
  - Through the rules relating to the appointment of members
  - Through formal accountability to the public through a multi-party body
  - By respect for editorial independence
  - In funding arrangements.

- Principle 35.2 of the Access to the Airwaves Principles provides in its relevant part that '[t]he governing body should be responsible for appointing senior management of public broadcasters and management should be accountable only to this body which, in turn, should be accountable to an elected multi-party body'.

- Principle 35.3 of the Access to the Airwaves Principles provides in its relevant part that '[t]he independent governing body should not interfere in day-to-day

decision-making, particularly in relation to broadcast content, should respect the principle of editorial independence and should never impose censorship'.

- Principle 37 of the Access to the Airwaves Principles provides in its relevant part that '... [p]ublic broadcasters should be required to promote diversity in broadcasting in the overall public interest by providing a wide range of informational, educational, cultural and entertainment programming'. Their remit should include, among other things, a service that:
  - Provides quality, independent programming that contributes to a plurality of opinions and an informed public
  - Includes comprehensive news and current affairs programming, which is impartial, accurate and balanced
  - Provides a range of broadcast material that strikes a balance between programming of wide appeal and specialised programmes that serve the needs of different audiences
  - Is universally accessible and serves all the people and regions of the country, including minority groups
  - Provides educational programmes and programmes directed towards children
  - Promotes local programme production, including through minimum quotas for original productions and material produced by independent producers.

4.4.2 Summary

- State broadcasters must be transformed into public broadcasters that serve the public.

- Public broadcasting is one of the three tiers of broadcasting services, the others being commercial and community broadcasting.

- A public broadcaster must have a clearly defined public service mandate including:
  - Providing quality, independent programming that contributes to a plurality of opinions and an informed public
  - Comprehensive news and current affairs programming, which is impartial, accurate and balanced
  - Avoiding one-sided reporting and programming, particularly during election periods
  - Providing a range of broadcast material that strikes a balance between programming of wide appeal and specialised programmes that serve the needs of different audiences

  - Being universally accessible and serving all the people and regions of the country, including minority groups
  - Providing educational programmes and programmes directed towards children
  - Promoting local programme production, including through minimum quotas for original productions and material produced by independent producers.

- A public broadcaster must enjoy editorial independence.

- A public broadcaster must be run by an independent board as follows:
  - The board must operate in the public interest.
  - The board must not be subject to political or economic/commercial interference.
  - The board's independence must be protected in legislation and, if possible, in the constitution too.

- A public broadcaster must be accountable to the legislature (a multi-party body), not to government.

- Public broadcasters must be adequately funded in a manner that protects their independence.

4.4.3 Comment

- It is particularly noteworthy that there are many African-focused international statements on the importance of independent regulation of broadcasting. This is no doubt due to recognition of the role that broadcasting plays in poor, mainly rural, countries with high rates of illiteracy. Newspapers are often not available outside of urban areas, and when they are available they are often relatively expensive and usually not published in local languages. Furthermore, the availability and cost of print media are irrelevant if the 'audience' cannot read. Broadcasting, particularly radio, is often the only mass means of communication in Africa due to the problems of poverty, illiteracy and lack of print media distribution outside of urban areas.

- Owing to the centrality of broadcasting in assisting African people to access news and current affairs, it is recognised that political control and manipulation of broadcasting services can severely limit citizens' rights, such as the rights to press freedom, an independent media and access to information.

- Having public broadcasters as opposed to state broadcasters is therefore in the public interest.

- The essential aspects of public as opposed to state broadcasting include:
  - Having an independent board
  - Being accountable to a multi-party body such as a parliament, with public participation in the nominations process
  - Being editorially independent and avoiding one-sided reporting.

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

4.5 Principle 5: Availability of community broadcasting

4.5.1 Relevant provisions in international instruments

- Article 1 of Part III of the African Charter on Broadcasting provides in its relevant part that '[c]ommunity broadcasting is broadcasting which is for, by and about the community, whose ownership and management is representative of the community, which pursues a social development agenda, and which is non-profit'.

- Article V.2 of the African Principles of Freedom of Expression Declaration provides that 'community broadcasting shall be promoted given its potential to broaden access by poor and rural communities to the airwaves'.

4.5.2 Summary

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

4.5.3 Comment

- Community broadcasting is generally based on two models:
  - Geographic communities, that is, a community living in a particular area or location
  - Community of interest, that is, a community bound by a common interest, such as a religious community broadcaster or a youth radio station.

- Community broadcasting provides an important platform for citizen empowerment given that it is not operated along commercial lines.

- It is, however, important to note that the community broadcasting stations are often beset with long-term viability concerns due to funding constraints.

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

4.6.1 Relevant provisions in international instruments

- Article V.2 of the African Principles of Freedom of Expression Declaration provides in its relevant part that '... licensing processes shall be fair and transparent, and shall seek to promote diversity in broadcasting ...'.

- Article 3 of Part I of the African Charter on Broadcasting provides that '[d]ecision-making processes about the overall allocation of the frequency spectrum should be open and participatory, and ensure that a fair proportion of the spectrum is allocated to broadcasting uses'.

- Article 4 of Part I of the African Charter on Broadcasting provides that '[t]he frequencies allocated to broadcasting should be shared equitably among the three tiers of broadcasting'.

- Article 5 of Part I of the African Charter on Broadcasting provides that '[l]icensing processes for the allocation of specific frequencies to individual broadcasters should be fair and transparent, and based on clear criteria, which include promoting media diversity in ownership and content'.

- Principle 18 of the Access to the Airwaves Principles provides in its relevant part that '[b]roadcasters should be required to obtain a licence to operate'.

- Principle 19.1 of the Access to the Airwaves Principles provides in its relevant part that '[a]ll licensing processes and decisions should be overseen by an independent regulatory body'.

- Principle 20.1 of the Access to the Airwaves Principles provides in its relevant part that '[t]here should be no blanket prohibitions on awarding broadcasting licences to applicants except in relation to political parties, where such a ban may be appropriate'.

- Principles 21.1 and 21.2 of the Access to the Airwaves Principles provide in their relevant parts that '[t]he process [for obtaining a broadcasting licence] should be fair and transparent, include clear time limits within which decisions must be

made and allow for effective public input and an opportunity for the applicant to be heard ... Licence applications should be assessed according to clear criteria set out in advance in ... law or regulations ... [which] criteria should … be objective and should include promoting a wide range of viewpoints which fairly reflects the diversity of the population and preventing undue concentration of ownership, as well as an assessment of the financial and technical capacity of the applicant'.

4.6.2 Summary

- Broadcasters must have a licence to operate.
- Licensing decisions must be made by independent broadcasting regulatory bodies.
- Licensing processes, including the licensing of radio frequency spectrum, must be:
  - Fair, open, transparent, and participatory, allowing for both the public and the applicant to be heard
  - Based on clear criteria set down in law, and which ought to include the technical and financial capabilities of the applicant
  - Subject to time limits for decisions.
- The aim of licensing processes is to promote diversity of ownership and content in broadcasting.
- A fair proportion of the radio frequency spectrum must be allocated to broadcasting uses and these must be shared equitably among the three tiers of broadcasting services – public, commercial and community.[3]
- The only appropriate blanket prohibition on awarding licences is in respect of political parties.

4.6.3 Comment

- As more and more countries pass broadcasting-specific legislation, these internationally accepted standards relating to licensing processes are becoming increasingly common.
- There are still a number of countries where the actual decision to grant a licence is made by or in conjunction with the relevant minister as opposed to being made entirely by an independent broadcasting regulatory authority.

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

4.7.1 Relevant provisions in international instruments

- Article 7 of Part II of the African Charter on Broadcasting provides in its relevant part that '[t]he transmissions infrastructure used by public service broadcasters should be made accessible to all broadcasters under reasonable and non-discriminatory terms'.

- Article VI of the African Principles of Freedom of Expression Declaration provides in its relevant part that '... public broadcasters should strive to ensure that their transmission system covers the whole territory of the country'.

- Principle 7.1 of the Access to the Airwaves Principles provides in its relevant part that '[t]he State should promote the necessary infrastructure for broadcast development, such as sufficient and constant electricity supply and access to adequate telecommunications services'.

- Article IV 2. l) of the COMESA Social Charter requires member states to cooperate with each other and 'recognise that the use of modern technology (information, communication and technology) can help in fulfilling social development goals and emphasise the need to facilitate easy access to such technology'.

4.7.2 Summary

- The state must promote infrastructure for broadcast development including:
  - Reliable electricity supply
  - Telecommunications.

- Universal access must be promoted by ensuring that public broadcasting transmission or signal distribution systems cover the whole country.

- Public broadcasting transmission systems must be made available to all licensed broadcasters on reasonable and non-discriminatory terms.

- ICT can help in fulfilling social development goals and easy access thereto must be facilitated.

4.7.3 Comment

- Broadcasting requires infrastructure: telecommunications facilities and links;

signal reception and distribution facilities; and, in particular, broadcasting transmitters.

- The public broadcaster must guarantee universal access to its services owing to the importance of public broadcasting for ensuring access to news and information.

- Public broadcasting infrastructure can and should be used by other licensed broadcasters on reasonable and non-discriminatory terms so as to avoid unnecessary costs in duplicating infrastructure and to ensure diversity of available services.

- Easy access to ICT requires the roll-out of telecommunications infrastructure supported by access to reliable electricity infrastructure.

4.8 Principle 8: Regulating broadcasting content in the public interest

4.8.1 Relevant provisions in international instruments

- Article 6 of Part 1 of the African Charter on Broadcasting states that '[b]roadcasters should be required to promote and develop local content, which should be defined to include African content, including through the introduction of minimum quotas'.

- Article VI of the African Principles of Freedom of Expression Declaration provides in its relevant part that the principles governing public service broadcasters include that '... the public service ambit of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods'.

- Principle 2.1 of the Access to the Airwaves Principles provides in its relevant part that '[t]he principle of editorial independence, whereby programming decisions are made by broadcasters on the basis of professional criteria and the public's right to know, should be guaranteed by law ...'.

- Principle 23.3 of the Access to the Airwaves Principles provides in its relevant part that '[a]ny content rules should be developed in close consultation with broadcasters and other interested parties and should be finalised only after public consultation'.

- Principle 23.4 of the Access to the Airwaves Principles provides in its relevant part that '[r]esponsibility for oversight of any content rules should be by [an independent] regulatory body'.

- Principle 24.2 of the Access to the Airwaves Principles provides in its relevant part that 'positive content obligations may be placed on commercial and community broadcasters but only where their purpose and effect is to promote broadcast diversity by enhancing the range of material available to the public ... Such obligations may be imposed, for example, in relation to local content and/or languages, minority and children's programming, and news'.

- Principle 29.2 of the Access to the Airwaves Principles provides in its relevant part that 'Public broadcasters have a primary obligation [to ensure that the public receive adequate information during an election period] but obligations may also be placed on commercial and/or community broadcasters ... provided ... these obligations are not excessively onerous'.

- Principle 29.3 of the Access to the Airwaves Principles provides in its relevant part that 'broadcasters are required to ensure that all election coverage is fair, equitable and non-discriminatory'.

- Principle 29.4 of the Access to the Airwaves Principles provides in its relevant part that 'any obligations regarding election broadcasting should be overseen by an independent regulatory authority'.

4.8.2 Summary

GENERAL CONTENT REGULATION

- Editorial independence, whereby programming decisions are made by broadcasters on the basis of professional criteria and the public's right to know, must be guaranteed by law.

- Content rules must be developed in close consultation with broadcasters and other interested parties, and must be finalised only after public consultation.

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

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

LOCAL CONTENT REGULATION

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

ELECTION-RELATED CONTENT REGULATION

- Public broadcasters have a primary obligation to provide adequate and balanced political reporting, particularly during election periods.

- Obligations to provide information during an election period may also be imposed upon commercial and/or community broadcasters, provided they are not too onerous.

- All broadcasters are required to ensure that election coverage is fair, equitable and non-discriminatory.

4.8.3 Comment

- Owing to its immediacy and often passive nature, broadcasting has always been subject to far more stringent content restrictions than the print media, which requires one to actually read it. This is not problematic provided the safeguards set out above and in Chapter 3 on internationally accepted grounds for restricting the media are adhered to.

- The problem of insufficient investment in local culture is particularly acute in respect of broadcasting due to high production costs. Nevertheless, ensuring that people have access to content that is in their home language and which is reflective of their community is important for preserving local cultures and identities, as well as for ensuring that people's information needs are met.

- Undoubtedly, the most serious challenge in respect of broadcasting content regulation is ensuring that broadcasters provide balanced, informative public interest information during election periods. All too often political parties (particularly ruling parties) try to ensure that broadcasters (particularly public broadcasters) play a partisan role in the government's interest rather than in the public's interest.

NOTES

1 http://programmes.comesa.int/attachments/article/82/Comesa%20Social%20Charter%20Final%20-%20ENGLISH.pdf, last accessed 30 July 2015.
2 http://newsghana.com.gh/mauritius-signs-comesas-social-charter/, last accessed 30 July 2015.
3 In its annual report of 2014, the World Association of Community Radio Broadcasters made a number of recommendations in relation to countries' regulation of community broadcasting, including that they promote 'free access to spectrum for community media in historical radio bands (AM, FM and Band III) and new resources for Digital Radio…'. http://www.amarc.org/sites/default/files/documents/annualreport2014_ok.pdf, p 13, last accessed 31 July 2015.

3 Media law: Pitfalls and protections for the media

In this chapter you will learn:

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

1 INTRODUCTION

It is clear that freedom of the press is not absolute. This chapter looks in some detail at the internationally accepted standards for restricting the media. It outlines the legitimate grounds upon which the media can be restricted and how such restrictions are implemented. This chapter identifies 14 instruments, charters, resolutions or declarations adopted by international bodies such as the United Nations (UN), the European Union (EU), and the African Union (AU), as well as those adopted at significant conferences held under the auspices of international bodies such as United Nations Education, Scientific and Cultural Organisation UNESCO. Others have been established by non-governmental organisations (NGOs) with long-standing records of work in the area of freedom of expression and freedom of the press, such as the international NGO, Article 19. These instruments (many of which have a particular focus on Africa) deal with, among other things, the legitimate grounds for regulating or restricting certain forms of expression.

Since this handbook is aimed at journalists and other media practitioners as opposed to lawyers, the content of the instruments, charters and declarations is not set out as a whole, as these typically deal with a wide range of topics besides the media. Instead, we detail the key grounds upon which expression, including by the media, may be regulated. It is also important to note that the list of instruments referred to does not purport to contain every instrument, charter or declaration relevant to democratic

media restriction. Rather, it is a selection of the key instruments, charters or declarations made by bodies of international standing, some of which have particular (but not exclusive) relevance for Africa.

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

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

- **The African Principles of Freedom of Expression Declaration:** The Declaration of Principles on Freedom of Expression in Africa was adopted in 2002 by the African Commission on Human and Peoples' Rights (ACHPR), a body established under the auspices of the AU.

- **The American Convention on Human Rights:** The American Convention on Human Rights, otherwise known as the Pact of San José, was adopted by the nations of the Americas in 1969 and came into force in 1978.

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

- **The European Convention for the Protection of Human Rights and Fundamental Freedoms:** The European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in 1950 under the auspices of the Council of Europe.

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

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

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

- **Midrand Declaration:** The Midrand Declaration on Press Freedom in Africa was adopted by the Pan African Parliament (PAP) in 2013 and launched the PAP's campaign on Press Freedom for Development and Governance: Need for Reform, in all five regions in Africa and called upon the AU member states to use the Model Law on Access to Information drafted by the ACHPR.

- **Resolution on Press Freedom for Development and Governance: Need for Reform:** This resolution was adopted by the PAP in 2012. Among other things it urges AU member states to: contribute positively in reform efforts that relate to media freedom; repeal laws that oppress journalists and adopt the Model Law on Access to Information drafted by the ACHPR.

- **Resolution 169:** Resolution 169 on Repealing Criminal Defamation Laws in Africa was adopted by the ACHPR in 2010. Resolution 169 calls on state parties to the African Charter on Human and Peoples' Rights to repeal criminal defamation laws or insult laws which impede freedom of speech.

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

- **UNESCO's Media Development Indicators:** UNESCO's International Programme for the Development of Communications published a document in 2008 entitled 'Media Development Indicators: A Framework for Assessing Media Development'. This set of indicators clearly articulates appropriate grounds for limiting the media's freedom of expression.

- **The WSIS Geneva Principles:** The WSIS Geneva Principles were adopted in Geneva in 2003 at the World Summit on the Information Society (WSIS) held by the UN in conjunction with the International Telecommunications Union. While the WSIS Geneva Principles mainly cover issues concerning universal access to

information and communications technology, they do contain some important statements on the media more generally.

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

2 RESTRICTING FREEDOM OF EXPRESSION

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

The specific grounds for restriction are examined in the next section.

2.1 Relevant provisions in international instruments

- Article 3 of the American Convention provides that '[t]he right to freedom of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communications and circulation of ideas and opinions'.

- Article II(2) of the African Principles of Freedom of Expression Declaration provides that '[a]ny restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society'.

- Article XIII(1) of the African Principles of Freedom of Expression Declaration provides that '[s]tates shall review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society'.

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

- The UNESCO Media Development Indicators provide that the state 'may not place unwarranted legal restrictions on the media such as legal provisions dictating who may practice journalism or requiring the licensing or registration of journalists'.

- The UNESCO Media Development Indicators provide that neither broadcasting nor print content may be 'subject to prior censorship, either by government or by regulatory bodies', and require that 'sanctions for breaches of regulatory rules relating to content are applied only after the material has been broadcast or published'.

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

- Principle 11 of the Camden Principles provides that states should not impose any restrictions on freedom of expression '... [unless these are] provided by law' and '[are] necessary in a democratic society to protect [legitimate] interests. This implies ... that restrictions [must be]':
  - Clearly and narrowly defined and respond to a pressing social need
  - The least intrusive measure available, in the sense that there is no other measure which would be effective and yet less restrictive of freedom of expression
  - Not overbroad, in the sense that they must not restrict speech in a wide or untargeted way or beyond the scope of harmful speech and rule out legitimate speech
  - Proportionate, in the sense that the benefit to the protected interest outweighs the harm to freedom of expression, including in respect to the sanctions they authorise.

2.2 Summary

- The right to freedom of expression may not be restricted by indirect methods, in particular by:
  - The abuse of control over access to media-related materials such as newsprint, printing materials, printing facilities, distribution networks, radio broadcasting frequencies and equipment, including through the imposition of import duties and other means
  - Requiring the licensing or registration of journalists.

- Legitimate restrictions on freedom of expression must be clearly set down in law and must:

  - Be narrowly defined and targeted
  - Serve a legitimate interest. In other words, serve a pressing social need (these legitimate interests or social needs are dealt with in the next section)
  - Be necessary in a democratic society
  - Be the least intrusive measure available
  - Be proportionate
  - Be in accordance with international law
  - Be subject to a public interest override where appropriate.

- Illegitimate legal restrictions on freedom expression include those that:
  - Require prior censorship. In other words, a process of approval of content by a government or regulatory body prior to publication. (Although, as will be dealt with in more detail in the next section, there are certain limited circumstances when prior censorship would be acceptable, namely, to determine age restrictions for films or during wartime or a state of emergency)
  - Give special protections to officials and institutions.

2.3 Comment

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

- It is important to bear in mind that the cumulative tests for a legitimate restriction on the media's right to publish or broadcast information are that the restriction must be clearly set down in law and must:
  - Be narrowly defined and targeted
  - Serve a legitimate interest, that is, serve a pressing social need
  - Be necessary in a democratic society

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

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

3 REGULATING AND PROHIBITNG THE DISSEMINATION OF CERTAIN FORMS OF EXPRESSION BY THE MEDIA

It was noted in the previous section that states must have legitimate grounds for regulating and restricting freedom of expression, including by the media. This section looks at the 14 internationally accepted specific grounds for such regulations or restrictions.

These are the 14 grounds upon which there is broad international agreement on the legitimacy of restricting the media's publication of such content or otherwise regulating the media. Each ground is dealt with, setting out the relevant provisions of the applicable international instruments, statements and declarations. A summary and/or comment are provided where necessary.

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

- Licensing and regulation of broadcasting and cinema
- Protection of reputations
- Protection of rights of others generally
- Protection of privacy
- Obscenity and the protection of children and morals
- Propaganda for war
- Hate speech or discriminatory speech
- National security or territorial integrity
- War or state of emergency
- Protection of public order or safety
- Protection of public health
- Maintaining the authority and impartiality of the judiciary
- For the prevention of crime
- Preventing the disclosure of information received in confidence.

3.1 Legitimate licensing and regulation of broadcasting and cinema

3.1.1 Relevant provisions in international instruments

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

3.1.2 Comment

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

3.2 Protecting reputations

3.2.1 Relevant provisions in international instruments

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

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

- Article 2(a) of the American Convention provides that the right to freedom of expression 'shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure respect for the ... reputations of others'.

- Article XII(1.) of the African Principles of Freedom of Expression Declaration

provides in its relevant part that '[s]tates should ensure that their laws relating to defamation conform to the following standards':

- No one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances.
- Public figures shall be required to tolerate a greater degree of criticism.
- Sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.

- The Table Mountain Declaration provides that African states must abolish 'insult and criminal defamation laws'.

- Resolution 169 of the ACHPR calls on state parties to the AU Charter to 'repeal criminal defamation or insult laws which impede freedom of speech'.

- UNESCO's Media Development Indicators provide that defamation laws must 'impose the narrowest restrictions necessary to protect the reputation of individuals'. In this regard, UNESCO's Media Development Indicators set out the characteristics of appropriate defamation laws, including that:
  - They do not inhibit public debate about the conduct of officials or official entities
  - They provide for sufficient legal defences such as:
    - The statement was an opinion not an allegation of fact
    - The publication/broadcasting was reasonable or in the public interest
    - That it occurred during a live transmission
    - That it occurred before a court or elected body
  - They provide for a regime of remedies that allow for proportionate responses to the publication or broadcasting of defamatory statements
  - The scope of defamation laws is defined as narrowly as possible, including as to who may sue
  - Defamation law suits cannot be brought by public bodies, whether legislative, executive or judicial
  - The burden of proof falls upon the plaintiff in cases involving the conduct of public officials and other matters of public interest
  - There is a reasonable cut-off date after which plaintiffs can no longer sue for an alleged defamation.

3.2.2 Summary

- While protecting the reputations of others is a legitimate ground for regulating or even prohibiting expression by the media, laws relating to defamation:
  - Must not:
    - Criminalise defamation but instead ought to impose post-publication civil sanctions, such as damages awards. It is interesting to note that the African Court of Human and Peoples' Rights[1] has recently held that '[a]part from serious and very exceptional circumstances … violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences'.[2] The effect of this judgment is to echo the international standards that financial penalties are an appropriate mechanism for punishing defamatory statements
    - Inhibit public debate about the conduct of officials or official entities who are required to tolerate a greater degree of criticism than ordinary members of the public
    - Allow defamation law suits to be brought by public bodies, whether legislative, executive or judicial.

  - Must:
    - Provide for legal defences to a defamation suit including that:
      - The statement was true and was made in the public interest
      - The statement was an opinion not an allegation of fact
      - Publication/broadcasting was reasonable or in the public interest
      - It occurred during a live transmission
      - It occurred before a court or elected body
    - Provide for a range of appropriate and proportionate remedies for the publication of defamatory material
    - Ensure the burden of proof falls upon the plaintiff in cases involving the conduct of public officials and other matters of public interest
    - Ensure there is a reasonable cut-off period after which plaintiffs can no longer sue for an alleged defamation.

3.2.3 Comment

The summary of the contours of internationally accepted standards for defamation law clearly lays out a progressive vision which puts the public interest ahead of the

reputations of, particularly, public figures. The reality, however, is that all Eastern African countries' defamation laws fall far short of these standards, as will be seen in the country chapters.

3.3 Protecting the rights of others generally

3.3.1 Relevant provisions in international instruments

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

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

- Article 58 of the WSIS Geneva Principles provides that the '[t]he use of ICTs and content creation should respect human rights and fundamental freedoms of others, including ... the right to freedom of thought, conscience and religion in conformity with relevant international instruments'.

3.3.2 Comment

- The wording of this ground is extremely vague and usually will be subsumed under other more specific grounds, such as reputation, privacy or morality. It is included here because it features in at least three international instruments.

3.4 Protecting privacy

3.4.1 Relevant provisions in international instruments

- Article XII(2) of the Principles of African Freedom of Expression Declaration provides that privacy laws 'shall not inhibit the dissemination of information of public interest'.

- Article 58 of the WSIS Geneva Principles provides that '[t]he use of ICTs and content creation should respect human rights and fundamental freedoms of others, including personal privacy ... in conformity with relevant international instruments'.

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

- In paragraph (xiii) of the Resolution on Press Freedom for Development and Governance: Need for Reform, the PAP resolves to 'contribute to the process of drafting clear policies for ensuring the privacy … aspects that are related to the media'.

3.4.2 Comment

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

3.5 Regulating obscenity and protecting children and morals

3.5.1 Relevant provisions in international instruments

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

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

- Article 2(b) of the American Convention provides in its relevant part that the right to freedom of expression 'shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure ... the protection of ... morals'.

- Article 3 of the American Convention specifically provides that 'public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence'.

- Article 59 of the WSIS Geneva Principles provides that '[a]ll actors in the Information Society should take appropriate actions and preventive measures as determined by law, against abusive uses of ICTs such as ... all forms of child abuse,

including paedophilia and child pornography, and trafficking in, and exploitation of, human beings'.

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

3.5.2 Summary

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

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

3.5.3 Comment

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

- Many countries are moving away from regulating the publication or broadcasting of materials based on the ground of 'morality' due to the difficulty of setting a national standard for morality. This is often a highly subjective matter, particularly in multicultural societies.

3.6 Propaganda for war

3.6.1 Relevant provisions in international instruments

- Article 20(1) of the ICCPR provides that '[a]ny propaganda for war shall be prohibited by law'.

- Article 5 of the American Convention provides in its relevant part that '[a]ny propaganda for war ...' shall be considered an offence punishable by law.

3.6.2 Summary

- Propaganda for war is prohibited and engaging therein is an offence.

3.6.3 Comment

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

3.7 Hate speech or discriminatory speech

3.7.1 Relevant provisions in international instruments

- Article 4(a) of the Convention on the Elimination of Racial Discrimination provides in its relevant part: '[s]tates parties condemn all propaganda ... which ... [is] based on ideas or theories of superiority of one race or group of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to ... such discrimination and to this end ... [s]hall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin ... .'

- Article 20(2) of the ICCPR provides that '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.

- Article 5 of the American Convention provides in its relevant part that '... any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offenses punishable by law'.

- Article 59 of the WSIS Geneva Principles provides that '[a]ll actors in the Information Society should take appropriate actions and preventive measures, as

determined by law, against abusive uses of ICTs, such as illegal and other acts motivated by racism, racial discrimination, xenophobia, and related intolerance, hatred, violence ...'.

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

- Principle 12 of the Camden Principles provides that states 'should adopt legislation prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.

3.7.2 Summary

- Hate speech is the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

- Discriminatory speech is propagating the idea of the superiority of one race or group of one colour or ethnic origin.

- Dissemination of hate speech should be an offence.

- Preventing hate speech or discriminatory speech are both legitimate grounds for regulating or even prohibiting expression by the media.

3.7.3 Comment

- As was the case for propaganda for war, the international community uses particularly strong language in relation to hate speech, and it requires that the dissemination thereof be made an offence under national law.

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

3.8 Protection of national security or territorial integrity

3.8.1 Relevant provisions in international instruments

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

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

- Article 2(b) of the American Convention provides that the right to freedom of expression 'shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure ... the protection of national security ...'.

- Principles 1(c) and (d) read together with principles 2(a) and (b) and Principle 6 of the Johannesburg Principles provide that the exercise of the right to freedom of expression 'may be subject to restrictions ... for the protection of national security. No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restrictions rests with the government ... A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government. In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology or to suppress industrial unrest'.

- Principle 23 of the Johannesburg Principles provides that '[e]xpression shall not be subject to prior censorship in the interest of protecting national security, except in a time of public emergency which threatens the life of the country ...'.

- Article XIII(2) of the Principles of African Freedom of Expression Declaration provides that '[f]reedom of expression should not be restricted on ... national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression'.

- In paragraph (xiii) of the Resolution on Press Freedom for Development and Governance: Need for Reform, the PAP resolves to 'contribute to the process of drafting clear policies for ensuring … the security aspects that relate to the media'.

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

- The UNESCO Media Development Indicators provide that 'national security restrictions must not inhibit public debate about issues of public concern'.

3.8.2 Summary

- Protecting national security or territorial integrity are both legitimate grounds for regulating or even prohibiting expression by the media. This cannot inhibit public debate on matters of public concern.

- Restricting the media's right to freedom of expression on the basis of a national security interest is not legitimate:

    - Unless it can be shown that:
        - The restriction will protect a country's existence or its territorial integrity against the threat of force, whether external or internal
        - There is a causal link between the expression and the risk of the threat of force.
    - If it protects interests unrelated to national security, including, for example:
        - Protecting a government from embarrassment or exposure of wrongdoing
        - Concealing information about the functioning of its public institutions
        - Entrenching a particular ideology
        - Suppressing industrial unrest.

3.8.3 Comment

- It is interesting to note that the international instruments go into a great deal of detail as to when resorting to 'national interest' restriction would not be legitimate. This is undoubtedly due to the history of the near-systematic abuse of this otherwise legitimate ground for media restriction by many government officials, particularly in the security forces.

- It is noteworthy that the international instruments detail the nature of the threat to national security and its relationship to the proposed restricted expression that must exist before such a ground will be legitimate.

- Very few national laws, particularly in Eastern African countries, comply with these requirements.

3.9 War or state of emergency

3.9.1 Relevant provisions in international instruments

- Article 15(1) of the European Convention on Human Rights provides that '[i]n a time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'.

- Article 27(1) of the American Convention provides in its relevant part that '[i]n a time of war, public danger or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation ...'.

- Principle 3 of the Johannesburg Principles provides that '[i]n time of public emergency which threatens the life of the country and the existence of which is officially and lawfully proclaimed in accordance with both national and international law, a state may impose restrictions on freedom of expression and information but only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government's other obligations under international law'.

- Principle 23 of the Johannesburg Principles provides that '[e]xpression shall

not be subject to prior censorship in the interest of protecting national security, except in a time of public emergency which threatens the life of the country ...'.

- The UNESCO Media Development Indicators expressly provide that laws must 'not allow state actors to seize control of broadcasters during an emergency'.

3.9.2 Summary

- War or a state of emergency are both legitimate grounds for regulating or even prohibiting expression by the media, including by means of prior censorship, provided that this is done only for the period of time strictly necessary in the circumstances.

- Emergency laws must not allow state actors to seize control of broadcasters during an emergency.

3.9.3 Comment

- Comments are confined to the state of emergency ground.

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

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

3.10 Protection of public order or safety

3.10.1 Relevant provisions in international instruments

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

conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of ... public safety ... [and] for the prevention of disorder ...'.

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

- Article 2(b) of the American Convention provides that the right to freedom of expression 'shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure the protection of ... public order ...'.

- Article XIII(2) of the Principles of African Freedom of Expression Declaration provides that '[f]reedom of expression should not be restricted on public order ... grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression'.

3.10.2 Summary

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

3.10.3 Comment

- As is the case with emergency provisions, governments often abuse the grounds of public order or public safety to restrict the publication of legitimate expressions of dissent. National laws often do not comply with internationally articulated standards in regard to these grounds.

3.11 Protection of public health

3.11.1 Relevant provisions in international instruments

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

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

- Article 2(b) of the American Convention provides that the right to freedom of expression 'shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure the protection of ... public health ...'.

3.11.2 Summary

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

3.12 Maintaining the authority and impartiality of the judiciary

3.12.1 Relevant provisions in international instruments

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

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

3.12.2 Summary

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

3.12.3 Comment

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

- *The rule against scandalising the court:* This is where attacks on the judiciary are

such that they undermine the administration of justice. This obviously goes far beyond fair and reasonable comment and criticism of judgments and judges, which does not undermine the administration of justice.

- *The sub judice rule:* This is where the outcome of a judicial proceeding is effectively preempted or prejudiced through the publication of information which also undermines the administration of justice.

3.13 For the prevention of crime

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

3.14 Preventing the disclosure of information received in confidence

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

4 LAWS THAT HINDER THE MEDIA IN PERFORMING ITS ROLE

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

- Democratic media regulation
- Democratic broadcasting regulation
- Restricting publication or broadcasting by the media.

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

- Unreasonably restrict market entry – that is, which act as a barrier to establishing independent media sources

- Provide for prior censorship

- Favour individual rights, particularly of public officials, over the public's right to know
- Do not comply with internationally accepted restrictions upon the publication of obscene materials
- Do not comply with internationally accepted restrictions upon the publication of propaganda for war or hate speech
- Do not comply with internationally accepted restrictions upon the publication of information which threatens national security, territorial integrity and public order
- Do not comply with internationally accepted restrictions upon the publication of information which threatens law enforcement
- Provide for indefinite states of emergency
- Do not comply with internationally accepted restrictions upon the publication of information which undermines the judiciary.

4.1 Laws that unreasonably restrict market entry

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

Note that licensing is in fact required in respect of broadcasting due to the need to regulate frequency spectrum use effectively.

4.2 Laws that provide for prior censorship

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

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

In an effort to guard against embarrassing public revelations in the media, governments sometimes enact (or deliberately fail to repeal) laws which provide a great deal of protection for private and even public figures at the expense of the media's right to publish or broadcast and the public's right to know. Thus, criminal defamation laws, insult laws or civil defamation laws – whether provided for in a statute or in the common law, as determined by the judiciary – that do not comply with internationally accepted standards for laws protecting privacy or reputations, or the rights of others hinder the media greatly in its operations.

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

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

Generally, the mainstream media does not often fall foul of laws that regulate obscenity, morality or which aim at protecting children. However, in the recent past, there have been a number of examples in Africa where obscenity laws have been invoked by officials to try to prevent the publication of news and information that is clearly in the public interest. In one instance, a journalist who was working on a story about the state of public health care in Zambia faced obscenity charges for circulating to public officials (not even publishing) photographs of a woman giving birth on the pavement outside a hospital.

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

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

Although one generally associates the passage of hate speech legislation with progressive governments anxious to protect citizens from racism or other discrimination, governments have made, and sometimes do make, use of such

legislation to stifle dissent and prevent the publication of material in the public interest.

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

Unfortunately, governments often confuse national security with government popularity. Thus, a threat to a government's standing or popularity among citizens is seen as a threat to 'national security' or 'public order'. This means that governments often abuse the legitimate grounds for limiting media expression of national security or territorial integrity for their own, as opposed to the public's, interests. Unfortunately, a large number of national laws relating to security issues – such as defence, intelligence, classified information, terrorism and the like – often do not comply with internationally accepted standards for such legislation, which standards are set out in chapters 2 and 3.

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

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

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

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

4.8 Laws that provide for indefinite states of emergency

Internationally, the ability of governments to restrict the media during a time of national crisis, such as a state of emergency, is widely recognised. However, this is

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

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

As a general rule it is rare that the judiciary acts in such a way as to unreasonably prevent the media from publishing information in the public interest. However, laws such as the *sub judice* rule in common law can be abused in ways that harm the media and prevent it from carrying out its functions. For example, sometimes public officials involved in court proceedings cite the *sub judice* rule as a reason for providing no information to the media, even if the case is on a matter of public importance and the publication of information would not prejudice the outcome of the case.

4.10 Laws that criminalise defamation

Although all the Eastern African countries considered in this book continue to have criminal defamation laws on their statute books, it is important to note that international best practice standards clearly indicate that the most appropriate way of protecting against defamation is through civil sanctions, such as damages awards, rather than criminal sanctions, such as imprisonment.

5 LAWS THAT ASSIST THE MEDIA TO PERFORM ITS VARIOUS ROLES

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

- Democratic media regulation
- Democratic broadcasting regulation
- Restricting publication or broadcasting by the media.

There are also other kinds of laws that greatly assist the media, if only indirectly, in its day to day operations, as well as in terms of building long-term support for media freedom. While it is difficult to give a definitive or even comprehensive list of the kinds of laws that assist the media, seven types of laws have been selected, which are commonly seen as supporting the functioning of the media, namely:

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

5.1 Constitutions

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

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

- The independence of the public broadcaster and the fact that it is to act in the public interest ought to be specifically guaranteed in constitutional provisions.

- An independent judiciary that has the final say over the legal interpretation of the provisions of the constitution should be provided for in the constitution.

- General public watchdog bodies to protect the public from abuses of power and to preserve constitutional values should be established by the constitution. Bodies that can perform these roles include human rights commissions, public protectors or a public ombudsman.

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

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

- Ensuring that regulation does not result in the public being unreasonably denied access to news and information in the public interest

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

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

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

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

5.4 Laws that comply with internationally accepted standards for restricting publication or broadcasting by the media

If all laws that restrict what the media may publish or broadcast were to comply with internationally accepted standards for restricting publication or broadcasting by the media (set out previously in this chapter), this would assist the media to perform its

roles effectively by ensuring that regulation does not result in the public being unreasonably denied access to news and information in the public interest.

5.5 Access to information legislation

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

Access to information statutes almost always provide for grounds upon which disclosure of the information or access to the records requested can be denied. Generally, these grounds are there to protect important societal interests, such as crime prevention, national security, privacy or information provided in confidence. Progressive access to information laws will contain a public interest override clause, allowing for the information to be disclosed if there is an overwhelming public interest in the information being made public (for example, if this will provide evidence of a crime or of public wrongdoing), even if the information falls within one of the grounds for non-disclosure.

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

It is important to recognise that the issue of access to information has been taken up by the ACHPR and also by the PAP; both of these institutions have called on state parties to the African Charter to implement the Model Law on Access to Information which has been developed by the ACHPR.

5.6 Whistleblower protection or anti-corruption laws

Other laws that are often particularly useful for journalists are statutes designed to promote good governance by supporting anti-corruption measures. Thus, anti-corruption statutes or statutes that provide 'whistleblower' protection for those who alert the authorities (or the media) to public wrongdoing, particularly criminal activities by public officials, help to provide an environment in which the media is able to access sources of public interest information without those sources suffering abuse or retaliation as a result.

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

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

NOTES

1 *Konate v Burkina Faso* (Application No. 004/20013) http://www.african-court.org/en /images/documents/Judgment/Konate%20Judgment%20Engl.pdf, last accessed on 31 July 2015.
2 Ibid, paragraph 165 of the Konate judgment.

4 Burundi

1 INTRODUCTION

The Republic of Burundi has a population of approximately 11.5 million people[1] and is the world's poorest country, according to International Monetary Fund statistics cited by international news agency *Agence France Presse* (AFP) in April 2016.[2] Even a cursory glance at the history of this landlocked country in the Great Lakes region of Eastern Africa shows why.

Until incorporated into German East Africa in the early 20th century, Burundi had been a Tutsi-dominated independent kingdom for more than 200 years. During the First World War, Belgium occupied Burundi and neighbouring Rwanda, ruling them as a colony, called Ruanda-Urundi. This continued even when the two countries became a League of Nations mandate territory in 1924, and a United Nations (UN) trust territory after the Second World War. Germans and Belgians both accepted the status quo of Tutsi dominance, despite the fact that Hutus comprised about 85% of the population, Tutsis about 14% and Twa (Pygmies) about 1%.[3] This was the situation in January 1959, when Burundi's ruler, Mwami (King) Mwambutsa IV, formally requested Burundi's independence from Belgium and dissolution of the Ruanda-Urundi union.

Democratic elections held in September 1961 resulted in a victory for the Union for National Progress, a party with both Hutu and Tutsi membership led by the king's son, Louis Rwagasore of the Tutsi-related Ganwa ethnic group. Rwagasore was assassinated 25 days later. He was succeeded in office by his Tutsi brother-in-law,

André Muhirwa, the last prime minister of the self-governing colony and the first under independence, which was attained on 1 July 1962. In a bid to secure greater Hutu political cooperation, Muhirwa was replaced less than a year after independence by a Hutu, Pierre Ngendandumwe, who was assassinated by a Tutsi gunman less than 10 months later.

Elections in May 1965 resulted in a Hutu majority in the National Assembly. Mwambutsa IV disregarded this, however, appointing his Tutsi private secretary, Pié Masumbuko, acting prime minister, which prompted an attempted coup by Hutu officers. Masumbuko's term in office lasted only 10 days before he was replaced in quick succession by Joseph Bamina (Hutu) and Prince Léopold Biha (Tutsi).[4]

On 18 October 1966, Hutus launched another coup attempt. Defence Minister Michel Micombero, a Tutsi graduate of the Belgian Royal Military Academy, rallied the army and its largely Tutsi officers against the coup. Just over three months later Micombero overthrew the monarchy and declared Burundi a republic, with himself president. He imposed a law-and-order regime, including suppression of Hutu militarism.[5]

Micombero ruled for almost 10 years before being ousted himself in a military coup led by Tutsi Army Deputy Chief of Staff Colonel Jean-Baptiste Bagaza. In 1981, a new constitution was endorsed by a popular referendum and Burundi became a one-party state with Bagaza as president. In power for almost 11 years, he was criticised for rigging elections, press censorship, police violence, and political and religious repression.[6] Bagaza was overthrown by Major Pierre Buyoya, also a Tutsi, who proceeded to suspend the constitution, dissolve political parties, and reinstate military rule.

While proclaiming a liberalisation agenda, Buyoya's ruling junta was predominantly Tutsi, leading to another Hutu uprising in which approximately 20,000 people died. Buyoya appointed a commission to mediate, resulting in a new constitution calling for a non-ethnic government. The democratic election of June 1993 was won by Melchior Ndadaye, who became the first Hutu president.[7]

Ndadaye was in office for only 103 days before being killed by Tutsi army officers. Thousands of Hutus rebelled, and the consequent civil war resulted in perhaps as many as 300,000 deaths that year alone, with perhaps a million people fleeing to neighbouring countries.[8]

Tutsi Sylvie Kinigi, prime minister in the Ndadaye government, took over as acting president briefly. She resigned as prime minister after Parliament's election of former

agriculture minister Cyprien Ntaryamira, a Hutu, as president. Sixty days after assuming office, Ntaryamira was killed when the aircraft in which he was flying with Rwandan president Juvénal Habyarimaana was shot down.[9]

Ntaryamira's successor, Sylvestre Ntibantunganya, a Hutu, was in office for a little over two years and three months before being deposed in a coup led by former President Buyoya, who instituted an ethnically inclusive government. His second period in office lasted more than six years, after which he handed over power and became a senator for life, continuing to play a significant role in the country's affairs.[10]

On 26 August 2005, Pierre Nkurunziza, son of a Hutu father and Tutsi mother, was elected president by the National Assembly and Senate. He was the only candidate. He was re-elected five years later by direct election in which he was again the only candidate. In 2015, Nkurunziza was nominated for a third term despite a constitutional limit on presidents serving more than two terms. Opponents attempted a coup, but Nkurunziza survived and, on 21 July, was declared the winner of a disputed election.[11]

A United Nations Electoral Observation Mission sent to report on the electoral process stated that freedoms of expression, assembly and association – essential conditions for the effective exercise of the right to vote – remained severely impaired, and media freedom was severely restricted, '... despite national and international appeals to the government to enable media to operate. State-owned media did not provide a balanced media coverage to all presidential candidates'.[12]

Violence continued, prompting the African Union (AU) to announce a plan to send in peacekeepers. Nkurunziza responded that the army would fight back if the AU tried to deploy in Burundi.[13]

In late April 2016, AFP published its report stating that a year into a political crisis that had claimed about 500 lives, driven a quarter of a million into exile and prompted Western donors to suspend government aid, Burundi's economy was 'on the ropes'.[14] The economy shrank by 7.4% in 2015, taking Burundi from the world's third-poorest country to the poorest, with a gross domestic product per capita of US$315.20.[15] Loss of foreign aid is critically important given that in 2014 it represented 42% of national income.[16]

At this point, the country's future looks bleak. More than half a century of almost continual chaos, including two genocides, has stalled social and economic progress. Only about half of all children go to school, and food and medicine remain in short

supply. In the 2013 Global Hunger Index, Burundi had the most severe hunger and malnutrition rates of all 120 countries ranked.[17] Less than 2% of the population have electricity in their homes. Perhaps unsurprisingly, Burundi ranks 184th out of 188 countries on the Unicef Human Development Index.[18] Development is hindered by a weak legal system, poor transport network, overburdened utilities and low administrative capacity.

The country is poorly served in terms of media – an issue complicated by the low literacy rate, self-censorship and government censorship.

There is only one daily newspaper, the government-owned *Renouveau* (*Renewal*). In addition, there are the following weekly papers:

- *Arc-en-ciel* (*Rainbow*) – private, French-language
- *Iwacu* – private, online content in English/French
- *Ndongozi* (*Pacesetter*) – founded by the Catholic Church
- *Ubumwe* (*Unity*) – government-owned.

There are two television stations. The government-controlled *Television Nationale du Burundi* broadcasts in Kirundi, Swahili, French and English. *Télé Renaissance*, a private commercial service, broadcasts in Kirundi and French.

Radio Burundi is government controlled, broadcasts in Kirundi, Swahili, French and English, and operates an educational network. In addition, there are five quasi-independent radio stations.

The *Agence Burundaise de Presse* (ABP) is the state news agency, in addition to which there is a privately owned service, Net Press.

Both telephone density and internet usage are among the lowest in the world. There were an estimated 526,372 internet users as of June 2016 (a 4.7% penetration rate) and 340,000 Facebook subscribers in November 2015 (a 3.1% penetration rate).[19]

The official languages of Burundi are Kirundi and French, and in addition many speak Swahili as the language of trade in Eastern Africa.[20]

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

- Media and the constitution

- Media-related legislation
- Media-related regulations
- Media self-regulation
- Media-related case law

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

2 THE MEDIA AND THE CONSTITUTION

In this section you will learn:

- ❑ The definition of a constitution
- ❑ What is meant by constitutional supremacy
- ❑ How a limitations clause operates
- ❑ Which constitutional provisions protect the media
- ❑ Which constitutional provisions might require caution from the media or might conflict with media interests
- ❑ What key institutions relevant to the media are established under the Constitution of Burundi
- ❑ How rights are enforced under the Constitution
- ❑ What is meant by the 'three branches of government' and 'separation of powers'
- ❑ Whether there are any clear weaknesses in the Constitution of Burundi that ought to be amended to protect the media

2.1 Definition of a constitution

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

The Constitution of Burundi sets out the foundational rules for the Republic of Burundi. These are the rules upon which the entire country operates. The Constitution contains the underlying principles, values and laws of Burundi. A key constitutional provision in this regard is Chapter 2 headed 'Fundamental Values' of

Part I of the Constitution which part is headed 'State and Sovereignty'. Articles 13–18 of Chapter 2 articulate the fundamental values of Burundi which are the following:[21]

- *Equality* – article 13
  - All citizens are equal and deserving of equal respect.
  - Equality before the law.
  - No citizen can be excluded from social and economic life based on race, language, religion, gender or ethnic origin.

- *Peace and security* – article 14
  - All citizens have the right to live in Burundi in peace and security. They must live together in harmony while respecting human dignity and being tolerant of differences.

- *Government of the people* – article 15
  - The government is based on the will of the people.
  - It is accountable to the people and must respect their freedoms and their fundamental rights.

- *Principles of government* – article 16
  - The government must represent all the people of Burundi.
  - Everyone must have an equal opportunity to be part of the government of Burundi.
  - Everyone must have access to public services and access to the decision-making processes of government.

- *Duties of government* – article 17
  - The government must bring about the realisation of the aspirations of the Burundian people, in particular, healing the divisions of the past, improving the quality of life for all in Burundi and enabling a life free from fear, discrimination, sickness and hunger.

- *Purpose of the political system* – article 18
  - The purpose of the political system is to bring about unity, stability and reconciliation.
  - The political system ensures that the government exists to serve the people that elected it.
  - The government must respect the principle of separation of powers, the rule of law and principles of good governance and transparency in public affairs.

The fundamental values contained in Chapter 2 are clearly geared to overcoming the legacy of genocide that haunts Burundi's recent history. The focus on peace, security and reconciliation speaks to Burundians' desire to move away from the past.

2.2 Definition of constitutional supremacy

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

The Constitution of Burundi makes provision for constitutional supremacy. The preamble to the Constitution provides: 'We, the Burundian people, solemnly declare this Constitution to be the fundamental law of the Republic of Burundi.' Further, article 48 provides that the Constitution 'is the supreme law. The legislature, the Executive and the Judiciary must respect the Constitution. Any law that does not comply with the Constitution is null and void'.

The effect of these provisions is that all three branches of government are required to comply with the Constitution and that the constitutional provisions take precedence over any other law, whether statutory, subordinate legislation such as regulations made by a member of the executive, or judge-made law.

It is, however, important to note that in a number of places, particularly in the Bill of Rights, the Constitution itself subordinates certain rights or aspects of the rights to the ordinary laws of the land, thereby undermining the principle of constitutional supremacy.

2.3 Definition of a limitations clause

It is clear that rights are not absolute as society would not be able to function. For example, if the right to freedom of movement were absolute, society would not be able to imprison convicted criminals. Similarly, if the right to freedom of expression were absolute, the state would not be able to protect its citizens from hate speech or false defamatory statements made with reckless disregard for the truth.

Clearly, governments require the ability to limit rights in order to serve important societal interests; however, owing to the supremacy of the constitution this can only be done in accordance with the constitution.

The Constitution of Burundi makes provision for three kinds of legal limitations on the exercise and protection of rights contained in Part II of the Constitution of Burundi, 'Fundamental Rights and Duties'.

2.3.1 Internal limitations

A number of rights contain internal limitations or qualifiers to the right in the text of the right itself. For example, the right to freedom of association has its own internal limitation.

Consequently, it is clear that certain of the rights contained in Part II of the Constitution of Burundi are subject to the limitations contained within the provisions of the right itself. Where a right that is relevant to the media has its own internal limitations clause, this is dealt with below.

2.3.2 General limitations clause

Article 47 of the Burundian Constitution contains a general limitations clause applicable to all rights and freedoms provided for in Part II of the Constitution. It provides as follows: Any restriction of a fundamental right must have a legal basis, must be justified in the public interest or for the protection of the fundamental right of another, and it must be proportionate to the purpose of the limitation.

This requires some discussion.

- The first and most basic requirement is legality. Consequently, arbitrary limitations of rights are not allowed.

- Second, rights can be limited on two general bases:
  - In the public interest, or
  - To protect the fundamental right of another.

- Third, it is critical to note that the limitation of a right must be proportionate to the purpose the limitation is meant to serve, whether this is the protection of another's rights or in the public interest.

Similarly, article 19, which is in Part II dealing with fundamental rights, provides that the rights contained in Part II are not subject to any restriction or derogation except in certain circumstances where the restriction is in the public interest or to protect another's rights. Despite the emphatic language used, it is clear, sadly, that there are many instances where fundamental rights are in fact limited.

2.3.3 Limitations in the Constitution

In certain circumstances, a constitution may provide for limitations of rights outside of the context of a general or internal limitations clause. The provisions in the Burundian Constitution relating to states of emergency is one such example.

Article 115 empowers the president, after consulting with the Cabinet, Parliament, the National Security Council and the Constitutional Court, to declare a state of emergency. The grounds for declaring a state of emergency are when the state, the independence of the nation, the territorial integrity or the performance of its international obligations are under serious and imminent threat such that the normal functioning of state institutions are interrupted.

It is important to note that the Burundian Constitution is entirely silent as to which rights can be derogated from during a state of emergency and which rights cannot be derogated from. Consequently, we are of the view that all rights can be derogated from during a state of emergency. This is particularly likely given wording in article 115 to the effect that the president is empowered to take 'any measures necessary in the circumstances'.

Similarly, article 42 of the Constitution of Burundi provides essentially that 'no one may be subjected to security measures except in accordance with a law, in particular, for reasons of public order and state security'. This suggests that rights can be limited for reasons of public order and state security.

It is important to note that the term 'security measures' is not defined, but it clearly indicates that a person can be subjected to these, and the implication is that these might be at variance with the fundamental rights provided for in Part II.

Secondly, security measures can be imposed in terms of a law, in particular for reasons of public order and state security. This is extremely broadly framed and has the potential impact of undermining the constitutional supremacy of the whole of Part II because, provided the law is passed in the interests of protecting public order and state security, it seems that the security measures that can be imposed are open-ended.

2.4 Constitutional provisions that protect the media

The Constitution of Burundi contains a number of important provisions in Part II of the Constitution, the 'Bill of Fundamental Rights and Duties', which directly protect the media, including publishers, broadcasters, journalists, editors and producers.

2.4.1 Freedom of expression

The most important provision that protects the media is article 31, which states:

> Freedom of expression is guaranteed. The state must respect freedom of … thought … and opinion.

This provision needs some detailed explanation.

- The guarantee of freedom of expression applies to all persons and not just to certain people, such as citizens. Hence, everybody (both natural persons and juristic persons, such as companies) enjoy this fundamental right.

- The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many different examples of this, including physical expression, such as mime or dance, photography or art.

- Article 31 expressly provides that the state must respect freedom of opinion, thereby protecting the media's right to write opinion pieces and commentary on important issues of the day.

2.4.2 Privacy

A second protection is contained in article 28 of the Constitution of Burundi which guarantees the right to privacy. It provides that '[e]veryone has the right to privacy, in respect of their private lives, their families, their homes and their personal communications'.

The fact that this right protects personal communications is a significant protection for journalists in their day-to-day work.

2.4.3 Protection of freedom of conscience

A third protection is again contained in article 31, which states: '… the state must respect freedom of … conscience … .'

2.4.4 Protection of right to assembly and association

Article 32 of the Constitution of Burundi provides that 'freedom of association is guaranteed as well as the right to form associations and organisations in accordance with the law'.

This right requires some explanation. While the right to freedom of association is guaranteed in article 32, it is noteworthy that the right to actually form associations and organisations is subject to first being 'in accordance with the law'. This is a so-called 'internal limitation' to the right of freedom of association. The wording is extremely problematic because essentially it subjects the right to form associations and organisations to the ordinary laws of the land. This takes away from the constitutional power of the right because statutes can trump the constitutional rights to form associations and organisations.

2.4.5 Right to form trade unions

Article 37 of the Constitution of Burundi provides that 'the right to form trade unions is guaranteed as is the right to strike'. There are exceptions to this. There is a blanket prohibition on members of the armed and security forces from exercising these rights. Further, article 37 contains another internal limitation to the effect that laws can regulate the exercise of these rights and may prohibit certain categories of workers from striking. Article 37 requires some explanation.

- The right to form trade unions is an important right for the media because it allows for media workers such as journalists to form a trade union to fight for their rights in the workplace. Traditionally, journalistic trade unions have supported rights which impact on their working lives, such as freedom of expression.

- Article 37 contains a number of internal limitations, namely, a blanket prohibition on members of the armed and security forces from forming trade unions and going on strike as well as a general internal limitation, which provides that the exercise of the right to form trade unions and to strike may be regulated by law and may prohibit certain categories of workers from striking. This is not unusual internationally as certain categories of workers, such as emergency medical personnel, are often prohibited from striking. However, the particular wording of this aspect of article 37 is broadly framed and has the potential to allow a statute effectively to trump the constitutional rights to form trade unions and to strike.

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

Just as there are certain rights or freedoms that protect the media, other rights or freedoms can protect individuals and institutions *from* the media. It is important for journalists to understand which provisions in the Constitution can be used against the media.

2.5.1 The right to dignity

Article 21 guarantees the right to dignity. It provides that 'human dignity is respected and protected. Any infringement of human dignity is punishable in terms of the Penal Code'.

The right to dignity requires caution on the part of the media because it is a fundamental aspect upon which the right to reputation is based, and this in turn is foundational to the legal right to claim damages for defamation. Defamation suits, whether civil or criminal, are a significant worry for journalists personally and for the media houses that employ them. Journalists therefore need to be aware of the right to dignity and need to ensure that a person's right to his or her reputation is not unlawfully undermined in the course of reporting a story.

2.5.2 The right to privacy

A second right that requires caution from the media is contained in article 28 of the Constitution of Burundi, which guarantees the right to privacy. It provides that '[e]veryone has the right to privacy, in respect of their private lives, their families, their homes and their personal communications'.

The right of privacy is an interesting right because it protects journalists themselves, particularly through the protection of personal communications, but also requires caution on their part when reporting the news or investigating the conduct of individuals. While the right to privacy can give way to the public interest, there is a zone of privacy around a person's private and family life which is relevant to the public only in fairly exceptional circumstances.

2.5.3 Security provisions

Article 42 of the Constitution of Burundi is extremely vaguely worded. It provides essentially that 'no one may be subjected to security measures except in accordance with a law, in particular, for reasons of public order and state security'. This article requires explanation as it is of concern to media practitioners and to the practise of journalism more generally.

First, the term 'security measures' is not defined but it clearly indicates that a person can be subjected to these, and the implication is that these might be at variance with the fundamental rights provided for in Part II.

Second, security measures can be imposed in terms of a law, in particular for reasons

of public order and state security. This is extremely broadly framed and has the potential impact of undermining the constitutional supremacy of the whole of Part II because, provided the law is passed in the interests of protecting public order and state security, it seems that the security measures that can be imposed are open-ended. Consequently, the provisions of article 42 are extremely problematic.

2.5.4 State of emergency provisions

Article 115 empowers the president, after consulting with the Cabinet, Parliament, the National Security Council and the Constitutional Court, to declare a state of emergency. The grounds for declaring a state of emergency are when the state, the independence of the nation, the territorial integrity or the performance of its international obligations are under serious and imminent threat such that the normal functioning of state institutions are interrupted.

It is important to note that the Burundian Constitution is entirely silent as to which rights can be derogated from during a state of emergency and which rights cannot be derogated from. Consequently, we are of the view that all rights can be derogated from during a state of emergency. This is particularly likely given wording in article 115 to the effect that the president is empowered to take 'any measures necessary in the circumstances'.

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

The Constitution of Burundi establishes a number of institutes that indirectly affect the media, namely, the National Council of Communication, the ombudsman and the judiciary.

2.6.1 The National Council of Communication

Part XII of the Constitution of Burundi deals with national councils established in terms of the Constitution. Chapter 5 thereof is headed 'the National Council of Communication' (NCC).

In terms of article 284 of the Burundian Constitution, the role of the NCC is to protect the freedom of the print and broadcast media while respecting laws, public order and good morals. To this end, the NCC is empowered to promote press freedom and to ensure that diverse political, social, economic and cultural opinions have equitable access to the public media. The NCC is also required to play a consultative role to the Cabinet on communications matters.

In terms of article 285, the NCC is composed of members chosen from the communications and media sector, and is based on their involvement in social communications and their commitment to freedom of the press, of expression and of opinion.

Article 286 deals with the appointment of members of the NCC. Essentially, the members are appointed by the president of the Republic of Burundi in consultation with the vice president. Article 287 requires the NCC to produce an annual report which is submitted to the president of Burundi, the Cabinet, the National Assembly and the Senate. Article 288 provides that a statute is to provide for the organisation and functions of the NCC.

The provisions of Chapter 5 of Part XII require some explanation. On the one hand, it is extremely significant that the Constitution of Burundi provides for the establishment of the NCC, because so often national constitutions are silent on the issue of media regulation. On the other hand, it is clear that the NCC is not an independent body that is answerable to a multi-party organ such as the Parliament. The NCC's members are appointed essentially by the president and the vice president of the country, the leaders of the executive branch of government. This appointment power weakens the NCC's ability to protect the freedom of the print and broadcast media given the members' reliance on the executive for their positions on the NCC.

A more detailed examination of the laws governing the operations of the NCC is set out elsewhere in this chapter.

2.6.2 The ombudsman

Part IX of the Burundian Constitution is headed 'the Ombudsman'. In terms of article 237, the role of the ombudsman is to receive and to investigate complaints about maladministration and violations of citizens' rights by public officials and the judiciary, and to make recommendations regarding such matters to the competent authorities. Other roles are to mediate between the administration and citizens and between executive ministers and the administration, and it plays an observation role in regard to the functioning of public administration. The performance of the ombudsman's functions is determined by law. In this regard, the law governing the ombudsman's functions is the Organisation and Functioning of the Ombudsman Act, 1/03 of 2010.

Article 238 requires the ombudsman to produce an annual report, which is submitted to the National Assembly and the Senate. Article 239 deals with the appointment of the ombudsman. Nominations are required to be made by three-quarters of the

members of the National Assembly. The nomination is required to be approved by two-thirds of the members of the Senate. The ombudsman is appointed for a single six-year term.

The provisions of Part IX require some explanation. First, it is clear that the ombudsman enjoys a greater level of independence from the executive than is the case with the NCC. This is because the nominations and appointment process takes place in the two houses of Parliament rather than at an executive level.

2.6.3 The judiciary

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

Part VIII of the Constitution of Burundi is headed 'Judicial Power'. Articles 205–209 set out generally applicable principles in regard to the exercise of judicial authority in Burundi.

In terms of article 205, judicial power in Burundi is vested in courts and tribunals. In terms of article 205, prosecutorial magistrates fulfil the roles and functions of the prosecuting authority. However, judges of local courts and police officers may fulfil the duties of the prosecuting authority under the supervision of the state prosecutor. In this regard, it is important to remember that Burundi, like many former Belgian colonies, follows a civil law system and not a common law system as is common with former British colonies. Civil law systems are characterised by a prosecutorial form of judicial processes in terms of which the magistrate or judge is actively and closely involved in the prosecutorial aspects of the case, including the investigation thereof, as well as the final adjudication thereof. Also, in terms of article 205, the structure and competence of the judiciary are determined in accordance with statute.

Article 206 provides that court proceedings are open to the public unless the judicial officer requires them to be held in camera on the basis that publicity might adversely affect public order or good morals.

Article 207 requires that reasons for judicial decisions be provided when the judgment is given in public.

Article 208 requires that the members of the judiciary reflect the population of Burundi in its entirety. Further, the procedures for recruitment and nomination of members of the judiciary must recognise the imperative to ensure a balanced representation of regions, ethnicities and genders.

Article 209 provides that the judiciary is impartial, and independent of legislative and executive power. In exercising judicial powers, a judge is bound only by the Constitution and the law.

Further, the president of the Republic, as head of state, guarantees the independence of the magistracy, with the assistance of the High Council of the Magistracy.

THE HIGH COUNCIL OF THE MAGISTRACY

Chapter 1 of Part VII is headed 'High Council of the Magistracy'. Articles 210–216 set out the powers and functions thereof. In brief these are:

- To ensure the provision of an excellent administration of justice and to guarantee the independence of magistrates in the exercise of their functions – article 210
- To oversee disciplinary matters involving magistrates – article 211
- To oversee the removal of magistrates on the basis only of professional misconduct or incompetence – article 212
- To advise the president of the Republic of Burundi and the Cabinet on:
  - Matters involving the development of policy regarding the administration of justice
  - Developments within the judicial domain and with regard to human rights
  - Strategies to combat impunity in general – article 213
- To advise the Minister of Justice on appointments of magistrates, and the Ministry of Justice in turn makes the necessary recommendations to the president of the Republic of Burundi who makes the appointments by decree – article 214
- To advise the Minister of Justice on appointments of all the judicial officers referred to in article 187(9) (except for judges of the Constitutional Court) and the Ministry of Justice in turn makes the necessary recommendations (with the approval of the Senate) to the president of the Republic of Burundi who makes the appointments – article 215 read with article 187(9)

- To provide an annual report on the status of justice in the country to the Cabinet, the National Assembly and the Senate – article 216.

Articles 217–220 deal with the composition and appointment of members of the High Council of the Magistracy. In brief these provide the following:

- The members thereof must have an ethnic, regional and gender balance and be composed of the following members:
  - Five members designated by the Cabinet
  - Three judges from the superior courts
  - Two magistrates from the prosecuting authority
  - Two judges from local courts
  - Three members from the legal profession who are in private practice.

  Further, except for the members designated by the Cabinet, all the other members must be chosen by their peers – article 217

- The members of the High Council of the Magistracy are appointed by the president of the Republic of Burundi after the nominations have been approved by the Senate – article 218.

- The High Council of the Magistracy is presided over by the president of the Republic of Burundi, assisted by the Minister of Justice – article 219.

- The structures and functioning of the High Council of the Magistracy and the procedures for determining its members are to be set out in a statute – article 220.

THE SUPREME COURT

- Chapter 2 of Part VIII of the Constitution of Burundi deals with the Supreme Court. The Supreme Court is the apex court of Burundi and is the final court of appeal on non-constitutional matters in terms of article 221.

- Article 222 deals with the appointment of judges to the Supreme Court. The process is that judges are recommended by the High Council of the Magistracy to the Ministry of Justice which makes the recommendations, after approval by the Senate, to the president of the Republic of Burundi for appointment.

- Article 223 provides that the Supreme Court has its own body of state prosecutors that function within the Supreme Court and who are appointed in the same manner as judges to the Supreme Court.

- The composition, structures and functioning of the Supreme Court are to be set out in a statute – article 224.

THE CONSTITUTIONAL COURT

- Chapter 3 of Part VIII of the Constitution of Burundi, deals with the Constitutional Court. The Constitutional Court is the only court in Burundi that may deal with constitutional matters and its decisions are not subject to appeal – articles 225, 230 and 231. Articles 228 and 229 (and a number of other cross-referenced articles) detail the specific powers of the Constitutional Court. These are, in brief:
  - Determining the constitutionality of laws and regulations. In this regard all statutes and regulations passed by the National Assembly and the Senate must be sent to the Constitutional Court for a determination of constitutionality prior to their promulgation
  - Ensuring adherence to the Constitution, including the Bill of Rights, by organs of state and other institutions
  - Interpreting the Constitution on the request of:
    - The president of the Republic of Burundi, the National Assembly, or the Senate, or
    - A quarter of the members of the National Assembly or of the Senate
  - Adjudicating upon the legitimacy of presidential and legislative elections and on referendums, and proclaiming the final results thereof
  - Swearing in the president and vice president of the Republic of Burundi and the members of the Cabinet
  - Declaring a vacancy in the Office of the President of the Republic
  - Consulting the president of the Republic of Burundi with regard to any proposed state of emergency – read with article 115
  - Determining whether or not there are sufficient grounds for moving the seats of the National Assembly and the Senate – read with article 157
  - Consulting with the president of the Republic of Burundi with regard to any proposed amendments to subordinate legislation – read with articles 160 and 161
  - Determining whether legislation is required to be passed by the Senate or the National Assembly – read with article 188
  - Determining whether or not an international treaty or agreement is in accordance with the Constitution or not after the agreement has been referred to it by the presidents of the Republic, the National

Assembly, the Senate (as the case may be), or by a quarter of the members of the National Assembly or of the Senate – read with article 296.

- Article 226 deals with the appointment of judges to the Constitutional Court. The Constitutional Court is made up of seven judges appointed for a single six-year term by the president, upon the approval of the Senate. The seven members are as follows:
  - Three members of the Constitutional Court must have been career magistrates.
  - All Constitutional Court judges must be eminent jurists appointed on the basis of their moral integrity, impartiality and independence.
  - The president and vice president of the Constitutional Court and the three career magistrates must take part in all hearings of the Constitutional Court (see also article 227).

- Article 227 provides that the minimum quorum for the Constitutional Court to sit is five judges (namely, the president and vice president of the Constitutional Court and the three career magistrates) and decisions of the court are taken by a simple majority. The president of the Constitutional Court has a casting vote where there is no majority.

- Article 232 provides that the organisation and functioning of the Constitutional Court must be provided for in legislation.

HIGH COURT OF JUSTICE

- The High Court of Justice is made up of the Supreme Court and the Constitutional Court acting together. The presiding officer of the High Court of Justice is the president of the Supreme Court and the prosecuting authority is represented by the national attorney general in all cases before the High Court of Justice – article 233.

- The High Court of Justice has very limited jurisdiction, namely: to try the president of the Republic with high treason and to try the presidents of the National Assembly, the Senate and the vice presidents of the Republic for crimes and delicts (that is, civil wrongs) committed while in office – article 234.

- Upon conviction, these public officials are stripped of their offices – article 235.

- While decisions of the High Court of Justice are not subject to appeal, it is

important to note that the decisions can be overturned by presidential pardon – article 234.

- Article 236 provides that the organisation and functioning of the High Court of Justice must be provided for in legislation.

Unfortunately, there is a key weakness with regard to the judiciary which needs to be understood by media practitioners working in Burundi. While lip service is paid to the concept of judicial independence, it is clear that, as the president of the Republic is also the president of the High Council of the Magistracy, this undermines judicial independence and the concept of the separation of powers, which is dealt with in more detail below.

2.7 Enforcing rights under the Constitution

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

Article 230 of the Constitution of Burundi provides that any person, whether natural or juristic (for example, a company or an organisation) may approach the Constitutional Court directly for a ruling on the constitutionality of laws or indirectly (for example, when before another court which will then refer the matter to the Constitutional Court).

Usually, one of the most effective ways in which rights are protected is through special protections granted to the provisions of a bill of rights when considering amendments thereto. Unfortunately, the Burundian Constitution does not contain any special protections to safeguard the Bill of Rights from constitutional amendments. Part XIV of the Constitution is headed 'Amendment of the Constitution'. Essentially, it provides that consideration of a constitutional amendment can only be undertaken by the president of the Republic after consultation with the Cabinet, the National Assembly or the Senate and with the concurrence of a majority of the members of those bodies – article 297. Note that in terms of article 299, there is a blanket prohibition on constitutional amendments that undermine national unity, cohesion among the people of Burundi, the secular nature of the state, reconciliation and democracy, and the territorial integrity of the Republic.

Article 300 deals with the process for amending the Constitution. Essentially, it requires a vote by four-fifths of the members of the National Assembly and by two-thirds of the members of the Senate. Article 298 also empowers the president but

does not require him to hold a referendum on the constitutional amendment in question.

2.8 The three branches of government and separation of powers

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

2.8.1 Branches of government

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

THE EXECUTIVE

Part V of the Constitution of Burundi deals with executive power in Burundi, and article 92 provides that the executive power of Burundi vests in the president of the Republic, the two vice presidents of the Republic and members of the Cabinet. Article 94 requires the members of the executive to declare their financial interests in writing.

Chapter 1 of Part V deals with the Office of the President. In terms of article 95, the president must embody national unity, respect for the Constitution and must ensure the functionality of the state and its institutions. The Office of the President guarantees national independence, territorial integrity and adherence to international treaties and agreements.

The criteria to stand for election as president are set out in article 97 and they include: being qualified to vote in terms of the electoral legislation; being a Burundian national by birth; being at least 35 years old at the time of the election; being a resident in Burundi when becoming a candidate; must be in a position to exercise all of his or her civil and political rights; and must adhere to the Constitution and the Charter of National Unity (a precursor to the current Constitution). Further, a presidential candidate cannot have been convicted of a crime or of a civil offence. Note, however, that the electoral law does provide for the restoration of a person's eligibility to stand as a candidate for presidential election once his or her sentence has been served.

The process of electing the president is set out in articles 98–103. In brief, the key aspects thereof are as follows:

- A candidate may represent a political party or be independent – article 98.

- A candidate must have the support of at least 200 people representing different ethnic groups and being of different genders – article 99.

- A successful candidate must cease to hold all other offices, whether public or private, upon the announcement of the election results – articles 100 and 101.

- Elections are held in two rounds. The successful candidate is the person who obtains an absolute majority of all votes cast. Where this does not take place after the first round of voting, a second round of voting must take place within 15 days. In the second round of voting, only the two candidates who secured the highest number of votes in round one will participate. Note that there are provisions for the candidate/s who came third and/or fourth to contest round two in the event of one or more of the candidates securing the highest number of votes in round one declining to participate in round two. In round two, the candidate who secures the highest number of votes is declared the winner – article 102.

- Presidential elections must take place before the expiration of the term of office of the sitting president, but the elections must be scheduled so that they do not take place more than two months or less than one month before the expiration of the term of office of the sitting president – article 103.

Article 96 has proved to be extremely controversial in Burundi. It requires that the president is elected as a result of a vote based on universal suffrage and that the president serves for a five-year term renewable once. The Constitutional Court has interpreted article 96 as not applying to the sitting president's initial term in office as that did not result from an election. Consequently, the president is currently serving his third term in office, which has resulted in a great deal of political instability arising from ongoing political protests at the president's refusal to leave office.

The president is required to take an oath of office before the Constitutional Court and Parliament. The oath essentially provides that the president undertakes to uphold the Constitution, the Charter of National Unity and the laws of the Republic, to defend the interests of the nation, and to preserve national unity, peace and social justice. The president also undertakes to combat ideas of genocide, exclusion and to promote and defend rights and freedoms – article 106.

Articles 107–115 set out the powers of the president. In brief, these are the power to:

- Make decrees, except when a sitting president is also a candidate for an upcoming

presidential election (article 104). Ordinarily, such decrees are also signed by one of the vice presidents and the minister concerned.

However, in certain circumstances article 107 empowers the president to enact decrees without such additional signatures (and note that the president may not delegate such decree-making powers). These circumstances include:

- Making a declaration of war after consulting the Cabinet, the National Assembly and the Senate – article 110
- Making presidential pardons after consultation with both vice presidents of the Republic and the High Council of the Magistracy – article 113
- Conferring national orders and decorations of the Republic – article 114
- Declaring a state of emergency after consultation with the Cabinet, the National Assembly, the Senate, the National Security Council and the Constitutional Court – article 115
- Signing into law statutes passed by Parliament after the Constitutional Court has verified the constitutionality thereof – article 197
- Subjecting any proposed law (that is, statute, constitutional amendment or any other) to a national referendum after consulting with the two vice presidents of the Republic and the presidents of the National Assembly and the Senate – article 198
- Initiating any proposed constitutional amendment after consultation with the Cabinet and either the National Assembly or the Senate provided that a majority of the sitting members of either of those bodies was present – article 297
- Subjecting any proposed constitutional amendment to a national referendum – article 298. Note that this article requires some explanation as it appears to contradict the provisions of article 198 in relation to the consultation required. However, it is clear that the president can elect between two different processes in relation to subjecting constitutional amendments to national referendums, namely that provided for in article 198 (which requires consultation with the vice presidents and the president of the National Assembly and the Senate) or that provided for in article 298 in terms of which the president is entitled to act alone
- Obviously, in regard to the president's powers outlined above, the president has those particular powers (for example, presidential pardons, etc.) independently of his power in terms of article 107 to make decrees thereon.

- Appoint and dismiss members of the Cabinet – article 108

- Preside over meetings of the Cabinet – article 109. Note that this function can be delegated from time to time to the first vice president or, failing his or her presence, to the second vice president in terms of article 125

- Act as commander-in-chief of the armed forces – article 110

- Appoint high-ranking civil and military officials subject to approval by the Senate – article 111

- Appoint and recall ambassadors and special envoys to foreign states and to receive diplomatic credentials by foreign ambassadors and special envoys – article 112.

Except in respect of these powers outlined above, any administrative action taken by the president can be challenged before a competent court in terms of article 119.

Article 116 deals with the impeachment and removal of the president. There are three grounds for impeaching a president: grave misconduct; abuse of power; or corruption. A president can be removed by a resolution of two-thirds of the members of the National Assembly and of the Senate in a joint sitting.

Article 117 provides that, notwithstanding the impeachment and removal of a president, a president enjoys on-going immunity from criminal prosecution for any acts committed while in office save for the crime of high treason. High treason is defined as any violation of the Constitution or of the law in circumstances in which the president's conduct constitutes a deliberate violation thereof, which seriously compromises national unity, peace, social justice, national development, or human rights, the integrity of the Republic or national independence and sovereignty. Only the High Court of Justice has jurisdiction to try the president for high treason, and the only body capable of instituting charges of high treason against the president are two-thirds of the members of the National Assembly and the Senate in a joint sitting and with a secret ballot. The investigation of alleged high treason committed by the president must be conducted by at least three state prosecutors and must be presided over by the attorney general of the Republic. Once an investigation into high treason by the president has begun, article 118 provides that the president is prohibited from dissolving Parliament for any reason whatsoever and Parliament is to continue until the judicial process has been completed.

Article 121 provides that where the president, for whatever reason, has permanently vacated his or her post, the president of the National Assembly or, failing him, the

vice presidents of the Republic and the Cabinet, assume the functions of the president. However, this can happen only after the Constitutional Court has definitively declared that there is such a permanent vacancy. The acting president may not form a new government. Further, the acting president may deal only with matters pending at the time that the vacancy arose and may not consider new matters until the formation of a new government. New presidential elections to fill an existing vacancy must take place no longer than three months after and no sooner than one month after the vacancy has occurred, unless the Constitutional Court determines otherwise.

The role of the first vice president is to coordinate the political and administrative affairs of the government, while the role of the second vice president is to coordinate the economic and social affairs of the government in terms of article 122 of the Constitution. In terms of article 126, each of the vice presidents may issue decrees in relation to their roles and functions.

The vice presidents are appointed from among the members of Parliament and are appointed by the president after confirmation by the majority of the members of the National Assembly and of the Senate, sitting separately, in terms of article 123. Interestingly, article 124 provides that the vice presidents must belong to different ethnic groups and political parties. In terms of article 127, both vice presidents are required to take an oath of office, which is similar to the oath taken by the president, dealt with in more detail above.

Articles 129–137 deal with the Cabinet. As Burundi has also suffered an ethnic genocide, it is important to note that article 129 requires that, of the ministers and vice ministers, 60% must be Hutu, 40% Tutsi and 30% women. Interestingly, article 129 also requires that representatives of political parties that obtained more than 20% electoral support in the previous election be part of the Cabinet, on the basis of proportional representation, if they so wish. Therefore, the constitution makes provision for, essentially, a multi-party Cabinet.

Article 131 provides that the Cabinet is responsible for developing government policy. Decisions of the Cabinet are implemented by way of ministerial regulations which give effect to presidential decrees. The Cabinet is routinely involved in making nominations for administrative posts in the public sector in terms of article 135, taking into account ethnic, regional, political and gender considerations.

THE LEGISLATURE

Legislative or law-making power in Burundi vests in Parliament which, in terms of article 147 of the Burundian Constitution, consists of the National Assembly and the

Senate. In terms of article 164, the National Assembly consists of at least 100 elected members, of whom 60% must be Hutu, 40% must be Tutsi and at least 30% must be women. Also, at least three members must be from the Twa community. Members serve for a five-year period. The process for the election of members of the National Assembly shall be direct, by universal adult suffrage. Elections are carried out under the auspices of the National Electoral Commission. The quorum for the National Assembly is two-thirds of the elected members.

Articles 179 and 180 deal with the Senate. Members of Senate must be Burundian nationals who are at least 35 years old and 30% of the senators are required to be women. In terms of article 180, the Senate is composed of:

- Two delegates from each province (there are 17 provinces in all)
- Three representatives of the Twa community
- All former presidents.

The quorum for the Senate is two-thirds of the members.

Article 149 of the Burundian Constitution is interesting in that it provides that members of the National Assembly and of the Senate are entitled to vote in accordance with their personal convictions and not in accordance with party political dictates. However, it is important to note that the separation of law-making powers between the legislature and the executive is not well developed in the Burundian Constitution given the extensive law-making powers accorded to the president via his ability to make presidential decrees in terms of article 107 and as more fully set out above.

THE JUDICIARY

Judicial power, as discussed previously in this chapter, vests in the courts. Essentially, the role of the judiciary is to interpret the law and to adjudicate legal disputes in accordance with the law. However, it is important to note that Burundi's courts do not have a reputation for independence and are seen to be subject to interference by both the executive and the legislature.[22]

2.8.2 Separation of powers

It is important in a functioning democracy to divide governmental power between different organs of the state in order to guard against the centralisation of power, which may lead to abuses of power. This is known as the separation of powers doctrine. The aim, as the Constitution of Burundi has done, is to separate the

functions of the three branches of government – the executive, the legislature and the judiciary – so that no single branch is able to operate alone, assume complete state control and amass centralised power. While each branch performs a number of different functions, each also plays a 'watchdog' role in respect of the other. This helps to ensure that public power is exercised in a manner that is accountable to the general public and in accordance with the Constitution.

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

There are a number of respects in which the Constitution of Burundi is weak. If these provisions were strengthened, there would be specific benefits for Burundi's media and democratic credentials more broadly.

2.9.1 Remove internal constitutional qualifiers to certain rights

The Constitution of Burundi, as has been set out above, makes provision for certain rights to be subject to 'internal' limitations – that is, the provision dealing with a right contains its own limitations clause, setting out ways in which a government can legitimately limit the ambit of the right. These internal limitations occur within a number of articles on rights in the Constitution of Burundi. They deal specifically and only with the limitation or qualification of the particular right that is dealt with in that article. As has been more fully discussed above, the rights to freedom of association and to form trade unions contain such internal limitations. In other words, the article that contains the right also sets out the parameters or limitations allowable in respect of that right.

The rights contained in the provisions dealing with fundamental human rights and freedoms, set out in Part II of the Constitution of Burundi, would be strengthened if the rights were subject to a single generally applicable limitations clause rather than each having their own limitations clause. Indeed, such a general limitations clause already exists in article 47 of the Burundian Constitution and so it is not clear why the internal limitations clauses are, in fact, necessary.

2.9.2 Clarifying what rights are non-derogable during a state of emergency or for reasons relating to state security

The Burundian Constitution at article 115 empowers the president to declare a state of emergency. In so doing, a number of rights that protect the media can be derogated or departed from although these are not specified. Article 115 is extremely broad and allows the president to 'take any measures necessary in the circumstances' during a

state of emergency. Similarly, article 42 allows individuals to be subjected to 'security measures' in particular for 'reasons of public order and state security' although again, these are not specified. The Constitution is entirely silent on whether or not there are any rights at all that are non-derogable during a state of emergency or security measures. In our view, providing that certain rights are non-derogable during a state of emergency or in respect of security measures would provide additional safeguards to the exercise and protection of a number of important civil rights.

2.9.3 Independent broadcasting regulator and public broadcaster

There is no doubt that the broadcasting sector would be greatly strengthened if the Burundian Constitution gave constitutional protection for a truly independent broadcasting regulator and public broadcaster. Given the importance of both of these institutions for ensuring access to news and information by the public, it is suggested that such amendments to the Constitution would be in the public interest and would serve to strengthen both the media and democracy more generally in Burundi.

2.9.4 Strengthen the independence of the judiciary

As has been set out above, the executive, particularly the president, is extremely involved in the judiciary and in particular sits as president of the High Council of the Magistracy. In our view, the structural independence and appointments procedures of judicial institutions are not provided for sufficiently in the Constitution and this undermines their independence.

2.9.5 Strengthen the separation of powers between the different branches of government

As has been set out above, the executive, particularly the president, has law-making powers through his power to make presidential decrees. This undermines the concept of the separation of powers between the executive and the legislature as the legislature ought to be the law-making body and the executive the implementation body. It is clear that the most powerful institution in the Burundian government is the Office of the President and that this is not sufficiently separated from either judicial powers or law-making powers that ought properly to vest in Parliament.

3 THE MEDIA AND LEGISLATION

In this section you will learn:

- ❑ What legislation is and how it comes into being, and what reference to 'the Minister' means in Burundian laws

- ❑ Legislation governing the print media (note in many instances this includes online media too)
- ❑ Legislation governing the making of films
- ❑ Legislation governing the broadcasting media generally
- ❑ Legislation governing the state broadcast media
- ❑ Legislation governing broadcasting signal distribution
- ❑ Legislation governing the state newsgathering agency
- ❑ Legislation that threatens a journalist's duty to protect sources
- ❑ Legislation that prohibits the publication of certain kinds of information
- ❑ Legislation that specifically assists the media in performing its functions

3.1 Legislation: An introduction

3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed by Parliament, the legislative authority. As we know, legislative authority in Burundi vests in Parliament, which is made up of the National Assembly and the Senate. However, it is also important to note that laws in the form of presidential decrees can also be proclaimed by the president. Again, this is an unfortunate blurring of the separation of powers doctrine.

As a general rule, the National Assembly and the Senate are ordinarily involved in passing legislation other than presidential decrees. There are detailed rules in the Constitution of Burundi which set out the different law-making processes that apply to different types of legislation. It is important for journalists and others in the media to be aware that the Constitution of Burundi requires different types of legislation to be passed in accordance with particular procedures. The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the Constitution of Burundi, there are three kinds of legislation, each of which has particular procedures and/or rules applicable to it. These are:

- Presidential decrees – the procedures and/or applicable rules are set out in article 107 of the Constitution

- Ordinary legislation – the procedures and/or applicable rules are set out in articles 175 and 186, respectively, of the Constitution. Essentially, laws must be passed by two-thirds of the members present in both the National Assembly and the Senate, sitting separately

- Legislation to change the Constitution – the procedures and/or applicable rules are set out in articles 297 and 300 of the Constitution.

3.1.2 The difference between a bill and an act

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

If a bill is passed by Parliament in accordance with the various applicable procedures required for different types of bills, as set out above, it becomes an act once it is assented to by the president, in terms of article 197 of the Constitution of Burundi (which he is required to do within 30 days).

Also be aware that some laws governing certain media-related aspects came into force prior to the coming into effect of the 2005 Constitution of Burundi. As they were passed by the governing authority of the time and have yet to be repealed, they are still good law.

3.1.3 References to various ministers in Burundian legislation

There are obviously a number of references to particular ministers in the Burundian statutes, decrees, etc. Currently the relevant minister in charge of media- and broadcasting-related matters is the Minister of Posts, Information Technology, Communication and Media. Consequently, unless otherwise specified, any reference to a minister in this chapter is to the Minister of Posts, Information Technology, Communication and Media.

3.2 Legislation governing the print media

3.2.1 Legislation that regulates the print media generally

Generally, the print media in Burundi is regulated in terms of:

- The National Council of Communication Act (NCC), Act 1/18 of 2007 (NCC Act)
- The Press Act, Act 1/15 of 2015 (2015 Press Act).

3.2.2 Establishment of the NCC

Article 1 of the NCC Act establishes the NCC as an independent administrative body. Article 14 constitutes the 15-member NCC, which performs the functions of the NCC under the NCC Act.

3.2.3 Main functions of the NCC

In terms of article 1 of the NCC Act, the NCC's overall function is to oversee freedom of the print media subject to the law, public order and good morals.

Articles 4–13 set out a number of the NCC's specific functions, and these include to:

- Promote a pluralistic and diverse communications sector – article 4
- Protect public and private media from interference in its distribution of information – article 6
- Ensure access to information – article 6
- Ensure that media outlets function in accordance with their undertakings – article 6
- Ensure that the media has equitable access to written content and to the internet – article 7
- Provide for the accreditation of print media journalists – article 8
- Provide a consultative role (presumably for government as well as other relevant institutions) in respect of – article 9:
  - The promotion of national culture and values
  - The training of journalists
- Make recommendations to the minister with regard to legislation pertaining to the media in general, ethics and codes of conduct for journalists – article 10, particularly:
  - On media outlets active on the internet
  - Newspapers and periodical publications (such as magazines) whether public or private
  - Journalists
- Hold workshops for accredited journalists – article 10
- Impose sanctions upon media outlets in cases of dereliction of duties – article 12
- Arbitrate conflicts between media houses, which decisions are subject to review by a court – article 13.

In terms of article 5 of the 2015 Press Act, in order to practise their profession all journalists have to be in possession of a press card issued by the NCC. Article 6 sets out the requirements for such a press card and they include a diploma in journalism or a certificate following a two-year internship in a media enterprise.

In terms of article 8 of the 2015 Press Act, foreign journalists are also required to be accredited by the NCC.

The NCC must give reasons for refusing to accredit a foreign journalist or to issue a press card to a local journalist in terms of article 9 of the 2015 Press Act.

3.2.4 Appointment of NCC board members

In terms of article 15 of the NCC Act, the 15 members of the NCC (who hold office for a renewable period of three years, in terms of article 18) are appointed by the president, after consultation with both vice presidents, from within the communications and media sectors.

Members are appointed on the basis of expertise, experience and a commitment to communication, and freedom of the press, expression and opinion – article 14.

3.2.5 Funding for the NCC

Article 27 of the NCC Act provides that the funding for the NCC is derived from moneys appropriated by Parliament – in other words, funding that is specified annually in the national budget.

3.2.6 Making print media-related regulations

The NCC Act is entirely silent on the making of regulations and it seems that the NCC does not have this power.

3.2.7 Rights and duties of journalists and media outlets

Chapter IV of the 2015 Press Act deals with the rights and duties of journalists and media outlets. Similarly, Chapter VI also deals with the right of reply, correction and damages. In brief these provide the following:

- *Rights of journalists*
  - Article 10 gives journalists the right to have access to sources of information, to investigate and comment freely on every facet of

public life. However, in doing so they must respect the laws and the rights and liberties of others.
- Article 11 gives journalists the right to security of their person and of their equipment within Burundi.
- Article 12 gives a journalist the right to follow his or her conscience in refusing to comply with an employer's contractual requirements without losing any employment benefits.
- Article 13 provides that a journalist has the right to join a trade union or a professional association of his or her choice.
- Article 14 entitles a journalist to collaborate with other press organisations but this is subject to the terms of his or her employment contract.
- Article 15 entitles a journalist to access government facilities as required to perform his or her professional functions.
- Articles 16 recognises and guarantees the protection of a journalist's sources of information.

- *Duties of journalists*
  - Article 17 provides that, in light of professional ethical requirements, a journalist is required to provide balanced information and sources of information must be rigorously verified.

- *Rights and duties of media house*
  - Article 18 requires a media house to adhere to the provisions of its memorandum of incorporation and makes it liable for any violations of the 2015 Press Act.
  - Article 19 provides that the state must assist media houses which contribute to the development of the right to information.
  - Article 20 exempts media houses from paying value added tax on the purchase of material and equipment.
  - Article 21 allows Burundian media outlets to access state subsidies as well as donations from private sources of funding.
  - Article 22 prohibits media outlets from making use of illicit sources of funds and requires all media outlets to submit annual financial statements to the NCC by 31 March.
  - Articles 41 and 42 of the 2015 Press Act provide that a publication, press agency or website must have an editor. The editor must be a natural adult person fully capable of exercising his or her civil and political rights, not subject to any immunity, and must meet the requirements for a practising journalist as set out in article 6 of the 2015 Press Act dealt with above.

- *Right of reply*
  - Articles 45 and 46 grant any person the right to reply to information published about him, her or it in that same publication.
  - Article 47 contains certain requirements for making a request for a right of reply and these include giving sufficient particulars on the publication concerned.
  - Article 49 provides that a media outlet may refuse to grant a person the right of reply in certain circumstances, namely: where it is injurious or contrary to the law or good morals; where a third party is unnecessarily implicated; the complaint does not relate to the publication; the complaint is in a language different to that of the publication; and where the complaint itself is longer than the original article.
  - Articles 48 and 50 contain a number of requirements on exactly how the right to reply is to be provided for in a publication, programme or website, including with regard to the timing of the reply. Article 50 gives the right of recourse to the NCC should a complainant be unhappy in regard to the exercise of his or her right to reply.

- *Right to correction*
  - Article 51 grants the right to correct factually inaccurate information published only to a public authority. Article 51 provides that a media outlet must correct the information free of charge in the next publication.

- *Damages*
  - Article 52 provides that a media outlet is legally responsible for any damage suffered by any person as a result of its publication.

3.2.8 Requirements for publication

Chapter V of the 2015 Press Act contains a number of requirements for publications. In brief, these are as follows:

- Article 26 requires that before any publication is published for the first time, including on a website, a copy thereof has to be submitted to both the NCC and to the prosecutor general of Burundi, together with required information signed-off by the editor such as the name, address, editor, languages, etc. of the publication.

- Article 29 requires a copy of the first edition of every publication to be provided to the national archives.

It is important to note that in terms of articles 54 and 55, a failure to comply with an obligation under the 2015 Press Act can result in the NCC issuing a warning to the media outlet or journalist concerned. Repeat violations may result in the publication being suspended or entirely prevented from publishing further; however, such a decision must be justified. Article 53 of the Press Act is interesting in that it makes provision that both the journalist and the media outlet is responsible for anything published in one of its publications. However, printers are not liable unless they fail to ensure that the editor's details appear in the publication. Article 55 provides that NCC decisions are subject to judicial review.

3.3 Legislation governing the making of films

The making of films is governed by the Press Act, Act 1/15 of 2015 (2015 Press Act). Article 43 of the 2015 Press Act provides that the NCC is responsible for authorising the making of films in Burundi. No film may be made in Burundi without such authorisation. An application to the NCC for authorisation to make the film in Burundi must contain:

- The identity of the film's director and the production house responsible for the making of the film
- The film script together with a statement regarding the subject matter and object of the film
- Proof that the film is being made by professional filmmakers
- Technical information regarding the equipment to be used.

In terms of article 44 of the 2015 Press Act, the NCC must give a decision on an application to make a film in Burundi within two months, failing which the authorisation is deemed to have been granted. A decision to refuse authorisation must be justified. The decision by the NCC is subject to judicial review.

3.4 Legislation governing the broadcast media generally

3.4.1 Legislation that regulates broadcasting generally

Generally, broadcasting in Burundi is regulated in terms of:

- The National Council of Communication Act (NCC) Act 1/18 of 2007 (NCC Act)
- The Press Act, Act 1/15 of 2015 (2015 Press Act)

- Telecommunications Regulatory Agency Decree 100/112 of 2012 (TRA Decree).

3.4.2 Establishment of the NCC

Article 1 of the NCC Act establishes the NCC as an independent administrative body. Article 14 constitutes the 15-member NCC, which performs the functions given to it under the NCC Act.

3.4.3 Main functions of the NCC

In terms of article 1 of the NCC Act, the NCC's overall function is to oversee freedom of broadcasting subject to the law, public order and good morals.

Articles 4–13 of the NCC Act set out a number of the NCC's specific functions, and these include to:

- Promote a pluralistic and diverse communications sector – article 4
- Protect public and private media from interference in its distribution of information – article 6
- Ensure access to information – article 6
- Ensure that media outlets function in accordance with their undertakings – article 6
- Ensure that the media has equitable access to media-related infrastructure particularly with regard to signal distribution, as well as to audio-visual content and to the internet – article 7
- Provide for the accreditation of broadcasting journalists – article 8
- Provide a consultative role (presumably for government as well as other relevant institutions) in respect of – article 9:
  - The quality and content of the broadcast media
  - The promotion of national culture and values
  - The training of journalists
- Make recommendations to the minister with regard to legislation pertaining to the media in general, ethics and codes of conduct for journalists – article 10, particularly:

  - On media outlets active on the internet
  - Public and private broadcasting enterprises
  - Journalists

- Hold workshops for accredited journalists – article 10

- Impose sanctions upon broadcasters in cases of dereliction of duties on their part – article 12

- Arbitrate conflicts between broadcasters, which decisions are subject to review by a court – article 13.

In term of the 2015 Press Act, the NCC is given additional functions. These include the power to license broadcasters in terms of article 34.

3.4.4 Appointment of NCC board members

In terms of article 15 of the NCC Act, the 15 members of the NCC (who hold office for a renewable period of three years, in terms of article 18) are appointed by the president, after consultation with both vice presidents, from within the communications and media sectors. Article 14 sets out criteria for members, and members are appointed on the basis of expertise, experience and a commitment to communication, and freedom of the press, expression and opinion.

3.4.5 Funding for the NCC

Article 27 of the NCC Act provides that the funding for the NCC is derived from moneys appropriated by Parliament – in other words, funding that is specified annually in the national budget.

3.4.6 Making broadcasting-related regulations

The NCC Act is entirely silent on the making of regulations and it seems that the NCC does not have this power.

3.4.7 Licensing regime for broadcasters in Burundi

BROADCASTING LICENCE REQUIREMENT

In terms of article 34 of the 2015 Press Act, a licence issued by the NCC is required in order to provide a broadcasting service.

CATEGORIES OF BROADCASTING LICENCES

We were unable to find any statutory reference to categories of broadcasting licence other than the recognition that broadcasting includes both radio and television.

Article 39 of the 2015 Press Act makes it clear that broadcasting licences are given for an open-ended period.

BROADCASTING LICENSING PROCESS

Articles 35–37 of the 2015 Press Act set out the broadcasting licensing process. Article 37 provides that the NCC has to give a decision on a broadcast licence application within two months of the receipt of the application.

Article 35 sets out the information that must be provided by a broadcasting licence applicant and this includes:

- The identity of the owner
- The founding documentation of the company including its memorandum of incorporation and similar documentation
- The shareholding
- Details of the management and directors
- Projected income and expenses
- Sources and amount of funding required.

Article 35 sets out the evaluation criteria used by the NCC in assessing whether or not to grant an applicant a broadcast licence. These are:

- The public interest
- Whether or not the broadcasting service would contribute to the diversity of views available to the public
- The experience and expertise of the applicant in relation to broadcasting.

Article 37 deals with the information that is required by the NCC on the actual

broadcasting service to be provided. This information must include:

- The hours of broadcasting and the nature of the broadcasting service to be provided
- The coverage area
- The technical equipment that is to be used in providing the service
- The time that is to be given to advertisements and sponsored programming as part of a broadcasting service
- The type of programming to be provided
- Whether or not educational and children's programming is to be provided.

It is critical to note the provisions of article 40 of the 2015 Press Act, which give the minister the power to approach a court for an order revoking a licence issued by the NCC, where the minister is of the view that the granting of the licence was contrary to law or the public interest.

FREQUENCY SPECTRUM LICENSING

It is clear from the provisions of article 38 of the 2015 Press Act that frequency spectrum licensing for broadcasters is carried out by the Telecommunications Regulatory Agency (TRA) established under the TRA Decree, in consultation with the NCC.

3.4.8 Responsibilities of broadcasters under the NCC Act

Chapters IV–VI of the 2015 Press Act deal with the rights and duties of journalists (including broadcast journalists) and media outlets (including broadcasters). They also deal with the right of reply, correction and damages. In brief these provide:

- *Rights of journalists*
  - Article 10 gives journalists the right to have access to sources of information, to investigate and comment freely on every facet of public life. However, in doing so they must respect the laws and the rights and liberties of others.
  - Article 11 gives journalists the right to security of their person and of their equipment within Burundi.

- Article 12 gives a journalist the right to follow his or her conscience in refusing to comply with an employer's contractual requirements without losing any employment benefits.
- Article 13 provides that a journalist has the right to join a trade union or a professional association of his or her choice.
- Article 14 entitles a journalist to collaborate with other press organisations but this is subject to the terms of his or her employment contract.
- Article 15 entitles a journalist to access government facilities as required to perform his or her professional functions.
- Articles 16 recognises and guarantees the protection of a journalist's sources of information.

- *Duties of journalists*
  - Article 17 provides that, in light of professional ethical requirements, a journalist is required to provide balanced information and sources of information must be rigorously verified.

- *Rights and duties of media outlets*
  - Article 18 requires a media outlet to adhere to the provisions of its memorandum of incorporation and makes it liable for any violations of the 2015 Press Act.
  - Article 19 provides that the state must assist media organs which contribute to the development of the right to information.
  - Article 20 exempts media outlets from paying value added tax on the purchase of material and equipment.
  - Article 21 allows Burundian media outlets to access state subsidies as well as donations from private sources of funding.
  - Article 22 prohibits media outlets from making use of illicit sources of funds and requires all media outlets to submit annual financial statements to the NCC by 31 March.
  - Articles 41 and 42 of the 2015 Press Act provide that a radio or television broadcasting service must have an editor. The editor must be a natural adult person fully capable of exercising his or her civil and political rights, not subject to any immunity, and must meet the requirements for a practising journalist as set out in article 6 of the 2015 Press Act dealt with above.

- *Right of reply*
  - Articles 45 and 46 grant any person the right to reply to information broadcast about him, her or it in that same programme.

- Article 47 contains certain requirements for making a request for a right of reply and these include giving sufficient particulars on the particular broadcast concerned.
- Article 49 provides that a media outlet may refuse to grant a person the right of reply in certain circumstances, namely: where it is injurious or contrary to the law or good morals; where a third party is unnecessarily implicated; the complaint does not relate to the broadcast; the complaint is in a language different to that of the broadcast; and where the complaint itself is longer than the original programme.
- Articles 48 and 50 contain a number of requirements on exactly how the right to reply is to be provided for in a programme, including with regard to the timing of the reply. Article 50 gives the right of recourse to the NCC should a complainant be unhappy in regard to the exercise of his or her right to reply.

- *Right to correction*
  - Article 51 grants the right to correct factually inaccurate information broadcast only to a public authority. Article 51 provides that a media outlet must correct the information free of charge in the next broadcast.

- *Damages*
  - Article 52 provides a media outlet is legally responsible for any damage suffered by any person as a result of its broadcasts.

It is important to note that in terms of articles 54 and 55, a failure to comply with an obligation under the 2015 Press Act can result in the NCC issuing a warning to the broadcaster or journalist concerned. Repeat violations may result in the broadcasting service being suspended or entirely prevented from broadcasting further; however, such a decision must be justified. Article 53 of the 2015 Press Act is interesting in that it makes provision that both the journalist and the broadcaster is responsible for anything broadcast in one of its programmes. Article 55 provides that NCC decisions are subject to judicial review.

3.4.9 Is the NCC an independent regulator?

Despite the provisions of article 1 of the NCC Act, which specifically state that the NCC is an 'independent' administrative body, the NCC cannot be said to be independent of the executive at all. It is appointed entirely by the president in consultation with the vice presidents and no multi-party body has any say in the

process. Essentially, it operates as an arm of the government. Appointments ought to be made by the president on the recommendation of the National Assembly.

Further, the National Assembly must require public nominations, and must conduct a public interview and short-listing process. Lastly, it is disappointing that the relevant statutes are silent about who makes broadcasting regulations. The NCC ought to be able to make broadcasting regulations on its own without any ministerial intervention.

3.5 Legislation governing the state broadcast media

The state broadcaster, *Radio Television National de Burundi* (RTNB), is governed by a presidential decree, the Creation of the *Radio Television National de Burundi* Decree, 100/11 of 1986 (RTNB Decree).

3.5.1 Establishment of the RTNB

Article 1 of the RTNB Decree establishes the RTNB as a public administrative institution and as a juristic person, and that with regard to its internal management processes, it is autonomous. However, as will be seen immediately below, this is not in fact the case as the RTNB actually operates under the very clear direction of the minister.

3.5.2 The RTNB's mandate

Article 4 of the RTNB Decree sets out the mission of the RTNB. In brief, this is to:

- Inform, educate and entertain the people of Burundi
- Promote a sense of national culture
- Ensure a diversity of high-quality programming that elevates the status of Burundi as a nation
- Broadcast programming that is in line with governmental objectives with regard to education, the economy and society
- Produce programming for sale or distribution to other broadcasters
- Enter into advertising contracts subject to the approval of the minister
- Ensure the appropriate broadcasting-related training of staff members

- Develop film and video production capacity.

3.5.3 Appointment of the RTNB Board

The RTNB is controlled by a board of directors. In terms of article 5 of the RTNB Decree, the RTNB Board is made up of seven directors. In terms of article 6, the directors are appointed by the president on the advice of the minister.

In terms of article 7 of the RTNB Decree, the directors hold office for a renewable period of three years. It is important to note the effect of the 1989 Amendment Decree (Decree 100/072 of 1989) which repealed the provisions of the RTNB Decree setting out the criteria for RTNB board membership. As a result of the repeal, the president now has unfettered discretion as to who is appointed.

3.5.4 Funding for the RTNB

Article 22 of the RTNB Decree sets out the allowable sources of funding for the RTNB. These are:

- State subsidies
- Advertising revenues
- Revenues from consulting
- Revenues from public events
- Any other forms of revenues
- Taxes or levies that may be instituted upon users. Note the RTNB Decree does not provide for a television licence fee as such
- Donations.

3.5.5 The RTNB: Public or state broadcaster?

It is clear that the RTNB is a state as opposed to a public broadcaster. Indeed, its very mission includes providing programming that supports government objectives and, in terms of article 28 of the RTNB Decree, the RTNB itself is openly stated to be 'under the authority of the minister'.

Further, the entire board is appointed directly by the president with no involvement of a multi-party body such as Parliament. It is also important to note that the RTNB Board, although it is hand-picked by the executive, is not entitled to appoint the director general of the RTNB. The director general is, too, appointed directly by the president in terms of article 15 of the RTNB Decree. Indeed, in terms of articles 28–30 of the RTNB Decree, the minister is empowered to cancel, veto, revoke or

annul any decision taken by the RTNB Board. The RTNB's quarterly reports are provided to the minister in terms of article 28 of the RTNB Decree. Again, if the RTNB was a public broadcaster, it would be appropriate for it to report to a multi-party body such as the National Assembly.

3.5.6 Weaknesses in the RTNB Decree which should be amended

A number of important weaknesses ought to be addressed through legislative amendments.

- First, the RTNB ought to be an independent public broadcaster, as opposed to a state broadcaster subject to the authority of the minister.

- Appointments of RTNB board members ought to be made by the president on the recommendation of the National Assembly following a public nominations, interview and short-listing process.

- The RTNB Board ought to enjoy functional independence with regard to the operations of the RTNB, and its decision-making ought to be subject only to judicial review, as opposed to being able to be set aside at the discretion of the minister.

- The RTNB Board ought to be able to appoint and dismiss the director general of the RTNB without any involvement of the minister.

- The RTNB Decree ought to be amended to provide for the above and to provide for:
    - It being a public as opposed to a state broadcaster
    - Editorial and functional independence of the RTNB from both political and commercial interference
    - A mandate that focuses entirely on meeting the needs of the public as opposed to promoting the objectives of the government
    - The RTNB's quarterly reports, which are currently provided to the minister in terms of article 28 of the RTNB Decree, ought to be made directly to the National Assembly.

3.6 Legislation that governs broadcasting signal distribution

Broadcasting signal distribution is governed by the:

- Telecommunications Decree of 1997 (Telecommunications Decree)

- Telecommunications Regulatory Agency Decree 100/112 of 2012 (TRA Decree).

Signal distribution is the physical processes of delivering the signal from a broadcasting studio to the audience. In Burundi, signal distribution is dealt with as a telecommunications matter as it is defined as being included in the definition of telecommunications in article 1 of the Telecommunications Decree. It is clear from the provisions of article 3 of the Telecommunications Decree that the Burundian state has an effective monopoly in respect of telecommunications infrastructure installation in Burundi, including signal distribution towers and the like. However, article 3 does enable the state to permit other persons to do so too, on a sub-contracting basis. What is less clear is whether or not a private person may apply to the TRA for a licence to engage in such telecommunication infrastructure development and provisioning.

3.7 Legislation governing the state newsgathering agency

The state newsgathering agency is the *Agence Burundaise de Presse* (ABP) which is governed by Decree 100/092 of 1990 (ABP Decree).

3.7.1 Establishment of the Burundi Press Agency

Article 1 of the ABP Decree states that the ABP is a state administrative body with juristic personality and which is autonomous. However, it is under the authority of the minister.

3.7.2 The ABP's mandate

Article 2 of the ABP Decree provides that the ABP's mission is to:

- Gather information in an objective manner
- Cooperate with other press agencies internationally
- Provide information gathered by the agency to any other person, subject to the payment of a fee.

3.7.3 The ABP's governing structures

Articles 4–9 of the ABP Decree deal with the governing structures of the ABP. In brief these provide the following:

- The ABP is governed by a director assisted by three deputies – the ABP directorate – responsible for the day to day operations of the ABP.

- The ABP also has a board of directors responsible for:
  - Overall strategic direction
  - Developing the annual budget
  - General oversight of the organisation
  - Setting out internal rules and regulations of the ABP.

- Those responsible for the ABP, namely the ABP directorate and the board of directors, are all appointed by the president on the advice of the minister. Members of the directorate or the board are required to have 'a specific set of skills' but these are not specified.

It is also important to note that the annual report of the ABP is presented to the minister, in terms of article 12 of the ABP Decree, and not to a multi-party body such as the National Assembly.

3.7.4 Funding for the ABP

In terms of article 13 of the ABP Decree, the ABP is funded through a range of sources, including:

- State subsidies
- Monies received from the sale of information
- Monies received from assistance provided to other media outlets.

3.8 Legislation that undermines a journalist's duty to protect sources

A journalist's sources are the life-blood of his or her profession. Without trusted sources, a journalist cannot obtain information that is not already in the public domain. However, sources will often be prepared to provide critical information only if they are confident that their identities will remain confidential and will be respected and protected by a journalist. This is particularly true of so-called whistleblowers – inside sources that are able to provide journalists with information regarding illegal activities, whether by company or government personnel.

Consequently, democratic countries often provide special protection for journalists' sources. It is recognised that without such protection, information that the public needs to know would not be given to journalists.

❖ **The 2013 Press Act, Act 1/11 of 2013**

Article 20 of the 2013 Press Act provides that journalists are required to reveal their sources in court proceedings where:

- Crimes against state security have been committed – article 20(1)
- Crimes against public order have been committed – article 20(2)
- Crimes against national defence have been committed – article 20(3)
- Crimes against the moral or physical wellbeing of one or more persons have been committed – article 20(4).

❖ **The 2015 Press Act, Act 1/15 of 2015**

The 2015 Press Act is unusual in that article 16 thereof guarantees the rights of journalists to protect their sources. However, it is not clear as to whether or not this statutory right is respected and protected in practice. Further, it is also clear that given the general nature of this right, article 16 of the 2015 Press Act does not repeal article 20 of the 2013 Press Act.

❖ **Criminal Procedure Act, Act 1/10 of 2013**

The Criminal Procedure Act was enacted in 2013. At least one provision of the Criminal Procedure Code might be used to compel a journalist to reveal confidential sources. Article 79 of the Criminal Procedure Act empowers the prosecuting authority of Burundi or a court to issue a summons to any person requiring his or her attendance before the authority or court. Failure to comply with such a summons can result in a period of imprisonment or the payment of a fine or both in terms of article 189 of the Criminal Procedure Act.

❖ **The Penal Code, Act 1/05 of 2009**

The Penal Code sets out a range of criminal offences in Burundi and is, effectively, the codification of criminal law in Burundi. Most of its articles do not affect the media. However, there are some that do.

Article 250 of the Penal Code prohibits a journalist from revealing confidential sources of information unless required to do so in court proceedings. The penalty is a period of imprisonment or a fine. We note this provision because of its inherent recognition of the need for journalists to protect their sources.

Clearly, article 20 of the 2013 Press Act and article 79 of the Criminal Procedure Act might well conflict with a journalist's ethical obligation to protect his or her sources. However, it is important to note that whether or not requiring a journalist to reveal a source is in fact an unconstitutional violation of the right to freedom of expression will be dependent on the particular circumstances in each case, particularly on whether the information is available from any other source. Consequently, it is extremely difficult to state that these provisions by themselves violate the right to freedom of expression under the Constitution.

3.9 Legislation that prohibits the publication of certain kinds of information

A number of statutes contain provisions which, looked at closely, undermine the public's right to receive information and the media's right to publish information, namely:

- The Press Act, Act 1/025 of 2003
- The Press Act, Act 1/11 of 2013
- The Penal Code, Act 1/05 of 2009.

These statutes are targeted and prohibit the publication of certain kinds of information, including:

- Prohibition of publications relating to legal proceedings held in camera
- Prohibition of publications relating to legal proceedings – prejudice to investigations
- Prohibition of publications relating to legal proceedings involving minors
- Prohibition of publications relating to legal proceedings that undermine the presumption of innocence
- Prohibition of publications relating to legal proceedings that would identify victims of rape
- Prohibition of publications relating to legal proceedings that constitute commentary with the intention of influencing the testimony of witnesses
- Prohibition of publications that constitute incitement
- Prohibition of publications that constitute enemy propaganda in times of war
- Prohibition of publications containing secret information regarding military operations
- Prohibition of publications containing secret information regarding national defence
- Prohibition of publications containing secret information regarding diplomatic activity

- Prohibition of publications containing secret information regarding scientific research
- Prohibition of publications containing secret information regarding judicial commissions
- Prohibition of publications that undermine national unity
- Prohibition of publications that undermine national sovereignty
- Prohibition of publications that undermine public order or public safety
- Prohibition of publications that discredit the Republic of Burundi internationally
- Prohibition of publications that undermine the Burundian economy
- Prohibition of publications that undermine the Burundian currency
- Prohibition of publications that justify criminal conduct
- Prohibition of publications that may lead to blackmail
- Prohibition of publications that may lead to fraud
- Prohibition of publications that incite ethnic or racial hatred
- Prohibition of publications that insult the president
- Prohibition of publications that are defamatory
- Prohibition of publications that undermine personal dignity and honour
- Prohibition of publications that are offensive and injurious
- Prohibition of publications that undermine the private life of another, including regarding medical records and personal confidential information
- Prohibition of publications that constitute an abuse of the right to freedom of expression
- Prohibition of publications that undermine public morality and good morals

- Prohibition of publications that expose minors to obscene or shocking images
- Prohibition of publications that do not correctly identify the author or printer.

3.9.1 Prohibition of publications relating to legal proceedings held in camera

❖ **The Press Act, Act 1/025 of 2003**

The 2003 Press Act is different from the later versions, namely the 2013 and 2015 Press Acts. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2003 Press Act which are still in force notwithstanding the later iterations of the Press Act, namely the 2013 and 2015 Press Acts.

Article 50 of the 2003 Press Act prohibits the publication of reportage of judicial proceedings held in camera and provides that the punishment is a period of imprisonment and a fine.

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 19(k) of the 2013 Press Act effectively prohibits the publication or broadcast of information relating to 'legal proceedings held in camera'. Note that this is not defined. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.2 Prohibition of publications relating to legal proceedings – prejudice to investigations

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in

force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act. Article 19(d) of the 2013 Press Act effectively prohibits the publication or broadcast of information relating to legal proceedings and that 'undermines judicial investigations prior to the court hearing'. Note that this is not defined. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.3 Prohibition of publications relating to legal proceedings involving minors

❖ **The Press Act, Act 1/025 of 2003**

The 2003 Press Act is different from the later versions, namely the 2013 and 2015 Press Acts. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2003 Press Act which are still in force notwithstanding the later iterations of the Press Act, namely the 2013 and 2015 Press Acts.

Article 50 of the 2003 Press Act prohibits the publication of reportage of judicial proceedings involving minors and provides that the punishment is a period of imprisonment and a fine.

3.9.4 Prohibition of publications relating to legal proceedings that undermine the presumption of innocence

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 18(g) of the 2013 Press Act prohibits the publication or broadcast of information that 'undermines the presumption of innocence'. Note that this is not defined. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.5 Prohibition of publications relating to legal proceedings that would identify victims of rape

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 19(l) of the 2013 Press Act prohibits the publication or broadcast of information that would 'identify victims of rape'. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.6 Prohibition of publications relating to legal proceedings that constitute commentary with the intention of influencing the testimony of witnesses

❖ **The Penal Code, Act 1/05 of 2009**

The Penal Code sets out a range of criminal offences in Burundi and is, effectively, the codification of criminal law in the country. Most of its articles do not affect the media. However, there are some that do.

Article 405 of the Penal Code prohibits 'the publication and broadcasting of commentary with the intention of influencing the testimony of witnesses during a trial'. The penalty is a period of imprisonment or a fine.

3.9.7 Prohibition of publications that constitute incitement

❖ **The Press Act, Act 1/025 of 2003**

The 2003 Press Act is different from the later versions, namely the 2013 and 2015 Press Acts. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2003 Press Act which are still in force notwithstanding the later iterations of the Press Act, namely the 2013 and 2015 Press Acts.

Article 50 of the 2003 Press Act prohibits the publication of 'incitement to civil

disobedience' (note that the words 'incitement to civil disobedience' are not defined in the 2003 Press Act) and that the punishment is a period of imprisonment and a fine.

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 19(f) of the 2013 Press Act effectively prohibits the publication or broadcast of information that 'incites the public to revolt, civil disobedience and to unauthorised public protest'. Note that this is not defined. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.8 Prohibition of publications that constitute enemy propaganda in times of war

❖ **The Press Act, Act 1/025 of 2003**

The 2003 Press Act is different from the later versions, namely the 2013 and 2015 Press Acts. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2003 Press Act which are still in force notwithstanding the later iterations of the Press Act, namely the 2013 and 2015 Press Acts.

Article 50 of the 2003 Press Act prohibits the publication of 'propaganda in time of war' (note that this is not defined in the 2003 Press Act) and that the punishment is a period of imprisonment and a fine.

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 19(h) of the 2013 Press Act effectively prohibits the publication or broadcast of information that 'constitutes enemy propaganda in times of war'. Note that this is not defined. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.9 Prohibition of publications containing secret information regarding military operations

❖ **The Press Act, Act 1/025 of 2003**

The 2003 Press Act is different from the later versions, namely the 2013 and 2015 Press Acts. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2003 Press Act which are still in force notwithstanding the later iterations of the Press Act, namely the 2013 and 2015 Press Acts.

Article 50 of the 2003 Press Act prohibits the publication of 'secret information regarding military operations' (note that this is not defined in the 2003 Press Act) and that the punishment is a period of imprisonment and a fine.

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 19(j) of the 2013 Press Act effectively prohibits the publication or broadcast of 'secret information regarding military operations'. Note that this is not defined. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.10 Prohibition of publications containing secret information regarding national defence

❖ **The Press Act, Act 1/025 of 2003**

The 2003 Press Act is different from the later versions, namely the 2013 and 2015 Press Acts. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect.

Consequently, it is important to note that there are provisions of the 2003 Press Act which are still in force notwithstanding the later iterations of the Press Act, namely the 2013 and 2015 Press Acts.

Article 50 of the 2003 Press Act prohibits the publication of 'secret information regarding national defence' (note that this is not defined in the 2003 Press Act) and that the punishment is a period of imprisonment and a fine.

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 19(a) of the 2013 Press Act effectively prohibits the publication or broadcast of information that 'reveal[s] national defence secrets'. Note that this is not defined. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.11 Prohibition of publications containing secret information regarding diplomatic activity

❖ **The Press Act, Act 1/025 of 2003**

The 2003 Press Act is different from the later versions, namely the 2013 and 2015 Press Acts. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2003 Press Act which are still in force notwithstanding the later iterations of the Press Act, namely the 2013 and 2015 Press Acts.

Article 50 of the 2003 Press Act prohibits the publication of 'secret information regarding diplomatic activity' (note that this is not defined in the 2003 Press Act) and that the punishment is a period of imprisonment and a fine.

3.9.12 Prohibition of publications containing secret information regarding scientific research

❖ **The Press Act, Act 1/025 of 2003**

The 2003 Press Act is different from the later versions, namely the 2013 and 2015 Press Acts. The legal system in Burundi operates in such a way that if an earlier

provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2003 Press Act which are still in force notwithstanding the later iterations of the Press Act, namely the 2013 and 2015 Press Acts.

Article 50 of the 2003 Press Act prohibits the publication of 'secret information regarding scientific research' (note that this is not defined in the 2003 Press Act) and that the punishment is a period of imprisonment and a fine.

3.9.13 Prohibition of publications containing secret information regarding judicial commissions

❖ **The Press Act, Act 1/025 of 2003**

The 2003 Press Act is different from the later versions, namely the 2013 and 2015 Press Acts. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2003 Press Act which are still in force notwithstanding the later iterations of the Press Act, namely the 2013 and 2015 Press Acts.

Article 50 of the 2003 Press Act prohibits the publication of 'secret information regarding judicial commissions' (note that this is not defined in the 2003 Press Act) and that the punishment is a period of imprisonment and a fine.

3.9.14 Prohibition of publications that undermine national unity

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 18(a) of the 2013 Press Act prohibits the publication or broadcast of information that 'undermines national unity'. Note that this is not defined. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.15 Prohibition of publications that undermine national sovereignty

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 18(e) of the 2013 Press Act prohibits the publication or broadcast of information that 'undermines national sovereignty'. Note that this is not defined. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.16 Prohibition of publications that undermine public order or public safety

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 18(b) of the 2013 Press Act prohibits the publication or broadcast of information that 'undermines public order or public safety'. Note that this is not defined. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.17 Prohibition of publications that discredit the Republic of Burundi internationally

❖ **The Press Act, Act 1/025 of 2003**

The 2003 Press Act is different from the later versions, namely the 2013 and 2015 Press Acts. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2003 Press Act which are still in force notwithstanding the later iterations of the Press Act, namely the 2013 and 2015 Press Acts.

Article 50 of the 2003 Press Act prohibits publications that 'discredit the Republic of Burundi internationally' (note that this is not defined in the 2003 Press Act) and that the punishment is a period of imprisonment and a fine.

3.9.18 Prohibition of publications that undermine the Burundian economy

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 19(i) of the 2013 Press Act effectively prohibits the publication or broadcast of information that 'undermines the Burundian economy'. Note that this is not defined. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.19 Prohibition of publications that undermine the Burundian currency

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 19(b) of the 2013 Press Act effectively prohibits the publication or broadcast of information that 'undermines the national currency'. Note that this is not defined. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.20 Prohibition of publications that justify criminal conduct

❖ **The Press Act, Act 1/025 of 2003**

The 2003 Press Act is different from the later versions, namely the 2013 and 2015 Press Acts. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect.

Consequently, it is important to note that there are provisions of the 2003 Press Act which are still in force notwithstanding the later iterations of the Press Act, namely the 2013 and 2015 Press Acts.

Article 50 of the 2003 Press Act prohibits publications that 'justify criminal conduct' (note that this is not defined in the 2003 Press Act) and that the punishment is a period of imprisonment and a fine.

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 19(f) of the 2013 Press Act effectively prohibits the publication or broadcast of information that 'justifies criminal conduct'. Note that this is not defined. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.21 Prohibition of publications that may lead to blackmail

❖ **The Press Act, Act 1/025 of 2003**

The 2003 Press Act is different from the later versions, namely the 2013 and 2015 Press Acts. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2003 Press Act which are still in force notwithstanding the later iterations of the Press Act, namely the 2013 and 2015 Press Acts.

Article 50 of the 2003 Press Act prohibits publications that 'may lead to blackmail' (note that this is not defined in the 2003 Press Act) and that the punishment is a period of imprisonment and a fine.

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is

important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 19(f) of the 2013 Press Act effectively prohibits the publication or broadcast of information 'that may lead to blackmail'. Note that this is not defined. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.22 Prohibition of publications that may lead to fraud

❖ **The Press Act, Act 1/025 of 2003**

The 2003 Press Act is different from the later versions, namely the 2013 and 2015 Press Acts. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2003 Press Act which are still in force notwithstanding the later iterations of the Press Act, namely the 2013 and 2015 Press Acts.

Article 50 of the 2003 Press Act prohibits publications that 'may lead to fraud' (note that this is not defined in the 2003 Press Act) and that the punishment is a period of imprisonment and a fine.

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 19(f) of the 2013 Press Act effectively prohibits the publication or broadcast of information that 'may lead to fraud'. Note that this is not defined. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.23 Prohibition of publications that incite ethnic or racial hatred

❖ **The Press Act, Act 1/025 of 2003**

The 2003 Press Act is different from the later versions, namely the 2013 and 2015 Press Acts. The legal system in Burundi operates in such a way that if an earlier

provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2003 Press Act which are still in force notwithstanding the later iterations of the Press Act, namely the 2013 and 2015 Press Acts.

Article 50 of the 2003 Press Act prohibits publications that 'incite ethnic or racial hatred' (note that this is not defined in the 2003 Press Act) and that the punishment is a period of imprisonment and a fine.

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 19(f) of the 2013 Press Act effectively prohibits the publication or broadcast of information that 'incites ethnic or racial hatred'. Note that this is not defined. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.24 Prohibition of publications that insult the president

❖ **The Press Act, Act 1/025 of 2003**

The 2003 Press Act is different from the later versions, namely the 2013 and 2015 Press Acts. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2003 Press Act which are still in force notwithstanding the later iterations of the Press Act, namely the 2013 and 2015 Press Acts.

Article 50 of the 2003 Press Act prohibits the publication of information that is 'offensive and injurious to the president' (note that the words 'offensive and injurious' are not defined in the 2003 Press Act) and that punishment is a period of imprisonment and a fine.

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The

legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 19(e) of the 2013 Press Act effectively prohibits the publication or broadcast of information that is 'offensive and injurious to the President'. Note that this is not defined. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.25 Prohibition of publications that are defamatory

❖ **The Press Act, Act 1/025 of 2003**

The 2003 Press Act is different from the later versions, namely the 2013 and 2015 Press Acts. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2003 Press Act which are still in force notwithstanding the later iterations of the Press Act, namely the 2013 and 2015 Press Acts.

Article 50 of the 2003 Press Act prohibits the publication of any writing or words that are 'defamatory' (note that the word 'defamatory' is not defined in the 2003 Press Act) and the punishment is a period of imprisonment and a fine.

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 19(g) of the 2013 Press Act effectively prohibits the publication or broadcast of information that is 'defamatory'. Note that this is not defined. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.26 Prohibition of publications that undermine personal dignity and honour

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 18(d) of the 2013 Press Act prohibits the publication or broadcast of information that 'undermines personal dignity and honour'. Note that this is not defined. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.27 Prohibition of publications that are offensive and injurious

❖ **The Press Act, Act 1/025 of 2003**

The 2003 Press Act is different from the later versions, namely the 2013 and 2015 Press Acts. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2003 Press Act which are still in force notwithstanding the later iterations of the Press Act, namely the 2013 and 2015 Press Acts.

Article 50 of the 2003 Press Act prohibits the publication of any writing or words that are 'offensive and injurious to any public figure or private person' (note that the words 'offensive and injurious' are not defined in the 2003 Press Act) and that the punishment is a period of imprisonment and a fine.

3.9.28 Prohibition of publications that undermine the private life of another, including regarding medical records and personal confidential information

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 18(f) of the 2013 Press Act prohibits the publication or broadcast of information that 'undermines the private life of another'. Note that this is not defined. Further, article 19(c) of the 2013 Press Act also effectively prohibits the publication or broadcast of information that reveals medical records and confidential personal documents. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.29 Prohibition of publications that constitute an abuse of the right to freedom of expression

❖ **The Press Act, Act 1/025 of 2003**

The 2003 Press Act is different from the later versions, namely the 2013 and 2015 Press Acts. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2003 Press Act which are still in force notwithstanding the later iterations of the Press Act, namely the 2013 and 2015 Press Acts.

Article 45 of the 2003 Press Act provides for the notion of an 'offence by the press'. This is defined as being 'the abuse of the right to freedom of expression'. However, it is important to note that there are no sanctions provisions in the 2003 Press Act and therefore enforcement is extremely problematic.

3.9.30 Prohibition of publications that undermine public morality and good morals

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 18(c) of the 2013 Press Act prohibits the publication or broadcast of information that 'undermines public morality and good morals'. Note that this is not defined. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.31 Prohibition of publications that expose minors to obscene or shocking images

❖ **The Press Act, Act 1/11 of 2013**

The 2013 Press Act is different from the later version, namely the 2015 Press Act. The legal system in Burundi operates in such a way that if an earlier provision in a statute is not specifically amended or repealed by a later law on the same subject then the original provisions continue to be of full force and effect. Consequently, it is important to note that there are provisions of the 2013 Press Act which are still in force notwithstanding the later iteration of the Press Act, namely the 2015 Press Act.

Article 19(m) of the 2013 Press Act prohibits the publication or broadcast of information that 'expose[s] children to obscene or shocking images'. Note that this is not defined. Article 58 of the 2013 Press Act prescribes the relevant sanction and it is the suspension or withdrawal of accreditation but only after three warnings.

3.9.32 Prohibition of publications that do not correctly identify the author or printer

❖ **The Penal Code, Act 1/05 of 2009**

The Penal Code sets out a range of criminal offences in Burundi and is, effectively, the codification of criminal law in the country. Most of its articles do not affect the media. However, there are some that do.

Article 385 of the Penal Code prohibits the publication and distribution of a publication that fails to accurately identify the author or printer thereof. The penalty is a period of imprisonment or a fine.

3.10 Legislation that specifically assists the media in performing its functions

In countries that are committed to democracy, governments pass legislation which specifically promotes accountability and transparency of both public and private institutions. Such statutes, while not specifically designed for use by the media, can and often are used by the media to uncover and publicise information in the public interest.

We have not been provided with any legislation that can be said to assist the media apart from certain general and ostensibly pro-media provisions in the 2015 Press Act and the NCC Act that are dealt with under the provisions of statutes that regulate the print or broadcast media above.

4 REGULATIONS AFFECTING THE MEDIA

Regulations are subordinate legislation. They are legal rules that are made in terms of a statute. Regulations are legal mechanisms for allowing a body other than parliament to make legally binding rules governing an industry or sector, without needing parliament to pass a specific statute thereon. Often regulations are made by the regulator of a particular sector or by the minister in charge of a particular ministry of the executive. We were not provided with any regulations of relevance to the minister.

5 MEDIA SELF-REGULATION

In this section you will learn:

- ❑ What self-regulation is
- ❑ Key self-regulatory provisions intended to govern the media in Burundi, including the establishment of the Observatory of the Press in Burundi and its functions

5.1 Definition of self-regulation

Self-regulation is a form of regulation that is established voluntarily. A grouping or body establishes its own mechanisms for regulation and enforcement that are not imposed, for example, in a statute or regulation. Media bodies often introduce self-regulation in the form of codes of media ethics and good governance.

5.2 The Observatory of the Press in Burundi

The Observatory of the Press in Burundi (OPB) was officially launched in October 2014 as a self-regulatory body for journalists and media owners, according to the preamble of its founding constitution. The OPB was established as a non-profit organisation in terms of article 1. Its objectives, according to article 4 of its founding constitution, are to:

- Promote and defend press freedom
- Ensure that its code of ethics is respected by the media
- Protect the public's right to the free flow of accurate information
- Raise awareness of, and train journalists in, the ethics of the profession
- Act as a self-regulatory tribunal
- Recognise examples of high professional conduct
- Ensure the security of journalists in performing their functions
- Conduct workshops and seminars on media-related topics

- Mediate disputes between journalists and their employers
- Monitor the development of the media in Burundi.

In performing its functions, the OPB is guided solely by the code of ethics which it developed for the press, in terms of article 5 of its founding constitution. In brief, the OPB's code of ethics deals with, among other things, the obligations and rights of journalists:

- *Obligations of journalists*
  - To respect human dignity
  - To avoid hate speech
  - To avoid obscenity
  - To avoid the identification of minors in sexual offences cases
  - To avoid the identification of victims in sexual offences cases without their consent
  - To avoid publicising images of violence without due justification
  - To avoid publishing information that is false, insulting, defamatory, a misrepresentation of the facts
  - To retain responsibility for all his/her writings including those that are not bylined in the publication
  - To ensure that the title does not misrepresent the content of the article
  - To make a clear distinction between reporting and commentary
  - In relation to reporting, to stick to the basic factual enquiries of who, what, where, when, how and why
  - To defend freedom of expression, information, and balanced reporting as well as the freedom to receive gather and distribute information that is verifiable in relation to credible sources
  - To not associate him- or herself with advertising material
  - To not commit plagiarism
  - To not accept financial reward for crafting a story in a particular way
  - To in no way act as a public relations practitioner or propagandist
  - To in no way utilise underhand or unfair practices in order to obtain information unless this is specifically required in the public interest
  - To not entrap sources to reveal information by failing to reveal his/her own identity or occupation
  - To not act contrary to his/her professional requirements
  - To rectify inaccurate reporting immediately upon becoming aware thereof
  - To conduct him- or herself in a manner consistent with building the solidarity of the media profession and to avoid acting in any way that undermines the profession

- To accept the jurisdiction of the OPB as a tribunal of peers
- To utilise the OPB as the primary source of mediation in disputes between journalists and their employers
- To refrain from reporting on matters in which there is a conflict of interest.

- *Rights of journalists*
  - To have unfettered access to all sources of information in the exercise of his/her profession and to freely investigate all facts relating to public life
  - To confidentiality, particularly in regard to sources
  - To act in accordance with the precepts of his/her conscience in relation to carrying out instructions of his/her employers without prejudice to his/her employment benefits
  - To be secure in relation to his/her personal safety and dignity and the safety of his/her professional equipment
  - To join or form a trade union
  - To collaborate with other media houses that are not competitors to his/her employer, and subject to the terms of his/her employment agreement
  - To enjoy basic employment rights including with respect to salary and other benefits in his/her employment.

In terms of article 29 of its founding constitution, the OPB is funded through membership fees paid by journalists and media houses as well as donations and other revenues generated by its own activities.

Unfortunately, the OPB's founding constitution is entirely silent on disciplinary procedures and sanctions that can be imposed with respect to violations of its code of ethics. This is problematic because the effectiveness of self-regulation and the public's faith in self-regulation is only as good as the ability of the self-regulatory body to enforce compliance with its codes of conduct such as the OPB's code of ethics. It is also noteworthy that the OPB's website[23] has not been updated for over a year and that it is not clear if it remains as effective as it appears to have been in the past.

6 CASE LAW AND THE MEDIA

Burundi's court and jurisprudential system is based on Belgian civil codes and customary law. Consequently, the case law is not as strictly based on precedent, as is the case in common law systems (usually found in former British colonies).
Case law in Burundi certainly affects the media and working journalists. However,

accessing Burundian case law is extremely difficult and we have not been provided with any judgments.

NOTES

1 http://data.un.org/CountryProfile.aspx?crName=burundi, last accessed 2 August 2016.
2 http://mgafrica.com/article/2016-05-01-burundi-battered-by-year-long-crisis-it-has-now-fallen-to-the-poorest-nation-in-the-world, last accessed on 9 July 2016.
3 https://www.wcl.american.edu/humright/center/rwanda/documents/Jigsaw1_History.pdf, last accessed 8 July 2016.
4 Harris M. Lentz (ed), *Heads of States and Governments Since 1945*. Routledge, 2014.
5 Paul Robert Bartrop, *A Biographical Encyclopedia of Contemporary Genocide*. ABC-CLIO, 2012.
6 http://www.nytimes.com/1987/09/04/world/burundi-s-president-is-ousted-by-army.html, last accessed 13 July 2016.
7 http://assiagency.com/who-is-major-pierre-buyoya-in-burundian-politics/, last accessed 13 July 2016.
8 http://www.bbc.com/news/world-africa-13085064, last accessed 1 August 2016.
9 www.nytimes.com/1994/04/07/obituaries/cyprien-ntaryamira-39-tried-to-end-burundi-s-strife.html, last accessed 29 July 2016.
10 www.revolvy.com/main/index.php?s=Pierre%20Buyoya&item_type=topic, last accessed 29 July 2016.
11 www.theguardian.com/world/2015/jul/24/burundi-pierre-nkurunziza-wins-third-term-disputed-election, last accessed 29 July 2016.
12 http://reliefweb.int/report/burundi/presidential-elections-21-july-2015-preliminary-statement-27-july-2015, last accessed 10 July 2016.
13 www.aljazeera.com/news/2015/12/burundi-president-threatens-fight-au-peacekeepers-151230102845333.html, last accessed 29 July 2016.
14 http://mgafrica.com/article/2016-05-01-burundi-battered-by-year-long-crisis-it-has-now-fallen-to-the-poorest-nation-in-the-world, last accessed on 9 July 2016 and www.nation.co.ke/news/africa/Burundi-economy-on-the-ropes-amid-political-crisis/-/1066/3184854/-/bdd4wxz/-/index.html, last accessed 10 July 2016.
15 http://www.nation.co.ke/news/africa/Burundi-economy-on-the-ropes-amid-political-crisis/-/1066/3184854/-/bdd4wxz/-/index.html, last accessed 10 July 2016.
16 https://www.cia.gov/library/publications/the-world-factbook/geos/by.html, last accessed 10 July 2016.
17 http://www.ruralpovertyportal.org/country/home/tags/burundi, last accessed 10 July 2016.
18 http://hdr.undp.org/sites/default/files/2015_human_development_report.pdf, last accessed 10 July 2016.
19 www.internetworldstats.com/africa.htm, last accessed 13 July 2016.
20 http://www.burundiembassy-germany.de/index.php?en_people-religion-language, last accessed 2 August 2016.
21 The author is paraphrasing the title of the articles here as they are untitled in the Constitution. For ease of finding one's way around the issues covered we have highlighted what the main theme of the article is in each case.
22 See, for example, A. Niyonkuru, 'The Independence of the Judiciary vis-à-vis the Executive', and sources cited therein. Available at http://www.hamann-legal.de/upload/7Aime-Parfait.pdf, last accessed 11 July 2016.
23 http://www.opb-burundi.org/, last accessed 28 July 2016.

5 Eritrea

1 INTRODUCTION

The State of Eritrea has a population of approximately 6.5 million people. Although there are no official languages in Eritrea, the languages of commerce and government are Tigrinya, Arabic and English, and there are a number of other local languages and dialects.[1] Literacy rates are approximately 66% for women and 82% for men.[2]

Eritrea was a colony of Italy until 1941, after which it was administered by Great Britain for 10 years. It gained independence as an autonomous region within the Ethiopian federation in 1952. In 1962, Ethiopia annexed Eritrea sparking a 30-year struggle for independence.[3]

Following a United Nations (UN)-sanctioned referendum on independence, Eritrea declared independence from Ethiopia and received international recognition in 1993.[4] Since that time it has been ruled by a so-called transitional government, which has deployed a perpetual state of emergency[5] to silence dissent and to curtail the media. No elections have been held since and the county has been described, accurately, as an 'authoritarian presidential regime'.[6]

Although a new constitution was formally adopted on 23 May 1997, after being drafted by a constitutional commission whose members were appointed by the president,[7] it has never been implemented. The president announced in 2014 that a new constitution would be drafted[8] but at the time of writing this new constitution has not materialised.

Currently, the Eritrean government formally recognises only one political party, the People's Front for Democracy and Justice (PFDJ), which is largely made up of former Eritrean People's Liberation Front members, who fought Ethiopia's annexation of Eritrea.[9] While PFDJ links to Al-Shabbab are disputed, such a link has been recognised by the United Nations Security Council and UN-backed sanctions have been imposed on Eritrea since 2009.[10]

The country is poor with 69% of the population living in poverty and a gross national income per capita of US$680 in 2014.[11] The country's level of electronic communications connectivity is extremely poor, with 1% teledensity in respect of fixed lines and 7% teledensity in respect of mobile penetration. Approximately 1% of the population has access to the internet; only 65,000 people as at June 2015.[12] It is important to note that while the government planned to introduce mobile internet capability in 2011, these plans were abandoned 'apparently because the government was fearful of the effect of the Arab Spring uprisings'.[13] Consequently it appears that most Eritreans who do access the internet do so via internet cafés.[14]

The media environment is, in a word, shocking.

In 2001 the shut-down of independent media took place when the last eight private newspapers were forced to close, and since then 'no independent media has existed in Eritrea'.[15] According to the international media freedom non-governmental organisation (NGO), Article 19, 'Eritrea is the only country in Africa with no privately-owned press, television broadcasters or radio stations, having banned the entire private press for "endangering national security" in 2001'.[16]

Further, 'the few remaining media are state owned and far from independent, essentially serving as a mouthpiece for the Ministry of Information. Alternative sources of information are limited given extremely low levels of internet penetration in the country'.[17]

In 2015, the Committee to Protect Journalists (CPJ) named Eritrea as 'the most censored country in the world'.[18] The CPJ, in its report on Eritrea, states that:

> Eritrea has the most jailed journalists in Africa. None of those arrested are taken to court, and the fear of arrest has forced dozens of journalists into exile. Those in exile try to provide access to independent online news websites and radio broadcasts, but the opportunity to do so is limited because of signal jamming and tight online control by the sole state-run telecommunications company, EriTel. All mobile communications must go through EriTel and all internet service providers must use the government-controlled gateway.

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

- Media and the constitution
- Media-related legislation
- Media-related regulations
- Media self-regulation
- Media-related law based on decided cases

The aim of this chapter is to equip the reader with an understanding of the main laws governing the media in Eritrea and to understand the Eritrean media environment more generally. Key weaknesses and deficiencies in these laws and in their implementation will also be identified. The hope is to encourage media law reform in Eritrea, to better enable the media to fulfil its role of providing the public with relevant news and information, and to serve as a vehicle for government–citizen debate and discussion.

2 THE MEDIA AND THE CONSTITUTION

In this section you will learn:

- ❑ The definition of a constitution
- ❑ What is meant by constitutional supremacy
- ❑ How a limitations clause operates
- ❑ Which constitutional provisions protect the media
- ❑ Which constitutional provisions might require caution from the media or might conflict with media interests
- ❑ What key institutions relevant to the media are established under the Constitution of Eritrea
- ❑ How rights are enforced under the Constitution
- ❑ What is meant by the 'three branches of government' and 'separation of powers'
- ❑ Whether there are any clear weaknesses in the Constitution of Eritrea that ought to be amended to protect the media

2.1 Definition of a constitution

A constitution is a set of rules that are foundational to the country, institution or organisation to which they relate. For example, you can have a constitution for a soccer club or a professional association, such as a press council. Such constitutions

set out the rules by which members of the organisation agree to operate. However, constitutions can also govern much larger entities, indeed, entire nations.

The Constitution of Eritrea was ratified by the Constituent Assembly on 23 May 1997 and sets out the foundational rules for the State of Eritrea. These are supposed to be the rules upon which the entire country operates; however, the provisions of the Constitution have not been implemented.[19]

The effect of this is that the Eritrean Constitution is literally a constitution on paper only and none of its provisions are in force to any practical effect. Nevertheless, we think it important to include the constitutional provisions in order to understand the kind of country that Eritrea, at one point, aspired to be.

The Constitution contains the underlying principles, values and laws of Eritrea although again, many of these have in fact been abrogated. Nevertheless, it is important to be aware of what the Constitution has committed the State of Eritrea to. A key constitutional provision in this regard is article 1(1), which states that 'Eritrea is a sovereign and independent State founded on the principles of democracy, social justice and the rule of law'.

2.2 Definition of constitutional supremacy

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

The Constitution of Eritrea makes provision for constitutional supremacy. Article 2(3) specifically states that 'this Constitution is the supreme law of the country and the source of all laws of the State, and all laws, orders and acts contrary to its letter and spirit shall be null and void'. Further, article 2(4) provides that 'all organs of the capital, all public and private associations and institutions and all citizens shall be bound by and remain loyal to the Constitution and shall ensure its observance'.

2.3 Definition of a limitations clause

It is clear that rights are not absolute as society would not be able to function. For example, if the right to freedom of movement were absolute, society would not be able to imprison convicted criminals. Similarly, if the right to freedom of expression

were absolute, the state would not be able to protect its citizens from hate speech or false defamatory statements made with reckless disregard for the truth. Clearly, governments require the ability to limit rights in order to serve important societal interests; however, owing to the supremacy of the constitution this can only be done in accordance with the constitution.

The Constitution of Eritrea makes provision for two types of legal limitations on the exercise and protection of rights contained in Chapter III of the Constitution of Eritrea, 'Fundamental Human Rights, Freedoms and Duties'.

2.3.1 General limitations

Article 26(1) specifically provides that the fundamental rights and freedoms guaranteed under the Constitution may be 'limited only in so far as is in the interests of national security, public safety or the economic well-being of the country, health or morals, for the prevention of public disorder or crime or for the protection of the rights and freedoms of others'. Further, article 26(2) provides that:

> Any law providing for the limitation of the fundamental rights and freedoms guaranteed in this Constitution must:
>
> (a) be consistent with the principles of democracy and justice;
> (b) be of general application and not negate the essential content of the right or freedom in question;
> (c) specify the ascertainable extent of such limitation and identify the article or articles hereof on which authority to enact such limitation is claimed to rest.

Finally, article 26(3) provides that notwithstanding the provisions of sub-article 26(1) and other articles of the Constitution to the contrary, the rights and freedoms guaranteed under articles 14(1) and (2), 15, 16, 17(2), (5), (7) and (8), and 19(1) of the Constitution shall not be limited.

Article 26 contains a number of interesting provisions that require some explanation.

- It is clear that rights can be limited on a number of different grounds, namely, national security, public safety, the economic well-being of the country, health, morals, prevention of public disorder, prevention of crime or protection of the rights and freedom of others.

- A law of limitation, besides falling within one of the stated grounds, has to:
  - Be consistent with the principles of democracy and justice

- Be of general application
- Not negate the essential content of the right or freedom in question
- Specify the ascertainable extent of such limitation
- Identify the constitutional article(s) upon which the authority to enact such a limitation is claimed.

- Further, certain rights are non-derogable, that is, they cannot be limited at all under any circumstances. These rights are:
  - The right to equality before the law – article 14(1)
  - The right not to be discriminated against on account of race, ethnic origin, language, colour, sex, religion, disability, political belief or opinion, or social or economic status or any other factors – article 14(2)
  - The right to life and liberty, that is, the right not to be deprived of life or liberty without due process of law – article 15
  - The right to human dignity, including not being subjected to torture or to cruel, inhuman or degrading treatment or punishment and not being held in slavery or servitude or being required to perform forced labour not authorised by law – article 16
  - The right not to be tried or convicted for any act or omission which did not constitute a criminal offence at the time it was committed – article 17(2)
  - The right of *habeas corpus*, that is, the right of an arrested person to petition to be brought before a court – article 17(5)
  - The right to be presumed innocent and not to be punished unless found guilty by a court of law – article 17(7)
  - The right to an appeal and not to be tried twice for the same criminal offence – article 17(8)
  - The right to freedom of thought, conscience and belief – article 19(1).

2.3.2 Constitutional limitations

Article 27 is an example of a constitutional limitation. Article 27(1) provides that '[a]t a time when public safety or the security or stability of the State is threatened by external invasion, by civil disorder or by natural disaster, the President may by proclamation published in the Gazette of Eritrean laws declare that a state of emergency exists in Eritrea or any part thereof'.

Importantly, article 27(5) provides that any measures undertaken and all laws enacted pursuant to a declaration of a state of emergency shall not:

(a) suspend articles 14(1) and (2); 16; 17(2); and 19(1) of the Constitution
(b) grant pardon or amnesty to any person who, acting under the authority of the State, has committed illegal acts
(c) introduce martial law where there is no external invasion or civil disorder.

This is important because it means that during a state of emergency the following rights cannot be abrogated, namely:

- The right to equality before the law – article 14(1)
- The right not to be discriminated against on account of race, ethnic origin, language, colour, sex, religion, disability, political belief or opinion, or social or economic status or any other factors – article 14(2)
- The right to human dignity, including not being subjected to torture or to cruel, inhuman or degrading treatment or punishment and not being held in slavery or servitude or being required to perform forced labour not authorised by law – article 16
- The right not to be tried or convicted for any act or omission which did not constitute a criminal offence at the time it was committed – article 17(2)
- The right to freedom of thought, conscience and belief – article 19(1).

Further, those acting under state authority cannot act illegally with impunity and martial law can only be imposed in circumstances where there is an external invasion or civil disorder. Sadly, the term 'civil disorder' is not narrow and so it is likely that the declaration of emergency including martial law is not a particularly difficult threshold to cross.

Articles 27(2) and (3) provide for a number of procedural safeguards in respect of proclamations of states of emergency, including that such a declaration be approved by a resolution passed by a two-thirds majority vote of all members of the National Assembly, and that the first period of a state of emergency is six months and can be extended by a resolution of the National Assembly for three months at a time. However, the current state of emergency, which was not declared in terms of the Constitution of Eritrea, is effectively perpetual.

2.4 Constitutional provisions that protect the media

The Constitution of Eritrea contains a number of important provisions in Part III,

'Fundamental Rights, Freedoms and Duties', which directly protect the media, including publishers, broadcasters, journalists, editors and producers.

2.4.1 Freedom of expression

The most important provision that protects the media is article 19(2) – the part of the article headed 'Freedom of conscience, religion, expression of opinion, movement, assembly and organisation', which sub-article states: 'Every person shall have the freedom of speech and expression, which includes freedom of the press and other media'.

This provision needs some detailed explanation.

- This freedom applies to all persons and not just to certain people, such as citizens. Hence everybody (both natural persons and juristic persons, such as companies) enjoy this fundamental right.

- The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many different examples of this, including physical expression, such as mime or dance, photography or art.

- Article 19(2) specifies that the right to freedom of speech and expression expressly guarantees the 'freedom of the press and other media', thereby protecting the media's right to exist and to operate freely, including in respect of reporting and writing opinion pieces and commentary on important issues of the day.

2.4.2 Right of access to information

Another important provision that protects the media is article 19(3) – the part of the article headed 'Freedom of conscience, religion, expression of opinion, movement, assembly and organisation', which states: 'Every citizen shall have the right of access to information'.

This provision needs some detailed explanation.

- Unlike the right to freedom of expression, this right applies only to citizens. Hence not everybody enjoys this fundamental right – only citizens have the right to information.

- No explanation is given as to what information, held by whom, does the right of access refer. Some constitutions explicitly limit the right of access to information

that is held by the state, while others broaden the right to provide a right of access to information held by private persons too. This provision is opaque and does not make it clear whose information citizens have a right to.

2.4.3 Privacy

A third protection is contained in article 18 of the Constitution of Eritrea, 'Right to privacy'. Article 18(1) specifies that '[e]very person shall have the right to privacy'. And article 18(2)(a) gives further content to the right to privacy by providing that 'no person shall be subjected to body search, nor shall his premises be entered into or searched or his communications or correspondence, or other property be interfered with, without reasonable cause'. Article 18(2)(b) provides that 'no search warrant shall be issued, save upon probable cause, supported by oath, and particularly describing the place to be searched, and the persons or things to be seized'.

This protection of correspondence and communications (which presumably would include letters, emails, telefaxes and telephone conversations) is an important right for working journalists, although the protection is not absolute as the term 'without reasonable cause' clearly shows that the right is not entirely protected.

2.4.4 Protection of freedom of conscience

A fourth protection is contained in article 19(1) of the Constitution of Eritrea, which provides 'every person shall have the right to freedom of thought, conscience and belief'. Freedom of thought is important for the media as it provides additional protection for commentary on public issues of importance.

2.4.5 Protection of freedom of assembly and organisation and to practise a profession

Article 19(6) of the Constitution of Eritrea provides that 'every citizen shall have the right to form organisations for political, social, economic and cultural ends'. Further, article 19(7) provides that 'every citizen shall have the right to practice any lawful profession, or engage in any occupation or trade'.

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

Similarly, article 21(3) also provides that 'every citizen shall have the right to participate freely in any economic activity and engage in any lawful business'. This sub-article falls under the title 'Economic, social and cultural rights and responsib-

ilities'. It is important to note that these rights pertain only to citizens and not to all persons within the borders of Eritrea.

2.4.6 Right to freedom of movement

Article 19(8) provides that 'every citizen shall have the right to move freely throughout Eritrea or reside and settle in any part thereof'. Although this right does not appear to be obviously directed at journalists, it does in fact assist in ensuring that journalists are able to travel in order to report on issues happening in a particular town or region of the country. However, as this right is limited to citizens, foreign journalists do not enjoy freedom of movement.

2.4.7 Right to administrative justice

Article 24 of the Constitution of Eritrea is headed 'Administrative justice' and it provides for two separate administrative justice rights. In terms of article 24(1), 'any person with an administrative question shall have the right to be heard respectfully by the administrative officials concerned and to receive quick and equitable answers from them'. In terms of article 24(2), 'any person with an administrative question, whose rights or interests are interfered with or threatened, shall have the right to seek administrative redress'. This right requires explanation.

- The reason why this right is important for journalists and the media is that it protects them (as it does all people) from administrative officials who act unfairly and unreasonably and who do not comply with legal requirements. It also entitles journalists and the media to redress when administrative action results in their rights being adversely affected or threatened. It is important to note that an administrative body is not necessarily a state body; indeed, these bodies are often private or quasi-private institutions. So these constitutional requirements would apply to non-state bodies, too.

- Many decisions taken by bodies are 'administrative' in nature, and this requirement of administrative justice is a powerful one that prevents or corrects unfair and unreasonable conduct on the part of administrative officials. Furthermore, having a constitutional right to administrative redress is a powerful tool in ensuring rational and reasonable behaviour on the part of administrative bodies, and aids in ensuring transparency and, ultimately, accountability.

2.4.8 Right to a public trial

Article 17(6) of the Constitution of Eritrea provides that 'every person charged with

an offence shall be entitled to a fair, speedy and public hearing by a court of law; provided, however, that such a court may exclude the press and the public from all or any part of the trial for reasons of morals or national security, as may be necessary in a just and democratic society'.

The formulation of this right to 'open justice' in the Constitution of Eritrea is interesting because it provides that the press may be excluded from an otherwise public trial on the grounds of 'morals' or 'national security'. However, these exceptions are narrowly cast as the exclusion of the press also has to be 'necessary in a just and democratic society'. As a general rule, the press and the general public ought to have a right to attend judicial proceedings.

2.4.9 Other constitutional provisions that assist the media

It is important to note that there are provisions in the Eritrean Constitution, apart from the fundamental rights provisions, that are important and assist the media in performing its functions.

PROVISIONS REGARDING THE FUNCTIONING OF PARLIAMENT

A number of provisions in the Constitution regarding the functioning of Parliament are important for the media, including the following:

- Article 38(3) specifically protects freedom of speech in the National Assembly as no member of the National Assembly may be charged for statements made or submitted by him or her at any meeting of the National Assembly or any meeting of its committees or any utterance or statement made outside the National Assembly in connection with his or her duty as a member thereof.

- Although not explained in any detail, article 36(5) of the Constitution refers to the National Assembly issuing rules and regulations concerning its operations and tasks as well as rules governing 'the transparency of its operations'.

These provisions assist the media in two key ways.

- They protect parliamentarians by allowing members of Parliament to speak freely in front of the media without facing arrest or charges for what they say.

- Depending on the level of 'transparency' provided for in the National Assembly's rules, a commitment to transparency might mean that the media has access to the workings of Parliament by being able to be physically in Parliament.

PROVISIONS REGARDING PUBLIC PARTICIPATION

Article 7 is headed 'Democratic principles' and it appears in Chapter II of the Constitution which is headed 'National Objectives and Directive Principles'. Article 7(2) provides that it is a 'fundamental principle of the state of Eritrea to guarantee its citizens broad and active participation in all political, economic, social and cultural life of the country'. The concept of public participation is significant because meaningful political participation requires being sufficiently well-informed, and this in turn requires an independent media that is able to report on matters of public concern. Consequently, this provision is helpful to the media because of the relationship between public participation and a free press.

PROVISIONS REGARDING PUBLIC ADMINISTRATION

Article 11 is headed 'Competent civil service' and it too is found in Chapter II of the Constitution, which is headed 'National Objectives and Directive Principles'. Article 11(1) provides that the civil service in Eritrea 'shall have efficient, effective and accountable administrative institutions dedicated to the service of the people'.

The reference to 'accountable' administrative institutions is useful to the media as the media plays a crucial role in educating the population, enabling citizens to participate meaningfully in a democracy and to force accountability on the part of the state and its organs. These provisions could therefore be interpreted as requiring media-friendly policies on the part of the state.

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

Just as there are certain rights or freedoms that protect the media, other rights or freedoms can protect individuals and institutions from the media. It is important for journalists to understand which provisions in the Eritrean Constitution can be used against the media.

2.5.1 Right to human dignity

The right to human dignity is provided for in article 16, which provides that 'the dignity of all persons shall be inviolable'. Dignity is a right that is often raised in defamation cases because defamation, by definition, undermines the dignity of the person being defamed. This right is often set up against the right to freedom of expression and freedom of the press, requiring a balancing of constitutional rights.

2.5.2 Right to privacy

Similarly, the right to privacy (discussed in some detail above) is often raised in litigation involving the media, with the subjects of press attention asserting their rights not to be photographed, written about or followed in public, etc. The media has to be careful in this regard. The media should be aware that there are always 'boundaries' in respect of privacy that need to be respected and which are dependent on the particular circumstances, including whether or not the person is a public figure or holds public office, and the nature of the issue being dealt with by the media.

2.5.3 Constitutional provisions allowing for the derogation of rights – States of emergency

Although this has been discussed above, it is important to restate the impact of article 27(1), which provides that '[a]t a time when public safety or the security or stability of the State is threatened by external invasion, by civil disorder or by natural disaster, the President may by proclamation published in the Gazette of Eritrean laws declare that a state of emergency exists in Eritrea or any part thereof.' Importantly, article 27(5) provides that any measures undertaken and all laws enacted pursuant to a declaration of a state of emergency shall not:

> (d) suspend articles 14(1) and (2); 16; 17(2); and 19(1) of the Constitution;
> (e) grant pardon or amnesty to any person who, acting under the authority of the State, has committed illegal acts; or
> (f) introduce martial law where there is no external invasion or civil disorder.

This is important because it means that during a state of emergency the following rights cannot be abrogated, namely:

- The right to equality before the law – article 14(1)
- The right not to be discriminated against on account of race, ethnic origin, language, colour, sex, religion, disability, political belief or opinion, or social or economic status or any other factors – article 14(2)
- The right to human dignity, including, not been subjected to torture or to cruel, inhuman or degrading treatment or punishment and not being held in slavery or servitude or being required to perform forced labour not authorised by law – article 16
- The right not to be tried or convicted for any act or omission which did not constitute a criminal offence at the time it was committed – article 17(2)

- The right to freedom of thought, conscience and belief – article 19(1).

Further, those acting under state authority cannot act illegally with impunity, and martial law can only be imposed in circumstances where there is an external invasion or civil disorder. Sadly, the term 'civil disorder' is not narrow and so it is likely that the declaration of emergency including martial law is not a particularly difficult threshold to cross.

Articles 27(2) and (3) provide for a number of procedural safeguards in respect of proclamations of states of emergency, including that such a declaration be approved by a resolution passed by a two-thirds majority vote of all members of the National Assembly, and that the first period of a state of emergency is six months and can be extended by a resolution of the National Assembly for three months at a time. Again, however, the country is currently under a perpetual state of emergency and has been for years.

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

While there are no media-specific institutions established under the Constitution of Eritrea, the Constitution does establish two institutions that indirectly affect the media, namely, the judiciary and the Judicial Service Commission (JSC).

2.6.1 The judiciary

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

Article 10 of the Eritrean Constitution which appears in Chapter II 'National Objectives and Directive Principles', is headed 'Competent justice system', and article 10(1) provides that the justice system of Eritrea 'shall be independent, competent and accountable pursuant to the provisions of the Constitution and laws'.

Chapter VI of the Constitution of Eritrea is headed 'The Administration of Justice'. In terms of article 48(1), judicial power is vested in the Supreme Court and such other lower courts as shall be established by law. In terms of article 48(2), in exercising

judicial power, 'courts shall be free from the direction and control of any person or authority. Judges shall be subject only to the law, to a judicial code of conduct determined by law and to their conscience'. In terms of the Constitution, the judiciary of Eritrea consists of:

- *The Supreme Court*
  - In terms of article 49(1) of the Constitution of Eritrea, the Supreme Court is the 'court of last resort' and is presided over by the chief justice.
  - In terms of article 49(2), the jurisdiction of the Supreme Court is as follows:
    - It has sole jurisdiction for interpreting the Constitution and for determining the constitutionality of any law enacted or action taken by government.
    - It has sole jurisdiction for hearing and adjudicating upon charges against a president who has been impeached by the National Assembly.
    - It has jurisdiction to hear and adjudicate cases being appealed from lower courts pursuant to law.
  - In terms of article 49(4), the tenure and number of justices of the Supreme Court shall be determined by law.
  - In terms of article 42(8) of the Eritrean Constitution, the president appoints justices of the Supreme Court upon proposal of the JSC and approval of the National Assembly.

- *The local courts*
  - In terms of article 50, the jurisdiction, organisation and function of lower courts and the tenure of their judges shall be determined by law.
  - In terms of article 42(9) of the Eritrean Constitution, the president appoints judges of the lower courts upon proposal of the JSC.

In terms of article 52 of the Constitution of Eritrea, a judge may be removed from office by the president only, acting on the recommendation of the JSC after an investigation on the grounds of physical or mental incapacity, violation of the law or breach of the judicial code of conduct. Further, the president may suspend a judge who is under investigation, on the recommendation of the JSC.

2.6.2 The Judicial Service Commission

The JSC is a constitutional body that is established in terms of article 53(1) of the

Eritrean Constitution and which is responsible for submitting recommendations for the recruitment of judges and the terms and conditions of the services. It is also responsible for recommending the removal of judges.

The JSC is relevant to the media because of its critical role in the appointment of senior judges to the judiciary, the proper functioning and independence of which are essential for democracy. Unfortunately, the Eritrean Constitution does not specify how the JSC is to be appointed and how it is to function. Its level of independence is therefore open to question and is not guaranteed by the Constitution itself. In any event it has never been established or become operational, and currently it appears that the Minister of Justice makes all judicial appointments.[20]

2.7 Enforcing rights under the Constitution

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

Article 28 of the Constitution of Eritrea, 'Enforcement of fundamental rights and freedoms', specifically states in article 28(1) that the National Assembly or any subordinate legislative authority shall not make any law, and the executive and the agencies of government shall not take any action that abolishes or abridges the fundamental rights and freedoms conferred by this Constitution, unless so authorised by this Constitution. Any law or action in violation thereof shall be null and void. Further, article 28(2) provides that any aggrieved person who claims that a fundamental right or freedom guaranteed by this Constitution has been denied or violated shall be entitled to petition a competent court for redress, and the court shall have the power to make all such orders as shall be necessary to secure for such petitioner the enjoyment of such fundamental rights or freedoms and, where such applicant suffers damage, to include an award of monetary compensation.

Ordinarily, one of the most effective ways in which rights are protected under a constitution is through the provisions of the constitution that entrench the rights contained in Chapter III, 'Fundamental Rights, Freedoms and Duties'. The Eritrean Constitution does not specifically entrench Chapter III but there are provisions regarding amendments to the Constitution. Article 59 of the Eritrean Constitution requires that a proposal for the amendment of any provision of the Constitution may be initiated and tabled by the president or 50% of all the members of the National Assembly.

Further, the procedure for actually voting to amend the Constitution is as follows:

- The National Assembly must, by a three-quarters majority vote of all its members, make the proposed amendments to a specific article tabled to be amended.

- One year later, the National Assembly must approve the same amendment by a four-fifths majority vote of all its members.

This is, of course, an extremely complex procedure which would make any constitutional amendment difficult unless it had the support of four-fifths of the members of the National Assembly.

2.8 The three branches of government and separation of powers

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

2.8.1 Branches of government

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

THE EXECUTIVE

Article 39(2) of the Constitution of Eritrea provides that the executive authority of Eritrea vests in the president and shall be exercised by him 'in consultation with the Cabinet'. Although not defined anywhere in the Constitution, a general definition of executive authority is essentially the role of executing the business of government.

Article 39(1) of the Constitution of Eritrea provides that the president of Eritrea shall be the head of state and government of Eritrea as well as the commander-in-chief of the Eritrean defence forces. In terms of article 45, the President's Oath requires him to swear that he will uphold and defend the Constitution of Eritrea and strive, to the best of his ability and conscience, to serve the people of Eritrea.

In terms of article 40, only a member of the National Assembly who is a citizen of Eritrea 'by birth' can be a candidate for president of Eritrea.

In terms of article 41(1), the president is elected from among the members of the National Assembly by an absolute majority vote of its members. Further, a candidate for president must be nominated by at least a 20% vote of all the members of the National Assembly. In terms of article 42(2), the term of the president shall be five

years, and in terms of article 42(3) no person shall be elected to hold the Office of the President for more than two terms.

Article 41(4) provides that the chairperson of the National Assembly shall assume the Office of the President when the Office of the President becomes vacant due to death, resignation or removal from office by the National Assembly in terms of article 41(6). The grounds for removing a president are:

- Violation of the Constitution or grave violation of the law
- Conduct which brings the authority or honour of the Office of the President into ridicule, content and disrepute
- Being incapable of performing the functions of his office by reason of physical or mental incapacity.

Article 41(7) empowers the National Assembly to determine the procedures for the election and removal of the president.

Article 41(4) of the Eritrean Constitution also provides that the chairperson of the National Assembly may act in the capacity of president for not more than 30 days, pending the election of another president to serve the remaining term of his predecessor.

Article 42 of the Eritrean Constitution sets out the powers and duties of the president. We have dealt with certain of these in other parts of this chapter, for example, appointing judges as proposed by the JSC. Other powers and duties include ordinary powers of state such as: delivering the state of the country speech annually in the National Assembly; ensuring the execution of laws and resolutions of the National Assembly; signing international agreements; appointing and receiving ambassadors and diplomatic representatives; appointing high-ranking members of the armed and security forces; establishing government ministries and departments necessary for good governance in consultation with the Public Service Administration; reprieving offenders and granting pardons or amnesties; presenting legislative proposals and the national budget to the National Assembly; conferring medals or other honours on citizens, residents and friends of Eritrea; and appointing, with the approval of the National Assembly, ministers, commissioners, the auditor general, governor of the National Bank, the chief justice and any other person required to be appointed by the president in terms of the Constitution or any other law.

Besides these, there are powers which apply in extraordinary circumstances, for

example: declaring a state of emergency and, when the defence of the country requires, martial laws; and summoning the National Assembly to an emergency meeting and to present his views to it.

Article 46 deals with the Cabinet. The president presides over the Cabinet and selects ministers. Note that in terms of article 46(2), the president has discretion to choose persons who are or are not members of the National Assembly. The president also issues the rules and regulations for the organisation, function, operations and code of conduct relating to members of the Cabinet and the secretariat of the presidential office – article 46(4). The Cabinet's essential role is set out in article 46(3) and this is to assist the president in: directing, supervising and coordinating the affairs of government; preparing the national budget; conducting studies on and preparing draft laws to be presented to the National Assembly; and conducting studies on and preparing the policies and plans of government.

Members of Cabinet, that is the ministers, are individually accountable to the president for the administration of their own ministries, and collectively accountable to the National Assembly for the administration of the work of the Cabinet in terms of article 47(1).

THE LEGISLATURE

Legislative or law-making power in Eritrea, in terms of the Constitution, vests in the National Assembly which is, in terms of article 31(1), 'the supreme representative and legislative body'.

The National Assembly is composed of representatives elected by secret ballot by all citizens qualified to vote – articles 31(2) and (3). Of concern is that the Eritrean Constitution does not specify the precise number of members who are to sit in the National Assembly nor does it specify their necessary qualifications or voting procedures. In terms of article 31(6), these matters and others such as conditions for vacating their seats, 'shall be determined by law'. This is extremely problematic because it means that the foundational event of a democracy, namely the exercise of universal suffrage, is determined by ordinary law and not by the Constitution itself. Thus the concept of supremacy of the constitution is rendered largely ineffectual in relation to the detailed processes in terms of which elections are to take place. In any event there have been no elections in Eritrea since 1993.

Article 32 sets out the powers and duties of the National Assembly. Critically, article 32(1)(a) empowers the National Assembly to enact laws. Article 32(1)(b) essentially provides that the National Assembly is the only authority capable of making decisions

having the force of law unless otherwise authorised by the Constitution or laws enacted by the National Assembly itself. Other functions of the National Assembly include: approving the national budget; ratifying international agreements; approving government borrowing; approving a state of peace, war or national emergency; and electing or impeaching the president.

Besides law-making, another critically important and common function of a legislature is performing oversight functions in respect of the executive. Article 32(7) specifies that the National Assembly has the power to oversee the execution of laws. This is in addition to its oversight function of Cabinet as a collective in terms of article 47(1). Article 47(2) empowers the National Assembly or any of its committees, through the Office of the President, to summon any minister to appear before them to question him concerning the operation of his ministry.

THE JUDICIARY

Judicial power, as discussed previously in this chapter, vests in the courts. Essentially, the role of the judiciary is to interpret the law and to adjudicate legal disputes in accordance with the law.

2.8.2 Separation of powers

It is important in a functioning democracy to divide governmental power between different organs of the state in order to guard against the centralisation of power, which may lead to abuses of power. This is known as the separation of powers doctrine.

The aim, as the Constitution of Eritrea has provided for, is to separate the functions of the three branches of government – the executive, the legislature and the judiciary – so that no single branch is able to operate alone, assume complete state control and amass centralised power. While each branch performs a number of different functions, each also plays a 'watchdog' role in respect of the other. This helps to ensure that public power is exercised in a manner that is accountable to the general public and in accordance with the constitution.

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

There are a number of respects in which the Constitution of Eritrea is extremely weak. The most obvious weakness, of course, is that the Constitution has not been implemented and is effectively suspended and Eritrea has no democratic credentials at all to speak of.

Nevertheless, we think it instructive to consider what improvements ought to be made to the Eritrean Constitution were its implementation to become a reality or another Constitution to be drafted.

2.9.1 Provide more detail for exactly how members of the National Assembly are to be elected

The Constitution of Eritrea contains no clear provisions on exactly how the members of the National Assembly are to be elected and even how many members are required to be in the National Assembly.

Providing for democratically elected representatives in the legislature is a foundational function of a democratic constitution, and this significant gap in the Eritrean Constitution ought to be dealt with in order to ensure the country's eventual transition to democracy.

2.9.2 Independent broadcasting regulator and public broadcaster

There is no doubt that the broadcasting sector would be greatly strengthened if the Eritrean Constitution gave constitutional protection to an independent broadcasting regulator and for a public broadcaster. Given the importance of both of these institutions for ensuring access to news and information by the public, it is suggested that such amendments to the Constitution would be in the public interest and would serve to strengthen both the media and democracy more generally in Eritrea.

2.9.3 Strengthen the independence of institutions

While it is laudable that the Eritrean Constitution makes provision for institutions such as the JSC, the fact that the structural independence and appointments procedures of the JSC are not provided for sufficiently in the Constitution is a weakness and undermines its independence.

3 THE MEDIA AND LEGISLATION

In this section you will learn:

- ❑ What legislation is and how it comes into being
- ❑ Legislation governing the print media
- ❑ Legislation governing the online media
- ❑ Legislation governing journalists
- ❑ Legislation governing the making of films

- ❑ Legislation governing the broadcasting media generally
- ❑ Legislation governing the state broadcasting sector
- ❑ Legislation that threatens a journalist's duty to protect sources
- ❑ Legislation that prohibits the publication of certain kinds of information
- ❑ Legislation that specifically assists the media in performing its functions

3.1 Legislation: An introduction

3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed by the National Assembly. As we know, legislative authority in Eritrea vests in the National Assembly. Both the National Assembly and the president are involved in passing legislation. Article 33 of the Constitution deals with the approval of draft legislation. The process provided for is that a draft law approved by the National Assembly must be transmitted to the president, who is required to sign it and have it published in the Official Gazette within 30 days of receipt from the National Assembly.

3.1.2 The difference between a bill and an act

A bill is a piece of draft legislation that is debated and usually amended by parliament during the law-making process. In terms of article 33 of the Constitution of Eritrea, if a bill is passed by the National Assembly it becomes an act once it is signed by the president and published in the Official Gazette. However, as has already been stated, the Constitution is not implemented. As a result, the real process for passing legislation is opaque, and it is alleged that sometimes key legislative provisions are simply approved by the president without the National Assembly's involvement.[21]

3.2 Legislation governing the print media

Unfortunately, in terms of the Press Proclamation No. 90 of 1996 (Press Proclamation), there are a number of constraints on the ability to operate a print media publication in Eritrea.

In particular, Eritrea requires the licensing of newspapers (which are defined to include magazines), which is out of step with international best practice – sections 7(2) and (3) of the Press Proclamation. Secondly, in terms of section 6(1), only Eritreans may own newspapers and minimum capital thresholds therefore are determined by the Ministry of Information. These kinds of restrictions effectively impinge upon the public's right to know by setting barriers to print media operations.

There are certain key requirements laid down by the Press Proclamation in respect of a newspaper. The definition of a newspaper is broad and is defined in section 3 of the Press Proclamation as meaning 'any printed matter containing news, reports and analyses issued regularly or periodically for general circulation, and includes cultural, literary, scientific, artistic, sports and other magazines'.

The key aspects of the Press Proclamation are discussed below.

- Section 4(1) of the Press Proclamation is headed 'Freedom of press'. Its first subsection (a) provides that freedom of the press 'is guaranteed pursuant to this proclamation'. However, the very next subsection (b) makes it clear that censorship, suspension or banning of newspapers can be effected under the proclamation or with the approval of the High Court. Further, subsection (c) specifically allows for governmental censorship of all publications 'under special circumstances, where the country, or part of it, is faced with a danger threatening public order, security and general peace caused by war, armed rebellion and public disorder or where a natural disaster ensues'.

- The Press Proclamation makes provision for two parts of the Eritrean press in section 4(3):
  - State press – that is, press owned by the state
  - Private press – that is, press owned by political associations, juridical persons (for example, companies) and individuals – for example, a newspaper.

- Section 7(2) provides that no person may, without a permit, publish newspapers. In terms of section 15(2), any person who publishes a newspaper without a permit is liable, upon conviction, to having his business licence, which is issued by the Business Licensing Office, suspended, having his copies confiscated and the owner of the newspaper shall be liable, upon conviction, to a fine of up to US$5000 as well as being prohibited from having a business licence for a year. The editor-in-chief shall be prohibited from heading any publication for a year, in terms of section 15(3). Any person who prints a newspaper which does not have a permit is liable, upon conviction, to imprisonment for up to one year, a fine of up to US$5000 and to having the newspaper confiscated.

- Section 7(6) sets out the requirements of the application for a permit to publish a newspaper, which is to be submitted to the Minister of Information. These requirements include: the applicant's full name; the name and address in Eritrea of the newspaper; the nature of the publication; the language and timed schedule of the publication; the editor's name; the financial resources; the publisher's name

and address; that the applicant has no tax liabilities and is not prohibited from publishing a newspaper in terms of section 7(5).

- The Press Proclamation contains a list of persons 'prohibited from publishing newspapers' or even participating therein (such as being engaged in journalism) in section 7(5). These include: persons prohibited from establishing political associations; persons deprived of their political rights; persons who oppose the principles of national unity or advocate for division and disintegration; and those convicted of moral crimes and crimes of corruption and misappropriation. It is clear therefore that the Press Proclamation aims to ensure that newspapers are published only by those who are in favour with the state.

- The Minister of Information is required to issue the necessary permit within two months of receipt of an application. However, if the permit is not issued then it is deemed to have been rejected – section 7(3). One can appeal to the High Court.

- It is clear that the publication of a newspaper is subject to ongoing ministerial oversight as section 7(9) requires that the publishers submit financial accounts to the Ministry of Information annually.

- Further, it is critical to note that a transfer of private press ownership requires the permission of the Minister of Information and must be done in accordance with the modes and restrictions provided for in the Transitional Commercial Code of Eritrea – section 6(3) of the Press Proclamation.

- Besides the newspaper permit requirements set out above, section 13 of the Press Proclamation also requires every Eritrean printer or publisher to submit two free copies of every publication that he publishes or disseminates to the Ministry of Information. Further, section 7(11) requires the printer's name, the chief editor's name, and the place and date of publication to be written on a newspaper or publication. The distributor or seller of a newspaper or publication has the obligation to ensure the said information is contained therein.

- An interesting provision is section 11, which provides that whenever a publication disseminates inaccurate news or information, the chief editor or journalist concerned shall, on the basis of the request of the person to whom the matter concerns, publish a reply or correction in its earliest publication after receipt of the request, and that the reply or correction shall be published free of charge in exactly the same column on the same page and in identical lettering. A failure to publish a reply or correction as required in terms of section 11 is punishable, upon

conviction, with a fine, and the court may also suspend all the activities of the newspaper unless and until it publishes a reply or correction – section 15(7).

3.3 Legislation governing the online media

The Press Proclamation No. 90 of 1996 also includes a number of constraints on the ability to publish information online. The definition of 'press products' in section (3) is extremely broad and it means 'all writings, pictures, video and tape cassette, musical notes, photographs and products disseminated to the public by means of new techniques, technology and others'. This is sufficiently broad to include SMSes, blogs, Facebook posts, tweets, and information posted on websites.

What is of particular concern is that the provisions which relate to the ownership and control of newspapers also apply to press products as defined above.

In particular, Eritrea requires the licensing of press products, which is entirely out of step with international best practice – sections 7(2) and (3) of the Press Proclamation. Second, in terms of section 6(1), only Eritreans may own press products, and minimum capital thresholds therefore are determined by the Ministry of Information. These kinds of restrictions effectively impinge upon the public's right to know by setting barriers to print and other media operations.

There are certain key requirements laid down by the Press Proclamation in respect of a press product. These are discussed below.

- Section 4(1) of the Press Proclamation is headed 'Freedom of press'. Its first subsection (a) provides that freedom of the press 'is guaranteed pursuant to this proclamation'. However, the very next subsection (b) makes it clear that censorship, suspension or banning of press products can be effected under the proclamation or with the approval of the High Court. Further, subsection (c) specifically allows for governmental censorship of all publications 'under special circumstances, where the country, or part of it, is faced with a danger threatening public order, security and general peace caused by war, armed rebellion and public disorder or where a natural disaster ensues'. Note that no mention is made of the state of emergency provisions in the Constitution. It is clear therefore that censorship is routine and that constitutional guarantees mean very little and are not referred to in the Press Proclamation.

- Section 7(2) provides that no person may, without a permit, publish press products. In terms of section 15(2), any person who publishes without a permit is liable, upon conviction, to having his business licence, which is issued by the

Business Licensing Office, suspended, and the owner of the publication shall be liable, upon conviction, to a fine of up to US$5000 and being prohibited from having a business licence for a year.

- Section 7(6) sets out the requirements of the application for a permit to be submitted to the Minister of Information for such permission. These requirements include: the applicant's full name; the name and address in Eritrea of the publication; the nature of the publication; the language and timed schedule of the publication; the editor's name; the financial resources; the publisher's name and address; that the applicant has no tax liabilities and is not prohibited from publishing a press product in terms of section 7(5).

- The Press Proclamation contains a list of persons 'prohibited from publishing … press products' or even participating therein (such as being engaged in online communication) in section 7(5). These include: persons prohibited from establishing political associations; persons deprived of their political rights; persons who oppose the principles of national unity or advocate for division and disintegration; and those convicted of moral crimes and crimes of corruption and misappropriation. It is clear therefore that the Press Proclamation aims to ensure that all online information is published only by those who are in favour with the state.

- It is clear that the publication of a press product is subject to ongoing ministerial oversight as section 7(9) requires that the publishers submit financial accounts to the Ministry of Information annually.

- Further, it is critical to note that a transfer of private press product ownership requires the permission of the Minister of Information and must be done in accordance with the modes and restrictions provided for in the Transitional Commercial Code of Eritrea – section 6(3) of the Press Proclamation.

- Besides the press product permit requirements set out above, section 13 of the Press Proclamation also requires every Eritrean printer or publisher to submit two free copies of every publication that he publishes or disseminates to the Ministry of Information. Further, section 7(11) requires the printer's name, the chief editor's name, and the place and date of publication to be written on a publication. The distributor or seller of a publication has the obligation to ensure the said information is contained therein. It is unclear how internet-based publications are supposed to comply with these provisions.

- An interesting provision is section 11, which provides that whenever a publication

disseminates inaccurate news or information, the chief editor or journalist concerned shall, on the basis of the request of the person to whom the matter concerns, publish a reply or correction in its earliest publication after receipt of the request and that the reply or correction shall be published free of charge in exactly the same column, on the same page and in identical lettering. A failure to publish a reply or correction as required in terms of section 11 is punishable, upon conviction, with a fine, and the court may also suspend all the activities of the press product unless and until it publishes a reply or correction – section 15(7).

3.4 Legislation governing journalists

The Press Proclamation No. 90 of 1996 also includes a number of constraints on the ability to practise the profession of journalism. A journalist is defined in section 3 of the Press Proclamation as being 'a natural person engaged in the profession of the Press as his main source of revenue and working in the mass media or news services in Eritrea or abroad and whose name is registered in the register of journalists in the Ministry [of Information]'. Consequently, the very definition of a journalist involves being registered with the Ministry of Information.

Section 5(1) of the Press Proclamation deals ostensibly with the rights of journalists, but these are often framed in such a way that they contain significant limitations on those rights. Examples include the following:

- Subsection (a): 'A journalist shall have the right to obtain news and information from any official or unofficial source and disseminate same after verifying the truth thereof.' The effect of this is that only if the journalist is able to prove the truth of any information obtained may he or she disseminate it. This is, of course, extremely limiting.

- Subsection (b): 'Except on the basis of law, a journalist's security may not be encroached upon, nor may he be exposed to pressure by any party or official on account of the opinion he expresses or the correctness of the information he disseminates.' Again this is limiting in that only the dissemination of 'correct' information entitles the journalist not to be exposed to pressure from parties or officials.

- Subsection (d) entitles only 'Eritrean journalists registered in the Ministry's Register' to establish a journalists' association.

Section 5(2) of the Press Proclamation sets out the duties of journalists. Certain of these are innocuous, for example, subsection (a) which requires a journalist to be

bound by 'the rule of law, professional ethics and his conscience', and subsection (b) which requires a journalist 'to be bound by all the laws of Eritrea with respect to whatever he writes or disseminates.' However, other duties contain significant restrictions on a journalist's ability to do his or her work. For example:

- Subsection (c) requires a journalist to 'respect the private life, dignity and prestige of all families and individuals where he raises matters related to [the] public interest'. While respect must be accorded to people, the implication appears to be that this might trump matters relating to the public interest. If this were to be the case, reporting would be extremely difficult.

- Subsection (d) prohibits a journalist from:
  - Disseminating information where the veracity of the information has not been ascertained
  - Distorting information.

  Again, it is extremely problematic for journalists to publish only truthful or correct information as it is impossible for a journalist to guarantee the accuracy of his or her information in all cases. What is required are 'best efforts' to ensure accuracy, truthfulness, correctness and the like. Otherwise, the journalist is effectively unable to publish what may be an important public interest story that deserves widespread dissemination but cannot be independently verified at the time of publishing.

- Subsection (g) prohibits journalists from infringing upon national safety and security and supreme national interests, promoting division and dissension or ideas inciting violence and terrorism. Unfortunately, terms such 'national interests' and 'division and dissention' are extremely broad so it is difficult to know when a piece of investigative journalism into differing political views and organisations, or into corruption within the armed services, for example, might run afoul of these provisions.

Significantly, the Press Proclamation has specific provisions governing foreign journalists working in Eritrea.

Section 10(1) provides that in order to work in the country as a resident correspondent of one or more foreign news agencies, a foreign journalist must first obtain permission and a foreign correspondent's press card from the Minister of Information. In terms of section 10(2), a foreign correspondence permit is to be renewed annually and the minister may without giving reasons reject or refuse applications. These provisions are extremely problematic because of the failure to require the minister to act justifiably or reasonably, and there are no specified rights

to appeal to the courts. Note also the provisions of section 10(6) empowering the minister to issue directives clarifying the preconditions to be met by a foreign journalist wanting to work in Eritrea. Once a foreign correspondent is duly permitted to work, he can be 'subjected to measures by the Minister for other discrepancies or infractions he may commit' in terms of section 10(7) of the Press Proclamation. Again, this wording is extremely vague as journalism often involves discrepancies when reporting.

3.5 Legislation governing the exhibition of films

Section 8 of the Press Proclamation deals with artistic press products (which term is not defined), and section 8(1) provides that the export and import, lease, sale, reproduction, display or distribution of artistic goods such as films, cinema, tape cassettes or video cassettes without a permit from the Ministry of Information and licence from the Business Licensing Office is prohibited. In terms of section 15(8), a person found guilty of dealing in artistic goods without a permit – that is, of violating section 8(1) – is liable to a fine and to having his goods confiscated.

3.6 Legislation governing the broadcast media generally

3.6.1 Legislation that regulates broadcasting generally

It is noteworthy that the Press Proclamation provides at section 4(1)(d) that radio and television ownership 'is reserved for the Government'. It contains no other mention of broadcasting.

Part Four of the Communications Proclamation 102 of 1998 (Communications Proclamation) is headed 'Broadcasting' and it makes provision for a number of broadcasting-related matters. Further, section 54 of the Communications Proclamation is headed 'Repeal' and it states that: 'Any provisions of any proclamation … concerning matters provided for in this Proclamation are hereby repealed and replaced by this Proclamation.' Consequently, it appears that with respect to broadcasting the provisions of the Communications Proclamation have superseded those of the Press Proclamation.

3.6.2 Establishment of the regulator

Section 4(1) of the Communications Proclamation states that the Ministry of Transport and Communications shall be the only government agency vested with the regulatory authority of the communications sector. In relation to communications it acts through the Ministry's Communications Department.

3.6.3 Main functions of the Communications Department

The Communications Department of the Ministry of Transport and Communications has a number of objectives set out in section 5 of the Communications Proclamation.

In relation to broadcasting, those that are particularly relevant include:

- Creating a regulatory environment for the supply of communications networks and services
- Promoting fair competition and efficient market practice in the communications sector. Note 'communications' is defined in section 2 of the Communications Proclamation as 'telecommunications, broadcasting and post'
- Facilitating the entry into markets for communications services of persons wishing to supply such networks and services
- Ensuring that standard broadcasting services are supplied as efficiently and economically as possible, and at such performance standards which reasonably meet the social, industrial, and commercial needs of the community
- Ensuring that the Eritrean public have growing access to communications.

3.6.4 Appointment of the regulator

As the regulator is the Communications Department of the Ministry of Transport and Communications, it is clear that the minister will be appointed by the president. Section 11(1) of the Communications Proclamation is silent as to who the head of the Department of Communications will be, but it does state that the Department of Communications may select such number of personnel as it needs for its regulatory functions 'from among civil servants'.

3.6.5 Funding for the regulator

Section 10 of the Communications Proclamation is headed 'Funding of the Department's regulatory functions' and makes provision for a range of funding sources, namely:

- Government budgetary appropriations
- Amounts paid to the Communications Department for regulatory tasks performed

- Amounts paid to the department as levies for regulatory documents
- Such sums as may vest in the Communications Department from time to time in connection with the department's regulatory functions
- Financial assistance from any other funding source.

3.6.6 Making broadcasting regulations

Section 6(1) of the Communications Proclamation provides that the Department of Communications shall have responsibility for 'economic and technical regulation of the communications industry'.

3.6.7 Licensing regime for broadcasters in Eritrea

BROADCASTING LICENCE REQUIREMENT

Section 28(1) of the Communications Proclamation provides that an operator's permit must be obtained by any person desiring to:

- Establish and/or operate installations for broadcasting or the retransmission of broadcasting
- Broadcast nationally
- Broadcast locally, that is, within a geographically delimited area.

The Communications Proclamation is unclear with regard to the process to be followed in cases of non-compliance with the Proclamation. Section 48 is headed 'Sanctions', and provides for a range of sanctions to be imposed by the Communications Department if a person fails to comply with the requirements laid down in or under the Communications Proclamation or in regulatory documents, which term is defined in section 2 of the Communications Proclamation as meaning 'permits, equipment, approvals, certificates, assignments of frequency and other approvals and documents issued by the Department'. These sanctions include:

- Coercive fines
- The publication of an apology
- The payment of a fine determined by the Department, to the Department

- A reduction of the period of exclusive rights in regards to licensed services

- A reduction of the period of validity of the relevant regulatory document, alternatively the suspension or revocation of such regulatory document.

However, section 50 is headed 'Penalties' and provides that any person who violates the provisions of this proclamation or regulations issued thereunder shall be punished in accordance with the Penal Code of Eritrea.

The Communications Proclamation is entirely silent as to which sanctions provision, namely section 48 or section 50, is to be used in particular circumstances or which takes precedence over the other. It does appear, however, that the Penal Code is reserved for criminal activities and that section 48 deals with non-criminal sanctions but nowhere is this made explicit.

CATEGORIES OF BROADCASTING LICENCES

It appears from section 28(1) of the Communications Proclamation that there are three types of broadcasting-related permits, called an operator's permit, namely: a permit to establish and/or operate installations for broadcasting or the retransmission of broadcasting; a permit to broadcast nationally; and a permit to broadcast locally. In terms of section 28(2), the Communications Department shall determine which of the above types of broadcasting-related activities shall be defined as:

- *Exclusive rights activities:* Defined in section 2(e) as 'an activity for which a permit may be issued to one person only granting him for a stipulated term of years the exclusive privilege of engaging in the activity specified in his permit.'

- *Limited competition activities:* Defined in section 2(g) as 'an activity for which permits may be issued to a limited number of persons in accordance with criteria and conditions stipulated by the Communications Department, granting the persons for a stipulated term of years the right to engage in the activity specified in the permit.'

BROADCASTING LICENSING PROCESS

The Communications Proclamation does not contain a licensing or permit procedures process. However, section 2(j) makes it clear that a business licence issued under the Business Licensing Office Establishment Proclamation No. 72 of 1995 is required in addition to a permit issued by the Communications Department under the Communications Proclamation.

FREQUENCY SPECTRUM LICENSING

Part Five of the Communications Proclamation is headed 'Radio Activities and Frequency Management'.

Section 33 empowers the Communications Department to assign radio frequencies for radio activities within the framework of actual or planned use of frequencies. In terms of section 34, radio equipment may only be possessed, established or used in terms of a certificate issued by the Communications Department.

3.6.8 Responsibilities of broadcasters under the Communications Proclamation

The Communications Proclamation contains no substantive provisions setting out responsibilities of broadcasters, and indeed section 3(1) provides that the Communications Proclamation 'does not apply to programme activities of broadcasting (radio broadcasting and television)'. The responsibilities appear to be to comply with permits and conditions as determined by the Communications Department.

3.6.9 Is the Communications Department an independent regulator?

The Communications Department can in no way be said to be independent. It is explicitly an arm of the Ministry of Transport and Communications and is part and parcel of the executive branch of government.

3.6.10 Amending the legislation to strengthen the broadcast media generally

There are a number of weaknesses with the legislative framework for the regulation of broadcasting generally in Eritrea:

- Only the bare bones of the broadcasting regulatory environment are set down in law. Far more legal detail is required of a broadcasting regulatory statute.

- No provision is made for an independent regulator. An independent regulator ought to be established by law and appointments thereto ought to be made by the president on the recommendation of the National Assembly, following a public nominations, interview and short-listing process.

- The broadcasting law makes no mention of three tiers of broadcasters: public; commercial; and community. Indeed, it is clear that commercial and community broadcasters have not been licensed in Eritrea.

- It is clear that there is a state broadcaster (for both television and radio) and that it has not been transformed into a public broadcaster.

- No public participation is provided for in the broadcasting service licensing process.

3.7 Legislation governing the state broadcast media

It is noteworthy that the Press Proclamation No. 90 of 1996 provides at section 4(1)(d) that radio and television ownership 'is reserved for the Government'. It contains no other mention of broadcasting. The Communications Proclamation 102 of 1998 does regulate broadcasting but it makes no specific mention of public or state broadcast media. Consequently, it appears that Eritrean television and radio is entirely controlled as a governmental activity which is operated by the executive branch of government. There are no laws or regulations setting out its mandate, its control structures, funding and the like. Presumably these matters are determined within the executive branch of government acting alone.

3.8 Legislation that undermines a journalist's duty to protect sources

A journalist's sources are the lifeblood of his or her profession. Without trusted sources, a journalist cannot obtain information that is not already in the public domain. However, sources will often be prepared to provide critical information only if they are confident that their identities will remain confidential and that their anonymity will be respected and protected by a journalist.

This is particularly true of so-called whistleblowers – inside sources that are able to provide journalists with information regarding illegal activities, whether by company or government personnel. Consequently, democratic countries often provide special protection for journalists' sources. It is recognised that without such protection, information that the public needs to know would not be given to journalists.

❖ **Press Proclamation No. 90 of 1996**

Section 5(1)(c) of the Press Proclamation specifies that the rights of journalists (note this only applies to registered journalists) include the right 'to preserve the secrecy of the source of his information and not to be compelled to disclose it'. However, this is subject to the proviso 'except by the order of court'. The clear effect of this is that a court can order a journalist to reveal his or her sources.

Clearly, these provisions might well conflict with a journalist's ethical obligation to protect his or her sources. However, it is important to note that whether or not

requiring a journalist to reveal a source is in fact an unconstitutional violation of the right to freedom of expression will be dependent on the particular circumstances in each case, particularly on whether the information is available from any other source. Consequently, it is extremely difficult to state that these provisions are, by themselves, a violation of the right to freedom of expression under the Constitution.

3.9 Legislation that prohibits the publication of certain kinds of information

A number of statutes contain provisions which, looked at closely, undermine the public's right to receive information and the media's right to publish information.

These statutes are targeted and prohibit the publication of certain kinds of information or expression, including:

- Prohibition of publications relating to legal proceedings
- Prohibition of publications relating to in camera governmental proceedings
- Prohibition of publications relating to state security
- Prohibition of publications that insult the national flag of Eritrea and other countries
- Prohibition of publications that vilify the Eritrean struggle
- Prohibition of publications that promote division and dissension
- Prohibition of publications that are obscene or contrary to public morality
- Prohibition of publications that constitute defamation, defamation of government institutions or that encroach upon the dignity of minors
- Prohibition of publications that constitute blackmail
- Prohibition of publications that invade privacy
- Prohibition of publications that constitute confidential information of public authorities
- Prohibition of publications that constitute false news
- Prohibition of publications that promote religious or ethnic divisions.

3.9.1 Prohibition of publications relating to legal proceedings

CLOSED JUDICIAL PROCEEDINGS

❖ **Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed 'Matters not to be disseminated'. The English translation of the Press Proclamation is not excellent but section 12(8) essentially provides that: 'All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters … cases which have been suspended from publication and dissemination by courts, prosecutors and investigation organs or cases at the investigations or trial stages, the publication of which may be prejudicial to the process of justice.'

Article 15(10) provides that a person who violates section 12(8) shall be liable, upon conviction, to a punishment under the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015.

The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply. Article 15(10) of the Press Proclamation also provides that where the offence is committed for a second time, the newspaper shall be banned, and its licence shall be cancelled.

❖ **Penal Code, 2015**

Article 172 of the penal code provides that a person who makes public a report or any document or information of a judicial proceeding that has been lawfully declared and conducted as a closed judicial proceeding is guilty of a violation of closed judicial proceedings, which is punishable with a term of imprisonment or a fine.

FALSE OR FORBIDDEN REPORTING ON JUDICIAL PROCEEDINGS

❖ **Penal Code, 2015**

Article 173 of the Penal Code provides that a person who publishes any false or forbidden information or report concerning judicial proceedings which are pending, proceeding or concluded, is guilty of an offence, which is punishable with a term of imprisonment or a fine.

BIASED PUBLICATIONS INTENDED TO PERVERT THE COURSE OF JUSTICE

❖ **Penal Code, 2015**

Article 174 of the Penal Code provides that a person who, with the intent to inflame the court, court officials, witnesses or the parties, publishes news or reports known

to be biased or which distort the facts and which have been drawn up for the purpose of influencing a judicial decision in the case being tried or pending, is guilty of perverting the course of justice by biased publications, which is punishable with a term of imprisonment of between one and six months or a fine.

3.9.2 Prohibition of publications relating to in camera governmental proceedings

❖ **Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed 'Matters not to be disseminated'. The English translation of the Press Proclamation is not excellent but section 12(7) essentially provides that: 'All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters … namely, the in-camera meetings of high officials and organs of the state.' Section 15 does not contain a specific offences and penalty provision in respect of violations of section 12(7), but this will be determined in accordance with the new Penal Code, 2015.

3.9.3 Prohibition of publications relating to state security

TREASONOUS DISCLOSURES IN A TIME OF WAR OR EMERGENCY

❖ **Penal Code, 2015**

Essentially, article 112(2) read with article 112(1)(a) provides that an Eritrean citizen or any other person entrusted with the protection of the national interests of Eritrea who discloses or communicates to a foreign power, state, organisation, individual or other persons or unauthorised members of the Eritrean public, a state secret or documents officially not required to be divulged in order to protect the interests of Eritrea, in a time of war or state emergencies, is guilty of treason during times of war or state emergencies, which is punishable by life imprisonment, or, in cases of exceptional gravity, with death or with a term of imprisonment of between 19 and 23 years.

ORDINARY TREASONOUS DISCLOSURES

❖ **Penal Code, 2015**

Essentially, article 112(1)(a) provides that an Eritrean citizen or any other person entrusted with the protection of the national interests of Eritrea who discloses or communicates to a foreign power, state, organisation, individual or other persons or unauthorised members of the Eritrean public, a state secret or documents officially not required to be divulged in order to protect the interests of Eritrea, is guilty of treason, which is punishable by a term of imprisonment of between 13 and 16 years.

ESPIONAGE

❖ **Penal Code, 2015**

Essentially, article 114(1)(a) provides that any person who, without being formally recruited by such entities, intentionally and without lawful authority, communicates or makes available to a foreign state or organisation hostile to Eritrea documents, plans or other items of information that he knows should be kept secret and that he knows may be used for a purpose prejudicial to the interests of Eritrea is guilty of espionage, which is punishable by a term of imprisonment of between 13 and 16 years. Note that in terms of article 114(2), where the person performing the espionage is formally recruited by such a foreign state or organisation hostile to Eritrea, the term of imprisonment is increased to between 16 and 19 years.

GENERAL SECURITY-RELATED INFORMATION

❖ **Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed 'Matters not to be disseminated'. The English translation of the Press Proclamation is not excellent but section 12(2) essentially provides that: 'All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters…namely, any document or secret information on the supreme interests of the nation and people, as well as national security and defence secrets.'

Section 15(10) provides that a person who violates section 12(2) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015.

The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation. Section 15(10) of the Press Proclamation also provides that where the offence is committed for a second time, the newspaper shall be banned and its licence cancelled.

SEDITIOUS LIBEL

❖ **Penal Code, 2015**

Article 122 of the Penal Code provides that a person who knowingly publishes any writing that advocates the use of force as a means of accomplishing a governmental change within Eritrea is guilty of seditious libel, which is punishable with a term of imprisonment.

INCITEMENT

❖ **Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed 'Matters not to be disseminated'. The English translation of the Press Proclamation is not excellent but section 12(3) essentially provides that: 'All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters … namely, any matter which incites … violence and terrorism.' Note that again, no definition of 'terrorism' is contained in the Press Proclamation but it can be inferred that these include ethnic differences.

Section 15(11) provides that a person who violates section 12(3) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015. The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation.

Section 15(11) of the Press Code also provides that where the offence is committed for a second time, the newspaper shall be banned, and its licence cancelled.

❖ **Penal Code, 2015**

Article 189 of the Penal Code provides that a person who incites others to commit acts of violence or offences against the community, individuals, groups or properties, or to disobey orders or laws issued by lawful authority, is guilty of public incitement, which is punishable with a term of imprisonment or a fine.

Article 190 of the Penal Code provides that a person who commits the offence of incitement under article 189 with an appeal to religious or ethnic hatred is guilty of aggravated public incitement, which is punishable with a term of imprisonment.

GEOGRAPHIC INFORMATION

❖ **Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed 'Matters not to be disseminated'. The English translation of the Press Proclamation is not excellent but section 12(10) essentially provides that: 'All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters…namely, shapes, pictures and maps of Eritrean territory without first obtaining permission from the governmental agency concerned.' Section 15 does not contain a specific offences and penalty provision in respect of violations of section 12(10).

TERRITORIAL INTEGRITY AND SOVEREIGNTY AND INDEPENDENCE OF THE NATION

❖ **Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed 'Matters not to be disseminated'. The English translation of the Press Proclamation is not excellent but section 12(4) essentially provides that: 'All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters … namely, any matter which undermines the territorial integrity and sovereignty and independence of the nation.' Section 15(10) provides that a person who violates section 12(4) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015. The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation. Section 15(10) also provides that where the offence is committed for a second time, the newspaper shall be banned, and its licence shall be cancelled.

ALARMING THE PUBLIC

❖ **Penal Code, 2015**

Article 194 of the Penal Code provides that a person who, with the intent to alarm the public, threatens to cause a catastrophe or other harm to the community or starts or spreads false rumours concerning impending catastrophes or disasters or other harm to society, thereby inflaming public opinion or causing a danger of public disturbance, is guilty of alarming the public, which is punishable by a term of imprisonment or a fine.

Note that if the offence of alarming the public was committed with the intent to undermine governmental authority, the punishment is imprisonment or a fine.

3.9.4 Prohibition of publications that insult the national flag of Eritrea and of other countries

❖ **Penal Code, 2015**

Article 123(1) of the Penal Code provides that a person who intentionally insults the national flag of Eritrea is guilty of insults to the national flag of Eritrea, which is punishable with a term of imprisonment or a fine.

Article 123(2) of the Penal Code provides that a person who intentionally insults the national flag of any other country is guilty of insults to the national flag of a country other than Eritrea, which is punishable with a term of imprisonment or a fine.

3.9.5 Prohibition of publications that vilify the Eritrean struggle

❖ **Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed 'Matters not to be disseminated'. The English translation of the Press Proclamation is not excellent but section 12(3) essentially provides that: 'All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters…namely, any matter which…vilifies the Eritrean people's tradition of struggle.' Section 15(11) provides that a person who violates section 12(3) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015. The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation. Section 15(10) of the Press Proclamation also provides that where the offence is committed for a second time, the newspaper shall be banned, and its licence shall be cancelled.

3.9.6 Prohibition of publications that promote division and dissension

❖ **Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed 'Matters not to be disseminated'. The English translation of the Press Proclamation is not excellent but section 12(3) essentially provides that: 'All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters…namely, any matter which…promotes the spirit of division and dissension among the people.'

Section 15(11) provides that a person who violates section 12(3) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015. The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation. Section 15(10) of the Press Proclamation also provides that where the offence is committed for a second time, the newspaper shall be banned, and its licence shall be cancelled.

3.9.7 Prohibition of publications that are obscene or contrary to public morality

❖ **Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed 'Matters not to be disseminated'. The English translation of the Press Proclamation is not excellent but section 12(5) essen-

tially provides that: 'All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters…namely, any matter which contravenes general morality.'

Section 15(10) provides that a person who violates section 12(5) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015.

The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation. Section 15(10) of the Press Proclamation also provides that where the offence is committed for a second time, the newspaper shall be banned, and its licence shall be cancelled.

❖ **Penal Code, 2015**

Article 313(1) provides that a person who publicly distributes writings, images, posters, films, objects or other communications that are obscene or grossly indecent is guilty of obscenity, which is punishable by a term of imprisonment of between six and 12 months or a fine. Note, however, that article 313(2) provides that there is no offence under article 313(1), where the conduct takes place in private or where the material is artistic, literary or scientific in character.

3.9.8 Prohibition of publications that constitute defamation, defamation of government institutions or that encroach upon the dignity of minors

DEFAMATION

❖ **Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed 'Matters not to be disseminated'. The English translation of the Press Proclamation is not excellent but section 12(6) essentially provides that: 'All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters…namely, any defamation.'

Section 15(10) provides that a person who violates section 12(6) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015.

The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation. Section 15(10) of the Press Proclamation also provides

that where the offence is committed for a second time, the newspaper shall be banned, and its licence shall be cancelled.

❖ **Penal Code, 2015**

It is important to note, however, that the new Penal Code itself provides for the crime of defamation. Article 301(1) of the Penal Code provides that a person who intentionally causes injury to the honour or reputation of another person by communicating to a third party or parties, directly or indirectly, any imputation of an act of fact or conduct that is false, is guilty of defamation, which is punishable with a term of imprisonment of between one and six months or a fine.

Further, article 301(2) of the Penal Code provides that a person who communicates to a third party or parties any imputation of an act of fact or conduct that is true solely with the intention to injure the honour or reputation of another person, is guilty of malicious injury to honour or reputation, which is punishable with a term of imprisonment of up to one month or a fine.

It is important to note that the effect of these provisions is to make defamation a criminal offence. Although the Penal Code does not repeal the Press Proclamation expressly, article 5(2)(a) of the Penal Code specifically states that the definition of the offences shall be that provided in the Penal Code. Consequently, it seems clear that defamation will effectively be dealt with in terms of the Penal Code and not the Press Proclamation, although it has not been expressly repealed.

In most democratic countries defamation is dealt with as a civil matter in which damages can be paid for unlawful defamation and there is no threat of arrest, imprisonment and a criminal record attaching to defamation. Criminal defamation has a very serious chilling effect on media activities given the criminal sanctions that can be imposed and, consequently, are not conducive to a free press.

What is particularly startling about this formulation in the Eritrean Press Proclamation is that the law contains few defences to defamation, such as a privileged occasion, for example, reporting on court proceedings, having published in good faith after making reasonable attempts to establish the truth, etc. This is entirely out of step with general tenets of defamation law internationally.

DIGNITY OF MINORS

❖ **Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed 'Matters not to be disseminated'. The English translation of the Press Proclamation is not excellent but section 12(5)

essentially provides that: 'All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters…namely, any matter which encroaches upon the dignity of minors.'

Section 15(10) provides that a person who violates section 12(5) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015. The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation. Section 15(10) of the Press Proclamation also provides that where the offence is committed for a second time, the newspaper shall be banned, and its licence shall be cancelled.

Again, these terms are not defined and it is not clear what kind of issues would be covered. Usually the identity of minors in custody battles and sexual offences cases are protected and so it can be assumed that these are also covered here, but it is not entirely clear as the wording is not explicit.

DEFAMATION OF GOVERNMENT INSTITUTIONS

❖ **Penal Code, 2015**

Article 154 of the Penal Code provides that a person who publicly disseminates fabricated or false facts, knowing them to be such, in order to cast disparagement upon legislative, executive or judicial institutions is guilty of defamation of governmental institutions, which is punishable with a prison term.

INSULTING BEHAVIOUR AND OUTRAGE

❖ **Penal Code, 2015**

Article 302(1) of the Penal Code provides that a person who, by addressing himself to another person or by referring to another person, offends the honour of that other person by:

- Distastefully touching upon the latter's physical or mental impairment, or the latter's ethnic, religious or racial background
- Use of grossly obscene words or utterances
- Reference to the victim's profession
- Any other words or utterances of similar severity

is guilty of insulting behaviour and outrage, which is punishable with a term of imprisonment or a fine.

3.9.9 Prohibition of publications that constitute blackmail

❖ **Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed 'Matters not to be disseminated'. The English translation of the Press Proclamation is not excellent but section 12(6) essentially provides that: 'All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters…namely, any…blackmail.'

Section 15(10) provides that a person who violates section 12(6) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015. The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation. Section 15(10) of the Press Proclamation also provides that where the offence is committed for a second time, the newspaper shall be banned, and its licence shall be cancelled.

Note that blackmail is not defined in the Press Proclamation.

3.9.10 Prohibition of publications that invade privacy

❖ **Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed 'Matters not to be disseminated'. The English translation of the Press Proclamation is not excellent but section 12(5) essentially provides that: 'All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters…namely, any matter which…encroaches upon the personal liberties and the private lives of citizens.'

Section 15(10) provides that a person who violates section 12(5) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015. The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation. Section 15(10) of the Press Proclamation also provides that where the offence is committed for a second time, the newspaper shall be banned, and its licence shall be cancelled. Note that these terms are not defined in the Press Proclamation and that there is no public interest defence in respect of such publications, as is the norm internationally.

3.9.11 Prohibition of publications that constitute confidential information of public authorities

❖ **Penal Code, 2015**

Article 157 provides that a person who, not being authorised to do so, intentionally publishes reports, deliberations or decisions of a public authority, the content of which he knows must be kept confidential, is guilty of a breach of a prohibition of publication, which is punishable with a term of imprisonment or a fine.

3.9.12 Prohibition of publications that constitute false news

❖ **Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed 'Matters not to be disseminated'. The English translation of the Press Proclamation is not excellent but section 12(9) essentially provides that: 'All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters…namely, inaccurate information and news intentionally disseminated to influence economic conditions, create commotion and confusion and disturb general peace.'

Section 15(9) provides that a person who violates section 12(9) shall be liable, upon conviction, to a punishment in terms of section 580 of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015. The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation.

3.9.13 Prohibition of publications that promote religious or ethnic divisions

❖ **Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed 'Matters not to be disseminated'. The English translation of the Press Proclamation is not excellent but section 12(1) essentially provides that: 'All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters…namely, any matter which vilifies or belittles humanitarian and religious beliefs.'

Further, section 12(3) essentially provides that: 'All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters…namely, any matter which incites religious and sub-national differences.' Note that again, no definition of 'sub-

national' is contained in the Press Proclamation but it can be inferred that these include ethnic differences.

Section 15(11) provides that a person who violates section 12(1) and/or (3) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015.

The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation. Section 15(11) of the Press Proclamation also provides that where the offence is committed for a second time, the newspaper shall be banned, and its licence shall be cancelled.

❖ **Penal Code, 2015**

Article 195 of the Penal Code provides that a person who intentionally and publicly asserts fabricated or distorted facts, knowing them to be such, in order to cast disparagement upon any religion or ethnic group is guilty of defamation of or interference with religious and ethnic groups, which is punishable by a term of imprisonment or a fine.

Article 196 of the Penal Code provides that a person who intentionally and publicly disparages the ceremony or rite of any lawful religious group, or profanes a place, image or object used for such religious ceremonies or ceremonies relating to any ethnic group is guilty of disturbance of religious or ethnic feelings, which is punishable by a term of imprisonment or a fine.

3.10 Legislation that specifically assists the media in performing its functions

In countries that are committed to democracy, governments pass legislation which specifically promotes accountability and transparency of both public and private institutions, such as access to information and whistleblower protection legislation. Such statutes, while not specifically designed for use by the media, can and often are used by the media to uncover and publicise information in the public interest. We have not been provided with any legislation that can be said to assist the media.

4 REGULATIONS AFFECTING THE MEDIA

In this section you will learn:

- ❑ What regulations are
- ❑ Key regulations governing the media

4.1 Definition of regulations

Regulations are subordinate legislation. They are legal rules that are made in terms of a statute. Regulations are legal mechanisms for allowing a body other than parliament to make legally binding rules governing an industry or sector, without needing parliament to pass a specific statute thereon.

4.2 Key regulations governing the media

We are not aware of any regulations which have been passed affecting the media by any minister or by the Information Commission.

5 MEDIA SELF-REGULATION

In this section you will learn:

- ❑ What self-regulation is
- ❑ Key self-regulatory provisions intended to govern the media in Eritrea

5.1 Definition of self-regulation

Self-regulation is a form of regulation that is established voluntarily. A grouping or body establishes its own mechanisms for regulation and enforcement that are not imposed, for example, in a statute or regulation. Media bodies often introduce self-regulation in the form of codes of media ethics and good governance.

5.2 Self-regulatory provisions intended to govern the media in Eritrea

As, in practice, there is no independent media in Eritrea, whether print or broadcasting, there are no self-regulatory bodies with their own codes of ethics, etc., which are governed by such self-regulatory bodies. This is obviously symptomatic of the basic lack of freedom of the press in Eritrea.

6 CASE LAW AND THE MEDIA

6.1 Eritrea's legal system

Eritrea's legal system is a combination of civil law, customary law and Sharia law systems.[22] Consequently, the case law is not as strictly based on precedent as common law systems (often found in former British colonies) are. Further, we have not been able to find any case law dealing with media law issues as at the date of writing.

6.2 African Commission on Human and Peoples' Rights – Complaint involving Eritrean journalists

This section focuses on a complaint that has a bearing on Eritrean media law or freedom of expression in some way and that has been dealt with by the African Commission on Human and Peoples' Rights (ACHPR).

In *Article 19 vs Eritrea* (No.275/03), the ACHPR found that the ongoing incommunicado detention of at least 18 journalists was contrary to the provisions of articles 5 (right to be free from torture and cruel, inhuman or degrading punishment or treatment), 6 (right to personal liberty and security of the person), 7.1.c (right to be defended by counsel), 9 (right to receive information and freedom of expression), and 18 (right to protection of family life) of the African Charter on Human and Peoples' Rights. Further, the ACHPR held that article 9 of the African Charter on Human and Peoples' Rights protects the right to freedom of expression and that:

- The imprisonment of journalist 'deprives not only the journalists of their rights to freely express and disseminate opinions, but also the public, of the right to information. This action is in breach of Article 9 of the Charter'.

- Banning the entire private press on the grounds that it constitutes a threat to the incumbent government 'is a violation of the right to freedom of expression, and is the type of action that Article 9 is intended to proscribe. A free press is one of the tenets of a democratic society and a valuable check on potential excesses by government'.

NOTES

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6 Ethiopia

1 INTRODUCTION[1]

The Federal Democratic Republic of Ethiopia has a population of just over 100 million people. The official languages include Oromo, Amharic, Tigrinya, Somali, and there many other local languages and dialects, with English being the major foreign language. Literacy rates are approximately 41% for women and 57% for men. Less than 20% of the population is urbanised.

Ethiopia is a landlocked country which borders Djibouti, Eritrea, Kenya, Somalia, Sudan and South Sudan. It is an ancient country, one of the oldest in the world with a history dating back 2000 years. It is unique in Africa in that it barely had a colonial history, being only briefly occupied by Italy for less than five years from 1936–1941. The Ethiopian monarchy has traditionally ruled Ethiopia; Emperor Haile Selassie ruled from 1930 until he was deposed by a military junta – the Derg – in 1974. The take-over by the Derg (headed by Mengistu Haile Mariam) ushered in a period of great instability characterised by coups and uprisings. In 1991, the Derg was toppled by the Ethiopian People's Revolutionary Democratic Front, and a constitution was adopted in 1994 which provides for a multi-ethnic federation of states. Ethiopia's first ever multi-party elections were held in 1995. The Ethiopian People's Revolutionary Democratic Front has been in power since then, although under different leaders.

Its neighbour, Eritrea, finally gained independence from Ethiopia in 1993 after a long independence struggle. However, Ethiopia has never accepted the border demar-

cations and border skirmishes between the two countries erupt from time to time. As recently as June 2016 one such border-related armed conflict between the countries was underway.

It is also fair to say that the political situation within Ethiopia is far from stable. In 2015 an uprising began in the Oromia state, which quickly divided along ethnic lines between the Oromo and Amhara people over governmental suggestions that towns in Oromia be incorporated into the capital Addis Ababa.[2] Hundreds of protesters have been killed and thousands arrested.

While Ethiopia has undergone a 33% reduction in the proportion share of the population living in poverty, the country remains underdeveloped.[3] Its communications infrastructure is particularly undeveloped. Only 34% of the population has access to mobile phone services, while only 1% of the population has access to fixed line services and only 2.3% has access to the internet.[4]

Further, the media environment is also weak. The print media sector is a recent phenomenon since the democratisation period of the 1990s. There are over 100 newspapers (most of them weekly) in the country. As the country has over 80 languages, broadcasting is challenging. Radio and television programmes are generally produced in Amharic, although some are produced in other languages such as Tigrinya and Oromiffa. Radio penetration is at less than 20% and television penetration is at less than 1%.[5]

Sadly, the media law environment is far from democratic and there are a number of laws which are used to enforce censorship and act against media practitioners. The situation has worsened since 2009 with the introduction of anti-terrorism laws and laws regulating non-governmental organisations (NGOs). These have been used against media advocacy groups and individuals. An example is the notorious case of the Zone 9 bloggers, where six bloggers were arrested and faced various charges under the terrorism laws. Although they were all eventually freed, they spent more than 18 months in detention.[6] Currently, 'most of Ethiopia's print, television and radio outlets are state-controlled and the few private print media often self-censor their coverage of politically sensitive issues for fear of being shut down'.[7]

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

- Media and the constitution
- Media-related legislation

- Media-related regulations
- Media self-regulation
- Media-related common law based on decided cases

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

2 THE MEDIA AND THE CONSTITUTION

In this section you will learn:

- ❑ The definition of a constitution
- ❑ What is meant by constitutional supremacy
- ❑ How a limitations clause operates
- ❑ Which constitutional provisions protect the media
- ❑ Which constitutional provisions might require caution from the media or might conflict with media interests
- ❑ What key institutions relevant to the media are established under the Constitution of Ethiopia
- ❑ How rights are enforced under the Constitution
- ❑ What is meant by the 'three branches of government' and 'separation of powers'
- ❑ Whether there are any clear weaknesses in the Constitution of Ethiopia that ought to be amended to protect the media

2.1 Definition of a constitution

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

The Constitution of Ethiopia sets out the foundational rules for the Federal Democratic Republic of Ethiopia. These are the rules upon which the entire country operates. The Constitution contains the underlying principles, values and laws of Ethiopia. A key constitutional provision in this regard is the first paragraph of the Preamble to the Ethiopian Constitution which states, among other reasons for

adopting the Constitution, the strong commitment of the peoples of Ethiopia 'in full and free exercise of our right to self-determination, to building a political community founded on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic order, and advancing our economic and social development'.

2.2 Definition of constitutional supremacy

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

The Constitution of Ethiopia makes provision for constitutional supremacy. Article 9(1) specifically states that '[t]he Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or public official which contravenes this Constitution shall be of no effect'.

Interestingly, article 9(2) also provides that '[a]ll citizens, organs of state, political organisations, other associations as well as their officials have the duty to ensure observance of the Constitution and to obey it'. The effect of this provision is that the Constitution does not only bind the state but also citizens and private entities.

2.3 Definition of a limitations clause

It is clear that rights are not absolute as society would not be able to function. For example, if the right to freedom of movement were absolute, society would not be able to imprison convicted criminals. Similarly, if the right to freedom of expression were absolute, the state would not be able to protect its citizens from hate speech or false defamatory statements made with reckless disregard for the truth. Clearly, governments require the ability to limit rights in order to serve important societal interests; however, owing to the supremacy of the constitution this can only be done in accordance with the constitution. The Ethiopian Constitution makes provision for two types of legal limitations on the exercise and protection of rights contained in Chapter Three, 'Fundamental Rights and Freedoms'.

2.3.1 Internal limitations

The Constitution of Ethiopia does not have a general limitations clause that applies to all rights contained in Chapter Three, 'Fundamental Rights and Freedoms'. In-

stead, many of the rights themselves contain specific limitations provisions within the text of the right. In our view, where rights have no such limitations provisions, the courts will have to determine whether or not a limitation is constitutional by having regard to interpreting the right itself and by balancing it against other rights.

The limitations in respect of each relevant right, if such limitations in fact exist, are dealt with in the discussion on rights below.

2.3.2 Constitutional limitations

Article 93 of the Ethiopian Constitution deals with a declaration of a state of emergency. Article 93(1)(a) entitles the Council of Ministers of the Federal Government to decree a state of emergency should any of the following occur: external invasion; a breakdown of law and order which endangers the constitutional order and which cannot be controlled by the regular law-enforcement agencies and personnel; and natural disaster or an epidemic.

Article 93(4)(b) specifically entitles the Council of Ministers to 'suspend such political and democratic rights contained in this Constitution to the extent necessary to avert the conditions that required the declaration of a state of emergency'.

Article 93(4)(c) sets out those constitutional provisions that cannot be suspended or limited during a state of emergency. These are:

- Article 1, which provides for the establishment of a federal and democratic state structure
- Article 18, which prohibits inhuman treatment or punishment, slavery and servitude and human trafficking, and forced labour
- Article 25, which guarantees the right to equality
- Article 39(1), which guarantees the peoples in Ethiopia the right to self-determination
- Article 39(2), which guarantees the peoples in Ethiopia the rights to language, culture and history.

The effect of the state of emergency provisions is that all of the rights that are critical to the media, particularly the right of freedom of expression, are derogable during a state of emergency.

2.4 Constitutional provisions that protect the media

The Constitution of Ethiopia contains a number of important provisions in Chapter Three, 'Fundamental Rights and Freedoms', which directly protect the media, including publishers, broadcasters, journalists, editors and producers.

2.4.1 Rights that protect the media

FREEDOM OF EXPRESSION

The most important provision that protects the media is article 29 headed 'Right of thought, opinion and expression'.

Article 29(2) states:

> Everyone has the right to freedom of expression without any interference. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any media of his choice.

This provision needs some detailed explanation.

- This freedom applies to all persons and not just to certain people, such as citizens. Hence everyone (both natural persons and juristic persons, such as companies) enjoy this fundamental right.

- The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many different examples of this, including physical expression, such as mime or dance, photography or art.

- Article 29(2) specifies that everyone has the right to freedom of expression 'without any interference', thereby signalling a constitutional disapproval of interference as a general rule.

- Article 29(2) specifies that the right to freedom of expression includes the 'freedom to seek, receive and impart information and ideas of all kinds'. This freedom of everyone to receive and impart ideas and information is a fundamental aspect of freedom of expression, and this article effectively enshrines the right to the free flow of information. Thus, the information rights of audiences, for example, as well as the expression rights of the media, are protected. This right is important because it also protects organisations that foster media development. These

organisations facilitate public access to different sources and types of information, particularly in rural areas that traditionally have little access to the media.

Article 29(3) states:

> Freedom of the press and other mass media and freedom of artistic creativity is guaranteed. Freedom of the press shall specifically include the following elements:
>
> (a) Prohibition of any form of censorship.
>
> (b) Access to information of public interest.

This provision needs some detailed explanation.

- Article 29(3) specifically mentions and guarantees the freedom of the press and other mass media. This is an important protection for journalists, editors and publishers and producers of the media.

- Further, this freedom prohibits 'any form of censorship'. This sounds like a significant right but the limitations on this right provide a lot of room for restricting media freedom (as is clear from other provisions in this chapter).

Article 29(4) states:

> In the interest of the free flow of information, ideas and opinions which are essential to the functioning of a democratic order, the press shall, as an institution, enjoy legal protection to ensure its operational independence and its capacity to entertain diverse opinions.

This provision needs some detailed explanation.

- Article 29(4) specifically mentions the 'free flow of information', which is one of the few references to freedom of information in the Ethiopian Constitution.

- Article 29(4) also specifically makes mention of the need to ensure that the press has 'operational independence', which is presumably a reference to it being independent from the state.

- Lastly, article 29(4) talks about the need to ensure the capacity of the press to entertain 'diverse opinions'. The issue of diversity is critically important when considering the press as a whole, and therefore the 'legal protection' of the press, which is ostensibly guaranteed under article 29(4), is significant.

Article 29(5) states:

> Any media financed by or under the control of the State shall be operated in the manner ensuring its capacity to entertain diversity in the expression of opinion.

This provision needs some detailed explanation.

- Article 29(5) is specifically focused on public or state media, which is determined by state funding or control.

- It requires, in line with international best practice, that such state or public media be operated so as to entertain diversity in the expression of opinion. The effect of this is that even if entirely state funded or controlled, a state media outlet may not present only a single viewpoint and is required to ensure that a diversity of opinions is expressed. This is a significant requirement for public broadcasting.

As discussed, constitutional rights are never absolute and the rights contained in article 29(1)–(5) can be limited in terms of article 29(6) of the Ethiopian Constitution, which states that: '[t]hese rights can be limited only to laws which are guided by the principle that freedom of expression … cannot be limited on account of the content or effect of the point of view expressed. Legal limitations can be laid down in order to protect the well-being of the youth, and the honour and reputation of individuals. Any propaganda for war as well as the public expression of opinion intended to injure human dignity shall be prohibited by law'. Further, article 29(7) provides that any citizen who violates any legal limitations in the exercising of these rights may be held liable under law.

These provisions need detailed explanation.

- Frankly, the limitation provisions are vague and contradictory. For example, the first part of article 29(6) prohibits the limitation of a particular point of view or 'effect' of such point of view, but then goes on to state a number of grounds of limitation that would clearly include 'effects' of expressing a point of view, namely, youth protection and individual reputation protection.

- It is important to note that article 29(6) requires the legal prohibition of propaganda for war as well as opinion intended to injure human dignity. Very often legal systems characterise the injury to human dignity as defamation, which constitutes an injury to a person's reputation. Article 29(6) appears to require the blanket prohibition of injury to human dignity, which is far broader and more draconian than international good practice requires in respect of defamation laws,

which are best dealt with as a matter for the civil courts and not as a matter of criminal law.

- Article 29(7), although it is not specific, appears to intimate that criminal sanction may be appropriate for citizens who violate the limitations set out in article 29(6).

It is extremely odd that article 29(7) refers to 'citizens', as the right to freedom of expression set out in article 29(2) applies to everyone and not only to citizens. This may be a translation error as the effect appears to be that only citizens may be held liable under the law for violating the legal limitations set out in article 29(6), which makes little sense.

RIGHT TO PRIVACY

A second protection is contained in article 26 of the Constitution of Ethiopia, 'Right to privacy'. It is made up of two specific kinds of privacy rights.

Article 26(1) specifies that '[e]veryone has the right to privacy. This right shall include the right not to be subjected to searches of his home, personal property, or the seizure of any property under his personal possession'.

Article 26(1) essentially relates to the right not to be subject to search and seizure operations – a basic privacy right.

Article 26(2) specifies that '[e]veryone has the right to the inviolability of his notes and correspondence including postal letters, and communications made by means of telephone, telecommunications and electronic devices'.

Article 26(2) is a particularly important right for journalists and others working in the media because, essentially, it protects a person's notes, correspondence and communications including by electronic means. The effect of this is that the right prohibits the interception and monitoring of communications, which also aids in enabling a journalist to protect his or her sources.

As is the case with the right to freedom of expression, the right to privacy in article 26 is subject to an internal limitation in article 26(3). Article 26(3) provides that '[p]ublic officials shall respect and protect these rights. No restrictions may be placed on the enjoyment of such rights except in compelling circumstances and in accordance with specific laws whose purpose shall be safeguarding of national security or public peace, the prevention of crimes or the protection of health, public morality or the rights and freedoms of others'.

The effect of the limitations clause is to set out grounds for interfering with privacy rights. Most of these are in line with international requirements, namely: national security, public peace, crime prevention, public health protection and public morality. The reference to 'rights and freedoms of others' is more problematic as this is extremely broad.

RIGHTS TO FREEDOM OF ASSOCIATION AND OCCUPATION

Article 31 of the Ethiopian Constitution is headed 'Freedom of association' and provides that '[e]very person has the right to freedom of association for any cause or purpose…'.

This is important because it protects the right of media to establish media houses and other press enterprises, and also protects the right of journalists, for example, to establish trade unions and for editors to establish editors' forums and the like.

Article 31 contains its own internal limitation, which provides that '[o]rganizations formed, in violation of appropriate laws, or to legally subvert the constitutional order, or which promote such activities are prohibited'.

The first effect of this internal limitation is that organisations can be regulated by 'appropriate laws'. This is obviously extremely vague, which is problematic as no guidance is given as to what is meant by 'appropriate'.

A second effect is the outright prohibition of organisations formed to legally subvert the constitutional order or to promote such activities.

Article 41 is headed 'Economic, social and cultural rights'. Article 41(2) provides that '[e]very Ethiopian has the right to choose his or her means of livelihood, occupation and profession'.

This provision needs further explanation.

- The right is not available to everyone; it is available only to Ethiopians, hence there appears to be a citizenship requirement to exercise this right.

- The right is important because it protects the rights of Ethiopians to choose to practise the profession of being a journalist.

It is important to note that article 41 contains no internal limitations that apply to article 41(2).

FREEDOM OF MOVEMENT

Article 32 is headed 'Freedom of movement' and article 32(1) states:

> Any Ethiopian or foreign national lawfully in Ethiopia has, within the national territory, the right to liberty of movement and freedom to choose his residence as well as the freedom to leave the country at any time he wishes to.

This provision needs some detailed explanation.

- The right to freedom of movement is not available to everyone. It is available to Ethiopians and to foreign nationals provided they are 'lawfully in Ethiopia'. Consequently, foreign nationals who are not lawfully in Ethiopia do not enjoy the right to freedom of movement.

- The right pertains not only to the choice of residence and the right to leave the country but also the right guarantees freedom of movement 'within the national territory'. This is an important right for journalists as laws, particularly security laws, often contain restrictions on journalists accessing particular places or areas. Consequently, this right provides a level of protection in ensuring access to all areas of Ethiopia by the media.

2.4.2 Other constitutional provisions that assist the media

It is important to note that there are provisions in the Ethiopian Constitution, apart from the fundamental rights and freedoms provisions contained in Chapter Three, that are important and that assist the media in performing its functions.

PROVISIONS REGARDING IMMUNITY OF MEMBERS OF THE FEDERAL HOUSES

A number of provisions in the Constitution regarding the functioning of the Federal Houses (effectively, the Parliament of Ethiopia) are important for the media:

- Article 54 is headed 'Members of the House of Peoples' Representatives'. Article 54(5) states that '[no] member of the House may be prosecuted on account of any vote he casts or opinion he expresses in the House, nor shall any administrative action be taken against any member on such grounds'. The effect of this is to protect freedom of expression for members of the House of Peoples' Representatives, which ought to assist in ensuring robust debate.

- Similarly, article 63 is headed 'Immunity of Members of the House of the

Federation'. Article 63(1) states that '[n]o member of the House of Federation may be prosecuted on account of any vote he casts or opinion he expresses in the House, nor shall any administrative action be taken against any member on such grounds'. Again, the effect of this is to protect freedom of expression for members of the House of the Federation, which ought to assist in ensuring robust debate.

PROVISIONS REGARDING CONDUCT AND ACCOUNTABILITY OF GOVERNMENT

Article 12 of the Ethiopian Constitution is part of Chapter Two, 'Fundamental Principles of the Constitution'. Article 12 is headed 'Conduct and accountability of government' and article 12(1) provides that '[t]he conduct of affairs of government shall be transparent'. The principle of transparency is an important one because it is, effectively, a promise that government business will be conducted in a visible and open manner.

As the media plays a crucial role in educating the population about the workings of government, enabling citizens to participate meaningfully in a democracy, a commitment to transparency could therefore be interpreted as requiring media-friendly policies on the part of the state, which allow the press and other media to do their work unhindered.

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

Just as there are certain rights or freedoms that protect the media, other rights or freedoms can protect individuals and institutions from the media. It is important for journalists to understand which provisions in the Constitution can be used against the media. There are a number of these:

2.5.1 Right to honour and reputation

The right to honour and reputation is provided for in article 24 of the Ethiopian Constitution. Article 24(1) states that 'everyone has the right to respect for his human dignity, reputation and honour'. The right to reputation is raised in defamation cases because defamation, by definition, undermines the reputation of the person being defamed. This right is often set up against the right to freedom of the press, requiring a balancing of constitutional rights.

2.5.2 Right to privacy

Similarly, the right to privacy (discussed in some detail above) is often raised in

litigation involving the media, with the subjects of press attention asserting their rights to privacy, including the right not to be photographed, written about or followed in public, etc. The media has to be careful in this regard. The media should be aware that there are always 'boundaries' in respect of privacy that need to be respected and which are dependent on the particular circumstances, including whether or not the person is a public figure or holds public office, and the nature of the issue being dealt with by the media.

2.5.3 Emergency provisions

Article 93 of the Ethiopian Constitution deals with a declaration of a state of emergency. Article 93(1)(a) entitles the Council of Ministers of the Federal Government to decree a state of emergency should any of the following occur: external invasion; a breakdown of law and order which endangers the constitutional order and which cannot be controlled by the regular law-enforcement agencies and personnel; and natural disaster or an epidemic.

Article 93(4)(b) specifically entitles the Council of Ministers to 'suspend such political and democratic rights contained in this Constitution to the extent necessary to avert the conditions that required the declaration of a state of emergency'.

Article 93(4)(c) sets out those constitutional provisions that cannot be suspended or limited during a state of emergency. These are:

- Article 1, which provides for the establishment of a federal and democratic state structure
- Article 18, which prohibits inhuman treatment or punishment, slavery, servitude and human trafficking, and forced labour
- Article 25, which guarantees the right to equality
- Article 39(1), which guarantees the peoples in Ethiopia the right to self-determination
- Article 39(2), which guarantees the peoples in Ethiopia the rights to language, culture and history.

The effect of the state of emergency provisions is that all of the rights that are critical to the media, particularly the right of freedom of expression, are derogable during a state of emergency.

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

While there are no media-specific institutions established under the Constitution of Ethiopia, the Constitution does establish a number of institutions that indirectly affect the media, namely, the Human Rights Commission, the ombudsman, the judiciary, the Council of Constitutional Inquiry and the judicial administration councils (at federal and state level).

2.6.1 The Human Rights Commission

The Constitution of Ethiopia in fact says very little about the Human Rights Commission (HRC) other than that the House of Peoples' Representatives shall establish one and determine its powers and functions by law – article 55(14). The House of Peoples' Representatives has passed such a law, namely, the Human Rights Commission Establishment, Proclamation 210 of 2000 (HRC Proclamation). Article 3 of the HRC Proclamation establishes the HRC as 'an autonomous organ of the federal government', which is accountable to the House of Peoples' Representatives. In terms of article 5 of the HRC Proclamation, the objective of the HRC is to educate the public to be aware of human rights, to see to it that human rights are protected, respected and fully enforced as well as to take necessary measures where human rights are found to have been violated.

Article 6 sets out the powers and duties of the HRC and these include: ensuring that human rights are respected by all citizens, organs of state, political organisations and other associations; ensuring that laws, regulations and directives as well as government decisions and orders do not contravene the human rights of citizens guaranteed by the Constitution; educating the public on human rights matters; undertaking investigations (either upon complaints or on its own initiation) of human rights violations; and making recommendations for the reform of existing laws and policies.

Article 10 provides that the HRC is appointed by the House of Peoples' Representatives, recruited by a nominations committee (which includes the speaker of the House of Peoples' Representatives, the speaker of the House of the Federation as well as members of opposition parties) and nominees have to receive the support of a two-thirds vote of the members of the nominations committee.

2.6.2 The ombudsman

The Constitution of Ethiopia in fact says very little about the Office of the

Ombudsman other than that the House of Peoples' Representatives shall establish the institution of the ombudsman and determine its powers and functions by law – article 55(15).

The House of Peoples' Representatives has passed such a law, namely, the Establishment of the Institution of the Ombudsman, Proclamation 211 of 2000 (Ombudsman Proclamation). Article 3 of the Ombudsman Proclamation, establishes the institution of the ombudsman as 'an autonomous organ of the federal government' which is accountable to the House of Peoples' Representatives.

In terms of article 5 of the Ombudsman Proclamation, the objective of the institution is to see to bringing about good governance that is of high quality, efficient and transparent, and based on the rule of law by way of ensuring that citizens' rights and benefits provided for by law are respected by organs of the executive.

Article 6 sets out the powers and duties of the ombudsman and these include: supervising administrative directives issued and decisions given by executive organs; investigating complaints of maladministration and seeking remedies therefor; undertaking studies and research on ways of curbing maladministration; and making recommendations to reform laws, practices and policy.

Note, however, that in terms of article 7(4) of the Ombudsman Proclamation, the ombudsman has no power to investigate decisions given by the security forces and units of the defence forces in respect of matters of national security or defence.

Article 10 provides that the institution of the ombudsman is appointed by the House of Peoples' Representatives, recruited by a nominations committee (which includes the speaker of the House of Peoples' Representatives, the speaker of the House of the Federation as well as members of opposition parties) and nominees have to receive the support of a two-thirds vote of the members of the nominations committee.

2.6.3 The judiciary

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

Chapter Nine of the Constitution of Ethiopia is headed 'Structure and Powers of the Courts'. In terms of article 79(1), 'judicial powers, both at Federal and State levels are vested in the courts'. Article 78(1) of the Constitution establishes 'an independent judiciary'. Article 79(2) provides that 'courts of any level should be free from any interference or influence of any governmental body, government official or from any other source'. Further, article 79(3) provides that 'judges shall exercise the functions in full independence and shall be directed solely by the law'. The courts of Ethiopia consist of:

- The Federal Supreme Court
  - In terms of article 78(2) of the Constitution of Ethiopia, the supreme federal judicial authority is vested in the Federal Supreme Court, but note that this excludes constitutional matters.

- Federal High Court and first instance courts
  - Article 78(2) also empowers the House of Peoples' Representatives to establish lower national courts such as the Federal High Court and first instance courts.

- State courts
  - Article 78(3) of the Ethiopian Constitution provides that states 'shall establish state supreme, high and first instance courts. Particulars shall be determined by law'.
  - In terms of article 80(2), a State Supreme Court has final judicial authority over state matters.

- Religious and customary courts
  - Article 78(5) empowers the House of Peoples' Representatives and State Councils to establish or give official recognition to religious or customary courts.

- Importantly, the Constitution, in article 78(4), prohibits special or *ad hoc* courts from being established if they take judicial powers away from the regular courts and if they do not follow legally prescribed procedures.

2.6.4 The Council of Constitutional Enquiry

Unusually, the Ethiopian Constitution takes significant judicial powers away from the judiciary because it vests the power to:

- Interpret the Constitution – article 62(1)

- Determine constitutional disputes – article 83(1)
- Determine whether any federal or state law is unconstitutional – article 84(2),

not with the judiciary at all but with the House of the Federation, a body which falls within the legislative branch of government. This is an anomaly as in most, if not all, democratic countries, the power to interpret the Constitution and to resolve constitutional disputes (whether involving challenges to legislation or otherwise) is given to the courts, or at least to a particular court with constitutional jurisdiction. The effect of this is to substantially weaken all rights in the Constitution as the judiciary is effectively excluded from constitutional determinations in Ethiopia.

The Ethiopian Constitution also establishes a body called the Council of Constitutional Enquiry, in terms of article 82. Its roles are to investigate constitutional disputes in terms of article 84 and to refer such constitutional disputes, after investigation, to the House of the Federation for determination, which determination is to be made within 30 days, in terms of article 83(2) of the Constitution. The Council of Constitutional Enquiry is, in terms of article 82(2), made up of 11 members comprising:

- The president of the Federal Supreme Court (its president)
- The vice president of the Federal Supreme Court (its vice president)
- Six legal experts appointed by the president on the recommendation of the House of Peoples' Representatives
- Three members of the House of the Federation designated by that body.

The process appears to be that where a Constitutional issue arises in any court proceedings, the matter is referred to the Council of Constitutional Enquiry, which is empowered to make recommendations on constitutional interpretations to the House of Federation in terms of article 84(1). In terms of article 84(3), where the Council of Constitutional Enquiry determines that:

- There is no need for constitutional interpretation it shall remand the case to the concerned court for determination (any interested party may appeal such decision to the House of Federation) – article 84(3)(a) – or
- There is a need for constitutional interpretation it shall submit its recommendations to the House of the Federation for a final decision – article 84(3)(b).

2.6.5 The Federal Judicial Administrative Council and state judicial administrative councils

The judicial administrative council (JAC) (at federal or state level) is involved in most of the appointments of federal court and state court judges, respectively.

Federal judicial appointments are made by the House of Peoples' Representatives in accordance with the following processes:

- The appointments of the president and vice president of the Federal Supreme Court are recommended by the prime minister – article 81(1).

- Other federal judges are selected by the Federal Judicial Administrative Council and their names are submitted by the prime minister – article 81(2).

State judges are appointed by the state councils in accordance with the following processes:

- The appointments of the president and vice president of the state supreme courts are recommended by the chief executive of the state – article 81(3).

- Other state supreme and high court judges are recommended by the State Judicial Administrative Council, which is obliged to attempt to obtain the views of the Federal Judicial Administrative Council on such appointments and to forward such views to the State Council – article 81(4).

- Judges of state first instance courts are recommended by the State Judicial Administrative Council – article 81(5).

The JACs, at both state and federal level, are also involved in the removal of judges. In terms of article 79(4) of the Constitution, a judge cannot be removed from his or her duties before retirement age (which is determined by law – article 79(5)) unless the House of Peoples' Representatives (in the case of a federal court judge) or the State Council (in the case of a state court judge) approves (by way of a simple majority) the decision of a JAC (federal or state as the case may be) to remove a judge on the grounds of: a violation of disciplinary rules; gross incompetence; inefficiency; or inability to perform based on illness.

The JACs are relevant to the media because of their critical role in the appointment and removal of most judges, the proper functioning and independence of which are essential for democracy. Unfortunately, the Ethiopian Constitution does not specify how the JACs are to be appointed and how they are to function. Their levels of

independence are therefore open to question and are not guaranteed by the Constitution itself.

2.7 Enforcing rights under the Constitution

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

Article 37(1) of the Constitution of Ethiopia is headed 'Right of access to justice' and it provides that everyone has the right to bring a justiciable matter to, and to obtain a decision or judgement by, a court of law or other competent body with judicial power. The reference to 'other competent bodies' is presumably a reference to the House of the Federation, which is the only body that can determine constitutional issues, including the unconstitutionality of any law in terms of article 83(1). Again this is unfortunate because it means that vital constitutional issues are not dealt with in the court system, undermining the effectiveness of constitutional rights themselves.

Another way in which rights are protected under the Ethiopian Constitution is through the provisions of the Constitution that entrench the rights contained in Chapter Three, 'Fundamental Rights and Freedoms'. Article 105 of the Constitution requires that a constitutional amendment of Chapter Three has to be done:

- When all state councils approve the proposed amendment by majority vote
- When two-thirds of the House of Peoples' Representatives approves the proposed amendment, and
- When two-thirds of the House of the Federation approves the proposed amendment.

2.8 The three branches of government and separation of powers

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

2.8.1 Branches of government

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

functions of these three branches ought to be distinct and separate. It is important to note that according to article 50(1) of the Constitution of Ethiopia, Ethiopia comprises the federal government and the state members. Further, in terms of article 50(2), both the federal government and the states have legislative, executive and judicial powers. For example, in terms of article 50(3), the House of Peoples' Representatives is the highest authority of the federal government while the State Council is the highest organ of state authority. However, for the purposes of this chapter, we focus on the separation of powers at the federal level.

THE EXECUTIVE

Although the president of the Federal Democratic Republic of Ethiopia (who is elected by a two-thirds majority vote of both the House of Peoples' Representatives and the House of the Federation – article 70(2)) is the Head of State in terms of article 69 of the Constitution, he or she is not the head of the executive branch of government. In terms of article 72(1) of the Constitution, executive powers of the federal government are vested in the prime minister and in the Council of Ministers. And the ministers are appointed by the prime minister on the approval of the House of Peoples' Representatives – article 74(2).

Article 74(1) of the Constitution of Ethiopia provides that the prime minister is the chief executive, the chairman of the Council of Ministers and the commander-in-chief of the national armed forces.

The prime minister is elected from among members of the House of Peoples' Representatives – article 73(1), presumably on a simple majority.

The Council of Ministers comprises the prime minister, the deputy prime minister, ministers and such other members as may be determined by law – article 76(1). Its role is, effectively, to ensure 'the implementation of laws and decisions adopted by the House of Peoples' Representatives' – article 77(1).

In terms of article 76, the Council of Ministers is responsible to the prime minister and to the House of Peoples' Representatives.

THE LEGISLATURE

Federal legislative or law-making power in Ethiopia vests in the House of Peoples' Representatives, in terms of article 55(1) of the Ethiopian Constitution. Importantly, this includes the 'enforcement of political rights established by the Constitution' – article 55(2)(d).

In terms of article 54, the House of Peoples' Representatives is made up of a maximum of 550 elected members, elected from candidates in each electoral district for a term of five years on the basis of universal suffrage and by direct, free and fair elections held by secret ballot. At least 20 seats are to be reserved for minority nationalities and peoples. The particulars of these processes are to be determined by law.

THE JUDICIARY

Judicial power, as discussed previously in this chapter, vests in the courts with the critically important exception of constitutional matters, which vests in the House of the Federation. Essentially, the role of the judiciary is to interpret the law and to adjudicate legal disputes in accordance with the law. However, in Ethiopia the courts lack jurisdiction to pronounce on constitutional matters, which is reserved for the House of the Federation.

We have dealt with the make-up of the judiciary above and in this section we focus on the House of the Federation.

In terms of article 61, the members of the House of the Federation are elected by state councils, and these councils may choose to make such elections themselves or to hold elections to have the members of the House of the Federation elected by the people in such state directly. Each nation, nationality and people shall be represented by at least one member in the House of the Federation with an additional representative member for every one million persons in such nation, nationality or people. The nations, nationalities and people recognised in the Constitution are set out in article 47(1) of the Constitution, and comprise the following states: Tigray; Afar; Amhara; Oromia; Somalia; Benshangul/Gumuz; the Southern Nations, Nationalities and Peoples; the Gambela Peoples; and the Harari People.

2.8.2 Separation of powers

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

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

There are a number of respects in which the Constitution of Ethiopia is weak. If these provisions were strengthened, there would be specific benefits for Ethiopia's media.

2.9.1 Remove internal constitutional qualifiers to certain rights

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

These internal limitations occur within a number of articles on rights in Chapter Three of the Constitution of Ethiopia. They deal specifically and only with the limitation or qualification of the particular right that is dealt with in that article. As has been discussed more fully above, the rights to freedom of expression and privacy contain such an internal limitation. In other words, the article that contains the right also sets out the parameters or limitations allowable in respect of that right.

The rights contained in the provisions dealing with fundamental human rights and freedoms, set out in Chapter Three of the Constitution of Ethiopia, would be strengthened if the rights were subject to a single generally applicable limitations clause rather than each having their own limitations clause.

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

2.9.2 Independent broadcasting regulator and public broadcaster

There is no doubt that the broadcasting sector would be greatly strengthened if the Ethiopian Constitution gave constitutional protection for an independent broadcasting regulator and for a public broadcaster. Given the importance of both of these institutions for ensuring access to news and information by the public, it is suggested that such amendments to the Constitution would be in the public interest and would serve to strengthen both the media and democracy more generally in Ethiopia.

2.9.3 Strengthen the independence of institutions particularly related to the judiciary

While it is laudable that the Ethiopian Constitution makes provision for institutions such as the federal and state JACs, the fact that the structural independence and appointments procedures of these institutions are not provided for sufficiently in the Constitution is a weakness and undermines their independence.

A much more serious concern is that the judiciary cannot entertain cases involving constitutional matters as exclusive jurisdiction to deal with constitutional disputes is reserved for the House of the Federation. This is of significant concern and undermines the separation of powers doctrine. It also renders constitutional rights difficult to protect as a matter of course in the courts.

3 THE MEDIA AND LEGISLATION

In this section you will learn:

- ❑ What legislation is and how it comes into being
- ❑ Legislation governing the publication of print media
- ❑ Legislation governing the distribution of films
- ❑ Legislation governing the broadcasting media generally
- ❑ Legislation governing the state broadcasting sector
- ❑ Legislation that threatens a journalist's duty to protect sources
- ❑ Legislation that prohibits the publication of certain kinds of information
- ❑ Legislation dealing with the interception of communication
- ❑ Legislation dealing with punishments for laws concerning the mass media
- ❑ Legislation that regulates the affairs of media-related NGOs
- ❑ Legislation that specifically assists the media in performing its functions

3.1 Legislation: An introduction

3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed by a body having legislative authority. As we know, federal legislative authority in Ethiopia vests in the House of Peoples' Representatives.

As a general rule the House of Peoples' Representatives and the president are ordinarily involved in passing legislation. Article 57 provides that laws deliberated

upon and passed by the House of Peoples' Representatives shall be submitted to the president for signature. If the president does not sign the law within 15 days, it nevertheless takes effect without such signature.

Article 59(2) empowers the House of Peoples' Representatives to adopt rules and procedures regarding the organisation of its work and of its legislative process.

There are detailed rules in the Constitution of Ethiopia which set out the different law-making processes that apply to different types of legislation. It is important for journalists and others in the media to be aware that the Constitution of Ethiopia requires different types of legislation to be passed in accordance with particular procedures. The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the Constitution of Ethiopia, there are two kinds of federal legislation, each of which has particular procedures and/or rules applicable to it. These are:

- Ordinary legislation – the procedures and/or applicable rules are set out in articles 57–59 of the Constitution. Essentially, there has to be a quorum of the majority of members of the House of Peoples' Representatives and decisions of the House shall be by a majority vote of the members present and voting

- Legislation that amends the Constitution – the procedures and/or applicable rules are set out in articles 104 and 105 of the Constitution.

3.1.2 The difference between a bill and an act

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

If a bill is passed by Parliament in accordance with the various applicable procedures required for different types of bills, as set out above, it becomes an act once it is assented to by the president, in terms of article 57 of the Constitution of Ethiopia, or unless 15 days has elapsed since the law was presented to the president for signature.

3.2 Legislation governing the print media

Unfortunately, in terms of the Freedom of the Mass Media and Access to Information Proclamation, No. 590/2008 (Proclamation 590), there are a number of constraints on the ability to operate as a print media publication in Ethiopia. In particular, Ethiopia requires the registration of periodicals, which includes newspapers and magazines, which is out of step with international best practice. These kinds of

restrictions effectively impinge upon the public's right to know by setting barriers to print media operations.

There are certain key requirements laid down by Proclamation 590 in respect of a periodical. The definition of a periodical is extremely broad and includes 'printed material which is scheduled to appear in regular sequences at least twice a year, which has a fixed title, and which has a general distribution aimed at the entire public or a sector thereof, and includes newspapers and magazines – article 2.

The key aspects of Proclamation 590 that relate to the print media are discussed below.

- Article 5.2 of Proclamation 590 limits the right to establish a mass media outlet (defined as including a periodical) to Ethiopian nationals only – that is, foreigners do not enjoy that right and only Ethiopian companies may own a periodical or news agency service.

- Article 6 requires a mass media outlet (note this includes periodicals) to appoint an editor-in-chief and failure to do so is an offence punishable by a fine in terms of article 45.2.

- Article 7.3 of Proclamation 590 makes it an offence for a person who exercises effective direct or indirect control (deemed as being a 15% shareholding – article 7.4) over a company operating a periodical to exercise such control over another company running a periodical published in the same languages and servicing the same or an overlapping market. The offence is punishable by the imposition of a fine in terms of article 45.1.

- Article 9.1 of Proclamation 590 requires the publisher of a periodical to register with the Minister of Information (where the proposed distribution is larger than one regional state) or with the relevant information bureau of the region (where the proposed distribution is within one regional state). Article 9.3 of Proclamation 590 sets out the registration details required and these include: name and address of publisher including branch offices; name of periodical and names and addresses of any person holding more than 2% of the shares in the publishing company and the amount of the shareholding. Any change to these registration details must also be registered. A publisher who fails to comply with the registration requirements commits an offence and is liable, upon conviction, to the payment of a fine in terms of article 45.2.

- Article 10.1 of Proclamation 590 requires that each publication of the periodical

carry: the names of the publisher, printer and editor-in-chief; and the volume and number of the periodical and the date of publication. Article 10.3–10.4 of Proclamation 590 requires that two copies of:

- Every periodical with a national distribution or which is distributed in the capital, Addis Ababa, is to be deposited free of charge with the Agency of the National Archives and Libraries, or
- Every periodical with a distribution within a regional state is to be deposited free of charge with the state public library or cultural bureau.

Failure to comply with the requirements of article 10 is an offence and is punishable by the payment of a fine in terms of article 45.3.

- Part Four of Proclamation 590 deals with rights and responsibilities of the media. In this regard:
  - Article 40.1 makes provision for any person to have the right of reply where any factual information or matter 'injurious to the honour or reputation of any person is reported in the mass media'. Note that the definition of 'mass media' includes periodicals. Article 40.1.a) sets out the periods within which such a right of reply is required to be published, namely, three days in the case of a daily publication, nine days in the case of a weekly publication or in the next issue for other types of periodicals. However, if the report or information is disseminated during an election then the time period is reduced to 24 hours in the case of a daily publication in terms of article 40.1.d).
  - Failure to publish a reply or correction in terms of article 40 is an offence that is punishable upon conviction by the payment of a fine in terms of article 45.3.
  - Article 40.2 and following sub-articles makes provision for a right to approach a court within three months where the editor-in-chief of a publication refuses a request for a right of reply.

3.3 Legislation governing the distribution of films

The Criminal Code, Proclamation No. 414 of 2004 makes provisions for crimes against morality and the family, which are set out in Title IV of Book V of Part II of the Criminal Code, and some of these specifically deal with films.

Article 640 makes it an offence to, among other things, import, possess, sell, distribute or circulate films (whether in a cinema, by way of projection or television

broadcast or video or in any other way – article 641) which are obscene or grossly indecent. Punishment is a period of imprisonment and a fine, and the incriminating material may be forfeited and destroyed. There are exceptions for works of artistic, literary or scientific character which are not calculated to inflame erotic feelings or lust – article 642.

Article 644 contains particular prohibitions on displaying writings or images such that they are visible from without and which stimulate unduly, pervert or misdirect the sexual instinct, arouse or stimulate unduly brutal or bloodthirsty instincts, antisocial feelings, or feelings that are inimical to the family, in minors. Punishment is a period of imprisonment and a fine, and the incriminating material may be forfeited and destroyed.

3.4 Legislation governing the broadcast media generally

3.4.1 Legislation that regulates broadcasting generally

Generally, broadcasting in Ethiopia is regulated in terms of the Broadcasting Service Proclamation, No. 533/2007 (Proclamation 533) as well as by the Freedom of the Mass Media and Access to Information Proclamation, No. 590/2008 (Proclamation 590).

Radio frequency spectrum licensing fees for broadcasting services are regulated in terms of article 3 read with Annexure 3A of the Telecommunication Licence Fee Directive, Directive 1/2004, issued in terms of the Telecommunication Proclamation No. 49/1996 and the Council of Ministers Regulations No. 47/1999 by the Ministry of Infrastructure.

3.4.2 Establishment of the EBA

Article 4 of Proclamation 533 establishes the Ethiopian Broadcasting Authority (EBA) whose objective, in terms of article 6, is 'to ensure the expansion of a high standard, prompt and reliable broadcasting service that can contribute to political, social and economic development and to regulate same'.

Article 8 provides that the EBA has to be made up of a board, a director general, a deputy director general and necessary staff.

3.4.3 Main functions of the EBA

In terms of article 7 of Proclamation 533, the EBA's main functions in relation to broadcasting include to:

- Ensure that a broadcasting service is conducted so as to contribute to social and economic development
- Issue, suspend and cancel broadcasting service licences
- Determine the site, coverage area, standards and types of instruments and capacities of broadcasting transmitting stations
- Control illegal transmissions
- Plan, permit, control and lease the use of radio waves allocated for broadcasting
- Prescribe technical standards for broadcasting services and equipment
- Determine broadcasting services-related complaints
- Determine and collect licence fees for broadcasting services
- Pay the appropriate fee for broadcasting radio frequencies allocated by the concerned organ – that is, the state organ responsible for allocating frequencies for different services (the organ is not specified but it is clearly not the EBA).

3.4.4 Appointment of EBA board members

In terms of article 9(1) of Proclamation 533, 'the number of members of the board shall be determined by the Government'.

In terms of article 9(2), members of the board are to be drawn from different institutions and parts of the society and are appointed by the government on the recommendation of the Minister of Information.

In terms of article 9(3), the director general of the EBA is a member and the secretary of the board. In terms of article 12(1), the director general is appointed by the government on the recommendation of the Minister of Information.

In terms of article 9(4), the board is accountable to the Ministry of Information.

3.4.5 Funding for the EBA

Article 14 of Proclamation 533 provides that the budget of the EBA shall be allocated to it by the government.

3.4.6 Making broadcasting regulations

Article 47 of Proclamation 533 empowers the Council of Ministers and the Ministry of Information, respectively, to issue regulations and directives necessary for the proper implementation of Proclamation 533. However, there are references to the EBA making certain directives or regulations itself, for example:

- In article 21, where the EBA determines additional criteria for evaluating applicants for a broadcasting service licence
- In article 27, where the EBA determines licence fees
- In article 43, in relation to election broadcasting scheduling.

However, the actual extent of the EBA's powers are unclear and appear limited to specified issues rather than having general regulation-making powers. Indeed, article 10(3) of Proclamation 533, which article deals with powers of the board of the EBA, specifies that one of the duties of the board is to 'review and submit to the Ministry of Information, for its approval, directives to be issued for the implementation of this Proclamation', making it clear that the Ministry of Information holds general directive- and regulation-making powers.

3.4.7 General requirements/responsibilities of broadcasters in Ethiopia

General requirements and responsibilities that broadcasters are required to comply with are found in two proclamations. The Freedom of the Mass Media and Access to Information Proclamation, Proclamation No. 590/2008 (Proclamation 590) and also the Broadcasting Service Proclamation, Proclamation 533.

FOREIGN OWNERSHIP RESTRICTIONS

Article 5.2 of Proclamation 590 limits the right to establish a mass media outlet (defined as including broadcasting) to Ethiopian nationals only – that is, foreigners do not enjoy that right and only Ethiopian companies may own a periodical or news agency service.

APPOINTMENT OF AN EDITOR

Article 6 of Proclamation 590 requires a mass media outlet (note this includes broadcasters) to appoint an editor-in-chief and failure to do so is an offence punishable by a fine in terms of article 45.2.

MEDIA OWNERSHIP RESTRICTIONS

Article 7.1 of Proclamation 590 makes it an offence for a person who exercises effective direct or indirect control (deemed as being a 15% shareholding – article 7.4) over a nation-wide broadcasting licence or with a broadcast licence for an area with a population of over 100,000 to exercise such control over another company holding such a licence and servicing the same or an overlapping market.

The offence is punishable by the imposition of a fine in terms of article 45.1.

RIGHT OF REPLY

Article 40.1 of Proclamation 590 makes provision for any person to have the right of reply where any factual information or matter 'injurious to the honour or reputation of any person is reported in the mass media'. Note that the definition of 'mass media' includes broadcasters. Article 40.1.b) sets out the periods within which such a right of reply is required to be published, namely, 14 days. However, if the report or information is disseminated during an election then the time limit is 48 hours in terms of article 40.1.d).

Failure to publish a reply or correction in terms of article 40 is an offence, which is punishable upon conviction by the payment of a fine in terms of article 45.3 of Proclamation 590.

Article 40.2 and following sub-articles of Proclamation 590 make provision for a right to approach a court within three months where the programming editor refuses a request for a right of reply. Article 42 of Proclamation 533 also imposes a duty upon a broadcasting service to respect the right of reply of a person who alleges that the programme has encroached on his or her rights or has failed to represent him or her properly. The reply must be proportionate and broadcast at a similar time.

PROGRAMMING CONTENT REQUIREMENTS

- *General* – Article 30 of Proclamation 533 sets out general programming requirements, including:
  - Programmes to reflect different and balanced viewpoints and serve the public at large
  - Accuracy of content and source of programmes to be transmitted shall be ascertained
  - News to be impartial, accurate and balanced
  - Programmes may not:

- Violate dignity, personal liberty, rules of good behaviour or undermine beliefs of others
- Constitute a criminal offence against state security, the constitutionally established government or the defence force
- Maliciously accuse or defame individuals, nationalities, peoples or organisations
- Cause dissention among nationalities or peoples
- Incite war.

Note that a failure to comply with article 30 is punishable by a fine in terms of article 45(2) of Proclamation 533, and in addition where there is a violation of the prohibited programming provisions of article 30 the broadcasting-related property of a person may also be confiscated.

- *Protecting the well-being of children* – Article 31 of Proclamation 533 provides that:
  - Programming which may corrupt the outlook of children, harm their feelings and thinking or encourage them to engage in undesirable behaviour may not be transmitted at hours during which children normally watch or listen to such programmes (that is, between 05h00 and 23h00).

Note that failure to comply with article 31 is punishable by a fine in terms of article 45(3) of Proclamation 533.

- *Local content* – Article 32 of Proclamation 533 deals with national, regional and local programme requirements:
  - National transmission programming shall allocate at least 60% of its weekly transmission to national programmes.
  - Regional transmission programming shall allocate at least 60% of its weekly transmission to regional affairs programmes.
  - Local transmission programming shall allocate at least 60% of its weekly transmission to local affairs programmes.

- *Advertising* – Article 33 of Proclamation 533 contains programming requirements relating to advertisements:
  - Any advertisement must be clearly differentiated from other programming and must not affect the content of programming.
  - Commercial advertisements must be truthful, not misleading and publicise lawful trade activities.
  - Advertisements that are malicious and undermine the products and services of others are prohibited.

- No advertisements may be shown during programmes that are less than 20 minutes long or during children's programming.

Note that a failure to comply with article 33 is generally punishable by a warning for the first violation and thereafter by a fine, except in the case of the broadcast of an advertisement that is malicious and undermines the products and services of others, which is immediately punishable by a fine – article 45(4) read with article (5) of Proclamation 533.

- *Prohibited advertisements* – Article 34 of Proclamation 533 prohibits advertisements:
  - That violate gender equality and that disregard the dignity and human rights of women
  - Relating to cigarettes or are cigarette-related
  - Relating to narcotic drugs
  - Relating to alcohol with more than 12% alcohol content
  - Relating to prescription medicines
  - That are otherwise prohibited by law.

Note that a failure to comply with article 34 is punishable by a fine in terms of article 45(4) of Proclamation 533.

- *Allocation of advertisement periods* – Article 35 of Proclamation 533 provides that:
  - Unless it is a broadcasting station that specifically broadcasts only advertisements, a broadcasting station shall not allocate more than 20% of its daily transmission or in a particular programme to advertisements.

Note that a failure to comply with article 35 is punishable by a warning for the first violation and thereafter by a fine – article 45(5) of Proclamation 533.

- *Sponsored programmes* – Article 36 of Proclamation 533 provides that:
  - Content and timing of a sponsored programme is not to be influenced by the sponsor. In particular, a sponsored programme shall not encourage the sale or hire of the sponsor's products or services
  - Persons whose advertisements for products or services are prohibited by law may not sponsor programming
  - Commercial advertising shall not interrupt sponsored programming unless agreed between the station and the sponsor

- The sponsor's name is to be announced at the beginning and end of every sponsored programme.

Note that a failure to comply with article 36 is punishable by a warning for the first violation and thereafter by a fine – article 45(5) of Proclamation 533.

NOTIFICATION OF PERSON RESPONSIBLE FOR BROADCASTING PROGRAMMING

Article 37 of Proclamation 533 provides that a broadcasting licensee must notify the EBA of the person who is responsible for programming, and if this is more than one person, their responsibilities are to be clearly defined.

Note that a failure to comply with article 37 is punishable by a warning for the first violation and thereafter by a fine – article 45(6) of Proclamation 533.

KEEPING OF PROGRAMME RECORDS

Article 38 of Proclamation 533 provides that every transmitted programme (including news) must be kept for 30 days or until the conclusion of a complaint regarding a transmitted programme and a copy must be provided to the EBA at the licensee's cost where this is required for an investigation or inspection. Note that a failure to comply with article 38 is punishable by a warning for the first violation and thereafter by a fine – article 45(6) of Proclamation 533.

PROVIDING INFORMATION ON AIR

Article 39 of Proclamation 533 requires every station to announce its name at the beginning and end of every transmission and that the name of the programme's producer shall be announced at the beginning and end of every programme.

Note that a failure to comply with article 39 is punishable by a fine – article 45(7) of Proclamation 533.

ALLOWING ACCESS FOR INSPECTION

Article 40 of Proclamation 533 requires broadcasters to provide the EBA with access to its broadcasting station for inspection purposes.

TRANSMISSION OF EMERGENCY GOVERNMENT STATEMENTS

Article 41 of Proclamation 533 provides that:

- Any broadcasting service shall transmit, free of charge, emergency statements given by the federal or state government in relation to an incident that endangers the constitutional order of the country, a natural disaster or an epidemic that threatens public health

- Broadcasters are entitled to demand payment for the broadcast of non-emergency government statements.

TRANSMISSION OF ELECTION PERIOD STATEMENTS

Article 43 of Proclamation 533 contains a number of requirements in respect of election broadcasting, including the following:

- A broadcasting station shall allocate free airtime to registered political organisations and candidates to publicise their objects and programmes in accordance with directives to be issued by the EBA.

- Any political organisation or candidate is responsible for the legality of, and may transmit, an election campaign advertisement, and the fee charged therefor may not exceed the fee charged for commercial advertisements.

Note that a failure to comply with article 43 is punishable by a fine – article 45(7) of Proclamation 533.

3.4.8 Licensing regime for broadcasters in Ethiopia

BROADCASTING LICENCE REQUIREMENT

Article 18(1) of Proclamation 533 prohibits any person from undertaking a broadcasting activity without obtaining a broadcasting licence from the EBA. Anyone who does not comply with article 18(1) is guilty of an offence and upon conviction shall be liable to a fine in terms of article 45(1) of Proclamation 533. Article 18(2) of Proclamation 533 provides, essentially, that each broadcasting station requires its own licence.

CATEGORIES OF BROADCASTING SERVICES AND LICENCES

Article 16 of Proclamation 533 provides that there are three categories of broadcasting licences:

- *Public*: This is defined in article 2(9) as a television or radio service established for

the purpose of educating, informing and entertaining the public, in the federal or a regional state to which government budget is allocated in full or in part, and is accountable to the Federal House of Peoples' Representatives or to regional councils. Interestingly, article 3 of Proclamation 533, which deals with the scope of application of the proclamation, refers to 'government' as opposed to 'public' broadcasting services, which indicates a recognition that in Ethiopia there is *state* as opposed to genuine *public* broadcasting.

- Essentially, therefore, a public broadcasting service is a government funded service which is accountable to the federal or a state government.
- Section 16(2)(a)–(e) of Proclamation 533 provides additional detail of what is required of a public broadcasting service, namely, that it shall:
    - Enhance the participation of the public through the presentation of government policies and strategies as well as activities related to development, democracy and good governance
    - Present programmes which inform, educate and entertain the public
    - Present programmes which reflect unity of people based on equality
    - Promote and enhance the cultures and artistic values of the public
    - Serve political parties operating in accordance with the constitution and the electoral laws of the country on the basis of fair and just treatment.

- *Community*: This is defined in article 2(11) as a non-profit radio or television service established by the will and interest of the community and administered and run by the community living in a specific area or who possess a common interest.
    - Essentially this definition means that non-profit community broadcasters either meet the needs of a geographic community or a particular community of interest, such as a religious community.
    - Section 16(4)(a)–(f) of Proclamation 533 provides additional detail of what is required of a community broadcasting service, namely, that it shall:
        - Carry out its activities based on the needs of the community regarding development, education and good governance
        - Promote and develop the language, culture and artistic value of the community
        - Allow the participation of the members of the community in the preparation of its programmes

- Transmit programmes on issues involving the common interests of the community that could not get coverage on other broadcasting services
- Utilise the income derived from different sources for the operation of the broadcasting station
- Provide community-centred informative and entertaining programmes to promote the information, culture and knowledge of the community.

- *Commercial*: This is defined in article 2(10) as a television or radio service established for profit by a legal entity with the purpose of informing, educating or entertaining the public.
  - The defining characteristic here is that it is a for-profit entity.
  - Section 16(3)(a)–(d) of Proclamation 533 provides additional detail of what is required of a commercial broadcasting service, namely, that it shall:
    - Provide equal treatment to any community in its licence area
    - Cover the whole area of its licence when transmitting programmes
    - Include regional and national news in its programmes
    - Register the broadcasting licence given by the EBA with the Ministry of Trade and Industry or with a regional trade and industry bureau.

Beyond the categories of services, there are also categories of licences that can be granted by the EBA. These are set out in article 17(1)(a)–(h) of Proclamation 533 and are:

- Terrestrial free-to-air radio broadcasting service
- Terrestrial free-to-air television broadcasting service
- Satellite radio broadcasting service
- Satellite television broadcasting service
- Satellite broadcasting service provided to customers for a fee
- Receiving and broadcasting foreign programmes to customers for a fee
- Cable television broadcasting service provided to customers for a fee
- Other broadcasting services to be prescribed by the EBA.

BROADCASTING LICENSING PROCESS

Article 19(4) of Proclamation 533 provides that an applicant for a public broadcasting or community broadcasting licence may apply to the EBA at any time

for such a licence. Article 19(1) of Proclamation 533 provides that the EBA shall invite applicants for a commercial broadcasting licence:

- By notice published in a newspaper having a wide circulation or communicated by other mass media – article 19(2).

- The invitation notice shall disclose the category of broadcasting service, the licence area, the frequency available, the time and place of submission of the application, the licence fee and any other necessary information – article 19(3).

Article 20(1)–(3) of Proclamation 533 sets out the grounds upon which the EBA may summarily reject an application for a broadcasting service licence, namely, if the applicant:

- Fails to produce legal evidence of its financial capacity and sources of funding
- Fails to produce a detailed project proposal
- Is a body that is not entitled to a licence as provided for in article 23(1)–(8), namely:
  - A body that does not have legal personality
  - An organisation not incorporated in Ethiopia or whose capital or management control is held by foreign nationals
  - A political organisation, an organisation which has a political organisation as a shareholder or where a member of a political organisation's supreme leadership is a shareholder or member of an organisation's management
  - A religious organisation
  - An organisation where a shareholder or member of its management has been:
    - Convicted of a serious crime
    - Deprived of exercising his or her civil political rights by a court
    - Deprived of his or her legal capacity by a court
  - An organisation where 50% of its capital is held by:
    - Another organisation which carries on the business of a printed press or news agency, or
    - A person who owns more than 20% of the capital of another organisation which carries on the business of a printed press or news agency
  - Is applying for a radio broadcasting service licence and already has:
    - A radio broadcasting service licence in the same licence area, or

- Two other radio broadcasting service licences.

Article 21(1) of Proclamation 533 requires the EBA to set criteria for evaluating applicants for a broadcasting service licence to be used by the EBA, and in terms of article 21(2)(a)–(e) these must include:

- The reliability and sufficiency of the applicant's financial resources to run the service
- Technological capability to render the service
- Organisational capacity, knowledge and experience to render the service
- That the contents of the proposed programming would address social needs
- Transmission time allocated for the service.

Article 22 is headed 'Decision making' and deals with the EBA's processes in relation to approving or rejecting an application for a broadcasting service licence. It is noteworthy that article 22(2) and (3) provides that where the EBA decides not to issue a licence, it must provide reasons for the decision and that the applicant has 14 days to appeal to the board of the EBA, which must render its appeal decision within 20 days of receipt of the appeal.

Further, article 26 of Proclamation 533 requires a licensee to apply to the EBA for an expansion licence when it intends to, among other things:

- Broadcast on additional frequencies to cover an area outside of its original broadcast coverage area. In this case, the EBA is required to ensure that the requested frequency is not held by another broadcasting service, and that there is a need for the service by the community in the area

- Upgrade the capacity of its transmitter. In this case, the EBA is required to ascertain that the equipment is compatible with the expansion plan

- Make technological changes.

Proclamation 533 also has provisions regarding:

- The process for renewing licences – article 25

- Suspension of licences for violations of Proclamation 533 – article 28

- Revocation of licences – article 29. In this regard, the grounds for the EBA's revocation of a licence are:

- Where a licensee has failed to commence broadcasting within one year of the issuing of the licence, although if a *force majeure* event has occurred the EBA may extend the commencement period by an additional six months in terms of article 29(3)
- Where the licence was obtained by fraudulent means
- Where a broadcasting station suspends its transmission for more than one month without good cause
- If so ordered by a court
- Where the licensee stops providing the service
- For a violation of article 30(4) – that is, in relation to broadcasting of prohibited programming
- For a violation of article 27 – that is for non-payment of any fee.

Note that provision is made for appeal procedures in respect of any revocation of a licence in terms of article 29(2).

LICENCE PERIODS

Article 24(1)–(7) of Proclamation 533 sets out different licence periods for different kinds of licences, namely:

- National transmission: radio – eight years; television – 10 years
- Regional transmission: radio – 10 years; television – 12 years
- Local transmission: radio – 12 years; television – 14 years
- Transmission limited to Dire Dawe: radio – 10 years; television – 12 years
- Transmission limited to Addis Ababa: radio – six years; television – eight years
- Community broadcasting service: five years
- Short-term community broadcasting service: not more than one year.

3.4.9 Is the EBA an independent regulator?

The EBA can in no way be said to be independent. Indeed, the word 'independent' does not appear in Proclamation 533.

The appointments process of the board of the EBA makes it clear that it operates as an arm of government, being appointed by the government on the recommendation of the Minister of Information and being accountable to the Ministry of Information as opposed to, for example, the public via, for example, the House of Peoples' Representatives.

Further, it is disappointing that apart from a few specific exceptions, broadcasting regulations are made by the minister.

3.4.10 Amending the legislation to strengthen the broadcast media generally

In our view a complete overhaul of the broadcasting legal framework is required to make the EBA an independent body, acting in the public interest.

- First, the EBA ought to be declared to be an independent body acting in the public interest in its founding statute. Second, its board ought to be appointed by a process characterised by public participation and with the involvement of Parliament (the House of Peoples' Representatives) rather than through a purely executive government process as it is now.

- We are of the view that the best process would be for the House of Peoples' Representatives to call for public nominations for the board, and ought to conduct a public interview and short-listing process before making the necessary recommendations to the prime minister for appointment. The board should appoint all EBA staff including the director general.

- Also, we are of the view that the EBA ought to be able to raise its own funding through levying licence fees and administrative fees and should be entirely responsible for its own processes, including being able to issue broadcasting regulations or directions on its own without any ministerial intervention.

Additionally, we believe that there ought to be more public participation in the broadcasting service licensing process and related processes such as amendments, revocations and suspensions of licences. This public participation can be ensured through having a compulsory notice and comment procedure allowing the public to air its views on licensing matters.

3.5 Legislation that regulates the state broadcast media

The state broadcast media is governed by the Ethiopian Broadcasting Corporation Establishment Proclamation No. 858/2014 (EBC Proclamation).

3.5.1 Establishment of the EBC

Article 3 of the EBC Proclamation establishes the Ethiopian Broadcasting Corporation (EBC) as 'an autonomous government institution having legal personality and rendering public service'.

3.5.2 The EBC 's mandate

Article 7 of the EBC Proclamation sets out the objectives of the EBC. In brief, these are to:

- Broadcast, on radio, television and on its website:
  - Current issues happening in the country and abroad
  - Educational and entertainment events
- Create national consensus
- Support national efforts to protect and promote national identity, dignity, diversity, tolerance and democratic unity.

Article 9 of the EBC Proclamation sets out the powers and duties of the board. Many of the duties include mandate-like issues, among them:

- To ensure that government policies and laws pertinent to the mass media are put into practice at the EBC
- To ensure that the EBC broadcasts government policies and laws that need to be publicised to society
- To ensure that political parties and classes of society with different views are given a balanced radio and television service.

3.5.3 Appointment of the EBC Board

The EBC has a board made up of a chairman, a secretary and seven members in terms of article 8(1) of the EBC Proclamation. In terms of article 8(2) read with sub-article 8(4) of the EBC Proclamation, the EBC board members must represent different classes of society and are recommended by the prime minister and appointed by the House of Peoples' Representatives for a term of five years.

Article 8(5) provides that the chief executive officer shall be the secretary and a member of the board. Article 11(1) of the EBC Proclamation provides that the chief executive officer is appointed by the House of Peoples' Representatives upon recommendation by the prime minister.

Importantly, article 8(3) provides that the board is accountable to the House of Peoples' Representatives.

3.5.4 Funding for the EBC

Article 14 of the EBC Proclamation sets out the allowable sources of funding for the EBC. These are:

- Revenues collected in accordance with this proclamation
- The budget allocated to the EBC by government in order that the corporation achieves its objectives
- Other sources.

3.5.5 The EBC: Public or state broadcaster?

There are some aspects of the regulatory framework for the EBC which suggests that it is a public as opposed to a state broadcaster. First, the EBC reports to the House of Peoples' Representatives. Second, and importantly, a multi-party body (in this case the House of Peoples' Representatives) has to appoint the board members on the recommendation of the prime minister.

However, there is clearly no public nominations process and so only candidates chosen by the prime minister can be appointed to the EBC Board. In addition, the EBC Board has no say over the appointment or removal of the chief executive officer. Third, there is no statement of editorial independence on the part of the EBC in the EBC Proclamation, and while article 3(1) describes the EBC as 'autonomous' it also clearly refers to it as a 'government institution'.

3.5.6 Weaknesses in the provisions of the EBC Proclamation which should be amended

A number of important weaknesses ought to be addressed through legislative amendments.

- Appointments of EBC board members ought to be made by the prime minister on the recommendation of the House of Peoples' Representatives following a public nominations, interview and short-listing process.
- The EBC Board ought to be able to, on its own, appoint and dismiss the chief executive officer of the EBC and all other EBC staff.
- The EBC's mandate and its board's duties ought to include language which guarantees its independence from political and commercial interference and make

it clear that its purpose is to serve only the public interest in the provision of its programming.

- The EBC Proclamation ought to make it clear that the EBC is a body established in the public interest and not as a governmental institution.

3.6 Legislation that undermines a journalist's duty to protect sources

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

❖ **Criminal Code, 2004**

The Criminal Code of Ethiopia is contained in Proclamation No. 414 of 2004 (Criminal Code) and is a modern law unlike many other African countries' criminal codes, which are often colonial-era statutes.

- Article 45(3) of the Criminal Code empowers a court to order the publisher or editor of a publication to disclose the source of information:

> (a) where a crime is committed against the Constitutional Order, National Defence Force or security of the State constituting clear and imminent danger; or
> (b) in the case of proceedings involving a serious criminal crime and where there is no alternative source of information and the information is decisive to the outcome of the case.

  In all other instances, article 45(2) of the Criminal Code provides that the publisher or editor of any publication may not be compelled to disclose the source of any matter printed in the publication, which in our view is a sufficiently high level of protection for a publisher or editor, but this protection does not extend to a journalist.

- Article 448 of the Criminal Code makes it an offence to 'refuse to aid justice'. In

particular, any person who has been lawfully summoned to appear in a judicial or quasi-judicial proceeding as, among other things, a witness or who has been ordered to produce evidence and who fails to appear, to produce the evidence or answer questions, without sufficient cause, can, upon conviction, be sentenced to a period of imprisonment or a fine.

The key issue here is the qualification 'without just cause'. Whether or not this will be interpreted to include the right of journalists to protect their sources will determine whether or not article 446 meets the requirements of article 29(2) of the Ethiopian Constitution which protects the right to freedom of expression.

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

3.7 Legislation that prohibits the publication of certain kinds of information

In the main, it is the Criminal Code of Ethiopia, contained in Proclamation No. 414 of 2004 (Criminal Code), that undermines the public's right to receive information and the media's right to publish information. The Criminal Code criminalises the act of publication in a number of instances, including:

- Prohibition of publications that constitute crimes relating to the mass media
- Prohibition of publications that constitute crimes relating to legal proceedings
- Prohibition of publications that constitute crimes against the national state
- Prohibition of publications that constitute crimes against foreign states
- Prohibition of publications that constitute fundamental crimes in violation of international law
- Prohibition of publications that constitute crimes against humanitarian organisations
- Prohibition of publications that constitute military or police crimes

- Prohibition of publications that constitute fiscal and economic crimes against the state
- Prohibition of publications that constitute crimes against the public interest or the community
- Prohibition of publications that constitute crimes against public security, peace and tranquillity
- Prohibition of publications that constitute crimes against honour
- Prohibition of publications that constitute crimes against morals or the family
- Prohibition of publications that constitute petty offences against the duties of a public office or authority.

3.7.1 Prohibition of publications that constitute crimes relating to the mass media

In a provision which is extremely uncommon, Chapter IV of Title II of the Criminal Code of Ethiopia, which is contained in Proclamation No. 414 of 2004 (Criminal Code), deals specifically with 'crimes relating to the mass media' which are those, in terms of article 42(2), that are 'committed by means of newspapers, books, leaflets, journals, posters, pictures, cinemas, radio or television broadcasting or any other means of mass media' where 'communication is made to the public through the mass media' and where the relevant crimes are those 'committed against the honour of other persons, public or private safety, or any other legal rights protected by criminal law' – article 42(3).

Article 43(1) sets out the chain of liability for crimes committed through periodicals as follows: the registered editor-in-chief or deputy editor; the publisher; the printer; the disseminator; the importer (in respect of periodicals published abroad).

Article 43(2) sets out the chain of liability for crimes committed through non-periodicals as follows: the author; the editor; the publisher; the printer; the disseminator.

Article 43(3) provides that liability for crimes committed through the broadcast media is as follows: the person responsible for the programme; the licensee.

Article 43(4) provides that if a person who would have been liable as set out above has no known place of abode in Ethiopia, and his present whereabouts cannot be ascertained, then liability shall pass to the person next liable after him.

The effect of the above is that one can be held liable for crimes effected through the mass media even when at a considerable distance from the actual writing, publication or broadcast thereof.

Article 46(1) is headed 'Exclusion of double liability' and it provides that punishment of one of the parties responsible in the order fixed by law in terms of article 43 excludes liability to punishment of the other parties for the same act. However, this does not apply to juridical persons (that is companies and the like) which are expressly disallowed in article 46(2) from escaping criminal liability either alone or jointly with any criminal listed in the order fixed by the law.

3.7.2 Prohibition of publications that constitute crimes relating to legal proceedings

PUBLICATIONS THAT CONSTITUTE CONTEMPT OF COURT

❖ **The Criminal Code, 2004**

The Criminal Code of Ethiopia is contained in Proclamation No. 414 of 2004 (Criminal Code) and is a modern law, unlike many other African countries' criminal codes which are often colonial-era statutes.

Article 449 of the Criminal Code makes it an offence to, in the course of a judicial proceeding, insult, hold up to ridicule, threaten or disturb the court or a judge in the discharge of his duty or disturb the activities of the court in any other manner. The offence is punishable by a period of imprisonment or the imposition of a fine.

Article 457 of the Criminal Code deals with another form of contempt of court. It provides that whoever publishes a report or spreads news which is inaccurate, tendentious or which distorts the facts and which has been drawn up for the purposes of influencing a judicial decision is guilty of an offence. The punishment is a period of imprisonment or a fine.

PUBLICATIONS THAT CONSTITUTE A BREACH OF COURT-ORDERED SECRECY

❖ **The Criminal Code, 2004**

The Criminal Code of Ethiopia is contained in Proclamation No. 414 of 2004 (Criminal Code) and is a modern law, unlike many other African countries' criminal codes which are often colonial-era statutes.

Article 450 of the Criminal Code makes it an offence to disclose facts declared secret by a court and obtained in the course of court proceedings at which the person was present. Upon conviction, the punishment is a period of imprisonment or a fine.

PUBLICATIONS THAT CONSTITUTE INACCURATE OR DISTORTED REPORTING

❖ **The Criminal Code, 2004**

The Criminal Code of Ethiopia is contained in Proclamation No. 414 of 2004 (Criminal Code) and is a modern law, unlike many other African countries' criminal codes which are often colonial-era statutes.

Article 451 of the Criminal Code makes it an offence to publish, among other things, information or a report concerning judicial cases which is inaccurate or distorted. Punishment is a fine or, in more serious cases (particularly those likely to perturb public opinion or to cause injury to another), a period of imprisonment.

3.7.3 Prohibition of publications that constitute crimes against the national state

❖ **The Flag Proclamation, Proclamation 654 of 2009**

Article 23(5) of the Flag Proclamation prohibits disrespecting, dishonouring or damaging the national flag of Ethiopia 'by writing … in public places'. The punishment is a period of rigorous imprisonment (this is defined in article 108(2) of the Criminal Code as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment) or a fine.

❖ **The Criminal Code, 2004**

As dealt with above, Chapter IV of Title II of the Criminal Code of Ethiopia published in Proclamation No. 141 of 2004 (Criminal Code) deals with crimes that are carried out through the mass media. Consequently, it is important to be aware of crimes that are capable of being so carried out as any such publication would constitute a crime in terms of the Criminal Code. The Criminal Code makes provisions for crimes against the national state, which are set out in Chapter I of Title 1 of Book III of Part II of the Criminal Code. These include:

- *Injuries and insults to the state – Attacks against the state and national and other emblems*
  - Article 244(1) of the Criminal Code makes it an offence to abuse, insult, defame or slander the state in public. The offence is punishable by a period of imprisonment or a fine.
  - Article 244(2) of the Criminal Code makes it an offence to intentionally insult or in any other way abuse an officially recognised national emblem such as the flag or insignia of Ethiopia or its regional states. The offence is punishable by a period of imprisonment or a fine.

- *Impairment of the defensive power of the state*
  Article 247 makes it a crime to publicly instigate refusals to serve in the military, mutiny or desertion or to incite any person liable to military service to commit any of the above. The offence is punishable by a range of punishments from rigorous imprisonment (this is defined in article 108(2) as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment) or, if in a time of war or danger thereof, with life imprisonment or death.

- *Treason*
  Article 249 makes it a crime to disclose or communicate or make accessible to, among other persons, the public, a secret, document, negotiations or decision which the interests of Ethiopia demand shall not be divulged. The offence is punishable by rigorous imprisonment (this is defined in article 108(2) as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment) or simple imprisonment in cases of negligence.

- *Economic treason*
  Article 250 makes it a crime to disclose or communicate or make accessible to, among other persons, the public, economic negotiations, or facts or decisions kept secret in the higher interests of Ethiopia or in those of national defence. The offence is punishable by rigorous imprisonment (this is defined in article 108(2) as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment) or simple imprisonment in cases of negligence.

- *Collaboration with the enemy*
  Article 251 makes it a crime for Ethiopian nationals, or those officially entrusted with the protection of Ethiopian national interests, in a time of war or of total or partial occupation of the territory of Ethiopia, to help the enemy, with the intention of promoting the objective of the enemy, including by entering any propaganda, publishing or press service designed to promote the interests of an enemy or occupying power. The offence is punishable by rigorous imprisonment (this is defined in article 108(2) as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment) or, in cases of exceptional gravity, with rigorous imprisonment for life or death.

- *Espionage*
  Article 252 makes it a crime to, on behalf of a foreign state, political party or

organisation, and to the detriment of Ethiopia or its institutions, organisations or nationals, collect, transmit, deliver or make available political, diplomatic, military or economic intelligence information which is secret or is not a matter of public knowledge, to an official or private service or to their agents. The offence is punishable by rigorous imprisonment (this is defined in article 108(2) as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment) with the periods of imprisonment being longer where the espionage is harmful to the state as opposed to private persons. Further, where espionage is carried out in a time of war or danger of war, the crime is punishable with rigorous imprisonment for life or with death.

- *Indirect aid and encouragement of crimes against the state*
  It is also important to be aware that in terms of article 254, it is a crime not to inform the authorities that a crime against the state (see above) is being prepared or has been committed. The offence is punishable by rigorous imprisonment (this is defined in article 108(2) as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment).

❖ **Anti-Terrorism Proclamation No. 652 of 2009**

The Anti-Terrorism Proclamation is hardly a media-related law at all. It makes only one reference to publishing. The only reason it has in fact been included in this chapter is that it has been used extremely frequently against journalists.

Article 3 of the Terrorism Proclamation sets out a long list of 'terrorist acts'. We have focused on those that could conceivably be carried out by a journalist. Essentially a 'terrorist act' is defined as including: 'Whosoever or a group intending to advance a political … or ideological cause by coercing the government, intimidating the public or section of the public, or destabilising or destroying the fundamental political, constitutional, economic or social institutions of the country':

- Creates a serious risk to the safety … of the public or section of the public
- Endangers, seizes or puts under the control, causes serious interference or disruption of any public service
- Attempting to do any of the above.

Terrorist acts are punishable with rigorous imprisonment (this is defined in article 108(2) of the Criminal Code as conditions of imprisonment which are more severe

than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment) or with death.

Article 5 of the Terrorism Proclamation deals with rendering support to terrorism. It makes it an offence to render such support. The offence is broadly framed and includes: knowingly supporting the commission of a terrorist act or a terrorist organisation through providing 'a skill, expertise or moral support or … advice'. The offence is punishable with rigorous imprisonment (this is defined in article 108(2) of the Criminal Code as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment).

Article 6 is entitled encouragement of terrorism. Again, this offence is broadly framed and consists of publishing a statement that is likely to be understood by some or all of the members of the public as a direct or indirect encouragement to them to commit, prepare or instigate an act of terrorism. The offence is punishable with rigorous imprisonment (this is defined in article 108(2) of the Criminal Code as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment).

Article 7 makes it an offence intentionally to communicate that a terrorist act has been or is being or will be committed while knowing or believing that the information is false. The offence is punishable with rigorous imprisonment (this is defined in article 108(2) of the Criminal Code as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment).

3.7.4 Prohibition of publications that constitute crimes against foreign states

❖ **The Criminal Code, 2004**

As dealt with above, Chapter IV of Title II of the Criminal Code of Ethiopia published in Proclamation No. 141 of 2004 (Criminal Code) deals with crimes that are carried out through the mass media. Consequently, it is important to be aware of crimes that are capable of being so carried out as obviously any such publication would constitute a crime in terms of the Criminal Code.

The Criminal Code makes provisions for crimes against foreign states (provided such states have reciprocal protective treatment of Ethiopia in terms of article 267) which are set out in Chapter II of Title 1 of Book III of Part II of the Criminal Code. These include:

- *Hostile acts against a foreign state*
  Article 261 makes it a crime for anyone within the territory of Ethiopia and at the risk of endangering peaceful relations with foreign countries, to attempt to disturb, by subversive activities, slander, malicious propaganda or violence, the internal political order or security of a foreign state. The offence is punishable by a period of simple or rigorous imprisonment (this is defined in article 108(2) as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment).

- *Insults to foreign states*
  Article 264 makes it a crime for anyone to publicly abuse, insult, defame or slander a foreign state either directly or in the person of its head of state or one of its constituted authorities or accredited diplomatic or official representatives. The offence is punishable by a period of simple imprisonment or a fine.

- *Insults to official emblems of foreign states*
  Article 265 makes it a crime for anyone, out of ill-will, hatred, discontent or improper motives, to tear down, destroy, deface, insult or in any other way abuse the emblems of sovereignty of a foreign state with which Ethiopia maintains peaceful relations (particularly its insignia or national flag publicly hoisted by an official representative of such state). The offence is punishable by a period of simple imprisonment or a fine.

- *Insults to inter-state institutions*
  Article 266 makes it a crime for anyone to insult the representatives or any of the official emblems of an inter-state institution of which Ethiopia is a member. The offence is punishable by a period of simple imprisonment or a fine.

3.7.5 Prohibition of publications that constitute fundamental crimes in violation of international law

❖ **The Criminal Code, 2004**

As dealt with above, Chapter IV of Title II of the Criminal Code of Ethiopia published in Proclamation No. 141 of 2004 (Criminal Code) deals with crimes that are carried out through the mass media. Consequently, it is important to be aware of crimes that are capable of being so carried out as any such publication would constitute a crime in terms of the Criminal Code. The Criminal Code makes provision for fundamental crimes against international law (such as genocide, war crimes against the civilian population and the like) which are set out in Chapter 1 of Title II of Book III of Part II of the Criminal Code.

While most of these are defined in ways that make it impossible for them to be carried out by the media *per se*, some could involve the media. These include:

- *War crimes against wounded, sick, shipwrecked persons or medical services*
  Article 271(1)(c) makes it an offence to organise, order or engage in compelling persons engaged in, among others, journalistic activities to perform acts or carry out work contrary to, or refrain from acts required by, their professional rules and ethics designed for the benefit of the wounded, sick or civilian population. The offence is punishable by a period of rigorous imprisonment (this is defined in article 108(2) as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment) or rigorous imprisonment for life, or death.

- *Incitement of crimes against international law*
  Article 274 makes it a crime publicly to encourage, including by writings, the following crimes against international law: genocide; war crimes against the civilian population; war crimes against wounded, sick, shipwrecked persons or medical services; war crimes against prisoners and interned persons; pillage, piracy and looting. The offence is punishable by a period of rigorous imprisonment (this is defined in article 108(2) as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment).

3.7.6 Prohibition of publications that constitute crimes against humanitarian organisations

❖ **The Criminal Code, 2004**

As dealt with above, Chapter IV of Title II of the Criminal Code of Ethiopia published in Proclamation No. 141 of 2004 (Criminal Code) deals with crimes that are carried out through the mass media. Consequently, it is important to be aware of crimes that are capable of being so carried out as any such publication would constitute a crime in terms of the Criminal Code. The Criminal Code makes provisions for crimes against humanitarian organisations, which are set out in Chapter II of Title II of Book III of Part II of the Criminal Code.

While most of these are defined in ways that make it impossible for them to be carried out by the media *per se*, some could involve the media. These include:

- *Hostile acts against international humanitarian organisations*
  Article 281(1)(a) makes it an offence to threaten or insult persons belonging to the International Red Cross or Red Crescent or corresponding organisations. The offence is punishable by a period of simple imprisonment or, in cases of

exceptional gravity or during a time of war, by a period of rigorous imprisonment (this is defined in article 108(2) as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment).

3.7.7 Prohibition of publications that constitute military or police crimes

❖ **The Criminal Code, 2004**

As dealt with above, Chapter IV of Title II of the Criminal Code of Ethiopia published in Proclamation No. 141 of 2004 (Criminal Code) deals with crimes that are carried out through the mass media. Consequently, it is important to be aware of crimes that are capable of being so carried out as any such publication would constitute a crime in terms of the Criminal Code. The Criminal Code makes provisions for military crimes which are set out in Title III of Book III of Part II of the Criminal Code, and article 340 thereof specifically makes these crimes also applicable to acts carried out against members of the police on active duty. While most of these are defined in ways that make it impossible for them to be carried out by the media *per se*, some could involve the media. It is important to note that in terms of article 339, where the following crimes are committed for gain (that is, where the accused has been found to have been paid to commit these offences) the punishment of a significant fine may be imposed in addition to any other punishment prescribed. The military or police crimes which could involve the media include:

- *Incitement and assistance to mutiny*
  Article 301 of the Criminal Code makes it an offence to incite or assist a mutiny in a time of emergency, general mobilisation or war. The offence is punishable by a period of simple imprisonment.

- *Crimes against guards, sentries or patrols*
  Article 302 of the Criminal Code makes it an offence to insult or threaten a military guard, sentry or patrol on duty. The offence is punishable in terms of article 302 read with article 298 by a range of punishments depending on the gravity thereof and whether or not it was committed during a time of emergency, general mobilisation or war, by a period of rigorous imprisonment (this is defined in article 108(2) as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment), rigorous imprisonment for life, or the death penalty.

- *Compelling breaches of duty*
  Article 323 of the Criminal Code makes it an offence to threaten a member of the defence force to execute his duty improperly or prevent him from executing a

duty. The offence is punishable by a period of simple imprisonment.

- *Incitement to disregard military orders*
  Article 332(1) of the Criminal Code makes it an offence to incite anyone to disregard a military order, to incite acts of indiscipline or breaches of military duties. The offence is punishable by a period of simple imprisonment or a fine.

- *Publishing information regarding specified military zones and objects*
  Article 333(2) of the Criminal Code makes it an offence to, among other things, reproduce, publish or communicate an account, sketch, photograph or any representation whatsoever of an establishment, work or site, access to which is forbidden by the military authorities or on military grounds. The offence is punishable by a period of rigorous imprisonment (this is defined in article 108(2) as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment).

- *Failing to report crimes against the defence forces and breaches of military obligations*
  Article 335(1) of the Criminal Code makes it an offence to fail to report to the authorities, plans to commit mutiny or desertion. The offence is punishable by a period of simple imprisonment or, where the mutiny or desertion is at least attempted or in other serious cases, by a period of rigorous imprisonment (this is defined in article 108(2) as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment).

  Article 335(3) of the Criminal Code makes it an offence to fail to report to the authorities, plans to commit treason or espionage. Read with article 254, the offence is punishable by a period of rigorous imprisonment (this is defined in article 108(2) as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment).

- *Disclosing military secrets*
  Article 336 of the Criminal Code makes it an offence to communicate, with an unauthorised person or to the general public, information of any kind which is not a matter of common knowledge and which by its nature constitutes a military secret (other than information the communication of which constitutes espionage or treason, which is dealt with elsewhere in this chapter). The offence is punishable by a period of rigorous imprisonment (this is defined in article 108(2) as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment).

Note that the punishment can be reduced to simple imprisonment in the case of non-serious negligent (as opposed to intentional) disclosure.

- *False or tendentious information*
  Article 337 of the Criminal Code makes it an offence, when troops have been mobilised or are on active duty, to disseminate information, while knowing that information to be inaccurate or tendentious (that is, false), with the intention to obstruct measures ordered in the military interest, to impede or endanger movements or operations of the defence forces, to incite troops to indiscipline or insubordination, or to foment disorder and spread alarm among the population. The offence is punishable by a period of rigorous imprisonment (this is defined in article 108(2) as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment) or rigorous imprisonment for life.

3.7.8 Prohibition of publications that constitute fiscal and economic crimes against the state

❖ **The Criminal Code, 2004**

As dealt with above, Chapter IV of Title II of the Criminal Code of Ethiopia published in Proclamation No. 141 of 2004 (Criminal Code) deals with crimes that are carried out through the mass media. Consequently, it is important to be aware of crimes that are capable of being so carried out as any such publication would constitute a crime in terms of the Criminal Code. The Criminal Code makes provisions for fiscal and economic crimes against the state, which are set out in Title IV of Book III of Part II of the Criminal Code. While most of these are defined in ways that make it impossible for them to be carried out by the media *per se*, some could involve the media. These include:

- *Incitement to refusal to pay taxes*
  Article 337 of the Criminal Code makes it an offence to incite another person to refuse to pay the taxes or dues prescribed by law. The offence is punishable by a period of simple imprisonment, or in more serious cases resulting from the spread of the crime, to a period of rigorous imprisonment (this is defined in article 108(2) as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment).

3.7.9 Prohibition of publications that constitute crimes against the public interest or the community

❖ **The Criminal Code, 2004**

As dealt with above, Chapter IV of Title II of the Criminal Code of Ethiopia

published in Proclamation No. 141 of 2004 (Criminal Code) deals with crimes that are carried out through the mass media. Consequently, it is important to be aware of crimes that are capable of being so carried out as any such publication would constitute a crime in terms of the Criminal Code. The Criminal Code makes provisions for crimes against the public interest or the community, which are set out in Book IV [note that this is incorrectly numbered] of Part II of the Criminal Code. While most of these are defined in ways that make it impossible for them to be carried out by the media *per se*, some could involve the media. These include the following:

- *Violence and coercion*
  Article 441 of the Criminal Code makes it an offence by threats to prevent a public servant from performing an act which it is his duty to perform or force him to perform an act which he is not supposed to do. The offence is punishable by a fine or a period of simple imprisonment.

- *Failure to report a crime*
  Article 443 of the Criminal Code makes it an offence to fail to report to the authorities the fact of the commission, or the identity of the perpetrator, of a crime punishable with death or rigorous imprisonment for life. The offence is punishable by a fine or a period of simple imprisonment. Similar provisions regarding false reports to authorities or false denunciations or accusations are contained in articles 446 and 447, respectively, of the Criminal Code, although in relation to false accusations, the punishment may be a period of rigorous imprisonment (this is defined in article 108(2) as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment).

3.7.10 Prohibition of publications that constitute crimes against public security, peace and tranquillity

❖ **The Criminal Code, 2004**

As dealt with above, Chapter IV of Title II of the Criminal Code of Ethiopia published in Proclamation No. 141 of 2004 (Criminal Code) deals with crimes that are carried out through the mass media. Consequently, it is important to be aware of crimes that are capable of being so carried out as any such publication would constitute a crime in terms of the Criminal Code. The Criminal Code makes provisions for crimes against public security, peace and tranquillity, which are set out in Title VI of Book IV of Part II of the Criminal Code. While most of these are defined in ways that make it impossible for them to be carried out by the media *per se*, some could involve the media. The crimes against public security, peace and tranquillity which could involve the media include the following:

- *Public provocation to or defence of a crime*
  Article 480 makes it an offence to publicly, by writing, provoke others to commit acts of violence or to defend such a crime or its perpetrator. The offence is punishable with imprisonment or a fine.

- *Alarming the public*
  Article 485 makes it an offence to spread alarm among the public by, among other things, spreading false rumours concerning threats of danger to the community (especially that of invasion, assassination, fire, devastation or pillage) or imminent catastrophe or calamity. The offence is punishable by a period of imprisonment or a fine. Note that where this is likely to cause serious disturbances or disorder, a penalty of rigorous imprisonment (this is defined in article 108(2) as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment) can be imposed.

- *Inciting the public through false rumours*
  Article 486 makes it an offence to, among other things, start or spread false rumours against the government or the public authorities, thereby disturbing or inflaming public opinion. Further, article 486 also makes it an offence to arouse hatred or stir up acts of violence or political, racial or religious disturbances. The punishment for these crimes is a period of imprisonment or a fine or, in serious cases, a period of rigorous imprisonment (this is defined in article 108(2) as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment).

  It is also important to have regard to article 813 of the Criminal Code which deals with less serious cases of publishing false, exaggerated or biased news intended to perturb public order or tranquillity. The punishment is a fine or arrest but not a period of imprisonment.

- *Seditious demonstrations*
  Article 487 makes it an offence to distribute seditious or threatening remarks in any public place or meeting or to publicly incite others to disobey laws or orders issued by lawful authority. The offence is punishable by a period of imprisonment or a fine.

3.7.11 Prohibition of publications that constitute crimes against honour

❖ **The Criminal Code, 2004**

As dealt with above, Chapter IV of Title II of the Criminal Code of Ethiopia

published in Proclamation No. 141 of 2004 (Criminal Code) deals with crimes that are carried out through the mass media. Consequently, it is important to be aware of crimes that are capable of being so carried out as any such publication would constitute a crime in terms of the Criminal Code. The Criminal Code makes provisions for crimes against honour which are set out in Title III of Book V of Part II of the Criminal Code. While most of these are defined in ways that make it impossible for them to be carried out by the media *per se*, some could involve the media. The crimes against honour which could involve the media include the following:

- *Defamation and calumny*
  Article 613(1) of the Criminal Code makes it an offence to impute a fact or conduct concerning a person with the intent to injure his honour or reputation to another person. This is the offence of defamation. In terms of article 613(2), where the imputed facts or conduct are false and are spread with knowledge of the falsity, this constitutes the offence of calumny. Punishment for defamation or calumny is a period of imprisonment or a fine. It is critical to note that the fact that the imputation is true does not absolve a person of the offence of defamation. Truth is only a defence if there was no intention to injure the reputation of another or if the person acted in the public interest – article 614.

  Note that in terms of article 618, additional punishments can be imposed where the defamation or calumny has been deliberately committed against a public servant in the discharge of his official duty.

3.7.12 Prohibition of publications that constitute crimes against morals and the family

❖ **The Criminal Code, 2004**

As dealt with above, Chapter IV of Title II of the Criminal Code of Ethiopia published in Proclamation No. 141 of 2004 (Criminal Code) deals with crimes that are carried out through the mass media. Consequently, it is important to be aware of crimes that are capable of being so carried out as any such publication would constitute a crime in terms of the Criminal Code. The Criminal Code makes provisions for crimes against morals and the family, which are set out in Title IV of Book V of Part II of the Criminal Code. While most of these are defined in ways that make it impossible for them to be carried out by the media *per se*, some could involve the media. The crimes against morals and the family which could involve the media include the following:

- *Obscene or indecent publications*
  Article 640 makes it an offence to, among other things, import, possess, sell,

distribute or circulate writings, images or films which are obscene or grossly indecent. Punishment is a period of imprisonment and a fine, and the incriminating material may be forfeited and destroyed. There are exceptions for works which are artistic, literary or scientific in character and which are not calculated to inflame erotic feelings or lust – article 642.

Article 644 contains particular prohibitions on displaying writings or images such that they are visible from without and which stimulate unduly, or pervert or misdirect the sexual instinct, arouse or stimulate unduly brutal or bloodthirsty instincts, antisocial feelings, or feelings that are inimical to the family, in minors. Punishment is a period of imprisonment and a fine and the incriminating material may be forfeited and destroyed.

3.7.13 Prohibition on publications that constitute petty offences against the duties of a public office or authority

❖ **The Criminal Code, 2004**

As dealt with above, Chapter IV of Title II of the Criminal Code of Ethiopia published in Proclamation No. 141 of 2004 (Criminal Code) deals with crimes that are carried out through the mass media. Consequently, it is important to be aware of crimes that are capable of being so carried out as any such publication would constitute a crime in terms of the Criminal Code. The Criminal Code makes provisions for petty offences against the duties of a public office or public authority, which are set out in Chapter IV of Title I of Book VIII of the Criminal Code. While most of these are defined in ways that make it impossible for them to be carried out by the media *per se*, some could involve the media. The petty offences against the duties of a public office or a public authority which could involve the media include the following:

- *Undue publications*
  Article 804 of the Criminal Code is a general provision which specifies that whoever contravenes any official directive, regulation or order prohibiting the disclosure of acts, deliberations or decisions of an authority is punishable with a fine or arrest. Further, in terms of article 761 of the Criminal Code, the following measures shall also be taken, namely: confiscation by the state; withdrawal of a licence; and suspension or closing of a media establishment.

3.8 Legislation dealing with the interception of communication

❖ **Terrorism Proclamation No. 652 of 2009**

Article 14(1) of the Terrorism Proclamation empowers the National Intelligence and

Security Service to obtain a court warrant to:

- Intercept or conduct surveillance on the telephone, fax, radio, internet, electronic, postal and similar communications of a person suspected of terrorism
- Enter into any premises in secret to enforce interception
- Install or remove instruments enabling the interception.

Article 14(2) provides that all information obtained through interception shall be kept in secret.

❖ **The Criminal Code, 2004**

The Criminal Code of Ethiopia which is contained in Proclamation No. 141 of 2004 (the Criminal Code) makes it a crime, in terms of articles 706 and 707 to, without authorisation, access a computer, computer system or computer network and negligently or intentionally take or use data or computer services or damage a computer, computer system or computer network. The punishment ranges from a period of imprisonment or a fine to a period of rigorous imprisonment (this is defined in article 108(2) as conditions of imprisonment which are more severe than simple imprisonment, in specific prisons which are designated as prisons for rigorous imprisonment) and a fine.

Article 708 makes it an offence to, without authorisation, access a computer, computer system or computer network, and negligently or intentionally disrupt the use thereof by an authorised user. The punishment is a period of imprisonment or a fine.

It is also an offence to produce, distribute, or possess instruments, secret codes or passwords with the intention to further the commission of one of the above offences. The punishment is a period of imprisonment or a fine – article 709.

3.9 Legislation dealing with punishments for laws concerning the mass media

❖ **The Criminal Code, 2004**

The Criminal Code of Ethiopia which is contained in Proclamation No. 141 of 2004 (Criminal Code) provides in article 812 that whoever contravenes the laws, regulations or directives concerning the printing, publication, sale, distribution or control of printed documents, public advertisements, posters or notices transmitted through the radio, television, internet or other public media, is punishable with a fine

or arrest. Further, in terms of article 761 of the Criminal Code, the following measures shall also be taken, namely: confiscation by the state; withdrawal of a licence; and suspension or closing of a media establishment.

3.10 Legislation that regulates the affairs of media-related NGOs

❖ **The Charities and Societies Proclamation, No. 621 of 2009**

It would appear the Charities and Societies Proclamation No. 621 of 2009 ought not to impact the media significantly. However, this is not the case because the proclamation has been used to restrict the operations of media advocacy and related NGOs.

The proclamation makes a distinction between Ethiopian and foreign charities but is not applicable to religious or cultural organisations or organisations operating in accordance with an agreement with the government – articles 1 and 2.

The proclamation creates the Charities and Societies Agency, which is an institution of the federal government – article 4. The agency is empowered to license, register and supervise charities and societies – article 6. The director-general and the seven-member board of the Charities and Societies Agency are appointed by government, although two of the board members are nominated from the charities and societies – article 8.

Charitable organisations are required to acquire a registration and licensing certificate from the agency in order to carry out charitable acts – article 15(2). Similarly, societies (defined as persons organised on a non-profit and voluntary basis for the promotion of the rights and interests of its members – article 55(1)) also have to be registered with the Charities and Societies Agency – article 64(2).
The licences granted to a charity or society by the agency have to be renewed every three years – article 76(1).

There are records that are required to be kept by charities and societies and these include records of all monies received. Note that no anonymous donations may be received – article 77. There are also prohibitions on public collections – article 98.

Perhaps the most problematic aspect of the proclamation is that it makes a distinction between the kinds of work that foreign charities and societies can do and those that Ethiopian charities and societies can do. (Note that an Ethiopian charity is defined in article 1 as one that receives not more than 10% of its funding from foreign sources.) Article 14(5) provides that only an Ethiopian charity may have the following purposes:

- The advancement of human and democratic rights
- The promotion of equality of nations, nationalities and peoples and that of gender and religion
- The promotion of rights of the disabled and children's rights
- The promotion of conflict resolution or reconciliation
- Any other purposes as may be prescribed by directives of the agency.

This is extremely draconian as it effectively prohibits a charity or society with the above aims from operating in Ethiopia if it is foreign or if it receives more than 10% of its funding from foreign sources. Most media-related NGOs promote human and democratic rights such as press freedom and freedom of expression, and therefore would be effectively prohibited from operating unless they were almost entirely locally funded.

3.11 Legislation that specifically assists the media in performing its functions

In countries that are committed to democracy, governments pass legislation which specifically promotes accountability and transparency of both public and private institutions. Such statutes, while not specifically designed for use by the media, can and often are used by the media to uncover and publicise information in the public interest.

❖ **The Criminal Code, 2004**

The Criminal Code of Ethiopia which is contained in Proclamation No. 141 of 2004 (Criminal Code) provides, at article 47 which is headed 'Immunity', that an author, publisher or distributor of a true record or representation, which is correct in form, of public debates or acts of a legislative, administrative or judicial authority, the distribution of which is not expressly prohibited by law or by a specific decision, shall not be liable to punishment.

❖ **The Freedom of the Mass Media and Access to Information Proclamation, 2008**

Part Three of the Freedom of the Mass Media and Access to Information Proclamation, No. 590 of 2008 (here, Access to Information Proclamation), is headed 'Access to information'. Article 11 sets out the objectives of Part Three. These include:

- Giving effect to the right of citizens to access and receive information held by

public bodies, subject to justifiable limits based on overriding public and private interests

- Establishing mechanisms and procedures to give effect to that right in a manner which enables persons to obtain information as quickly, inexpensively and effortlessly as is reasonably possible

- Encouraging and promoting public participation, public empowerment, fostering a culture of transparency, accountability and efficiency in the functions of public bodies and to encourage and promote good governance.

Article 12(1) provides that all persons have the right to seek, obtain and communicate any information held by public bodies, except as expressly provided for by this proclamation. This right includes the rights to be informed as to whether or not the public body holds a record containing the requested information, and to obtain the information by means of inspection, certified copies and electronic means.

Article 14(3) and (8) requires the information to be provided upon request within 30 working days, although this may be extended by an additional 30 working days for practical reasons.

Grounds for rejecting an information request are set out in various articles and include the following:

- Defective requests such as those that are too broad, are likely to divert state resources or which relate to information soon to be published – article 27.

- Peremptory grounds, that is, grounds upon which the public official must refuse access to the information:
    - *Personal information about a third party:* Where this would involve the unreasonable disclosure of personal information about a third party including a deceased individual who has been dead less than 20 years – article 16.
    - *Commercial information of a third party:* Where this would involve the disclosure of: trade secrets; financial, commercial, scientific or technical information of a third party where disclosure would be likely to cause harm to the commercial or financial interests of such person; information supplied in confidence where disclosure could be reasonably predicted to put the third party at a disadvantage in contractual or other negotiations or in commercial competition – article 17.

- *Confidential information of a third party:* Where this would constitute a breach of the duty of confidence owed to the third party or where the record was supplied in confidence, and disclosure would be likely to prejudice the future supply of similar information – article 18.

  It is important to note that many of the above articles do contain exceptions to the duty to keep information confidential and these include: with the consent of the third party; where the information is already publicly available; where the information relates to the health or well-being of a minor or a person incapable of understanding the nature of the request and giving access would be in the individual's best interests.

  Article 19 makes provision for third parties to be notified about requests for access to information concerning them.
- *Protection of safety of individuals and property:* Where disclosure would be likely to: endanger the life or physical safety of an individual; impair the security of building structures or systems including a computer communication or transport system; prejudice public safety procedures or a witness protection programme – article 20.
- *Privileged records:* Where a record is privileged from production in legal proceedings unless the privilege has been waived – article 22.
- *Cabinet documents:* Where a record is a Cabinet record other than those which the Cabinet has decided to make available to the general public – article 24.
- *Operations of public bodies:* Where the record contains an opinion, report or recommendation in respect of a deliberation or minutes of a meeting in respect of policy development or to take a decision conferred or imposed by law; and where disclosure could reasonably be expected to frustrate the deliberative process or successful implementation of policy of the public body – article 26(1).

- Discretionary grounds, that is, grounds upon which the public official may refuse access to the information:
  - *Protection of proceedings – law enforcement and legal investigation:* Where the record contains methods, techniques, procedures or guidelines for the: prevention, detection or investigation of crimes or prosecution of alleged offenders; or where the information could lead to the circumvention of the law or facilitate the commission of an offence; or lead to a miscarriage of justice – article 21.
  - *Defence, security and international relations:* Where disclosure would be likely to cause prejudice to the security, defence and

international relations of the country. The article sets out detailed examples – article 23.

- *Economic interests and financial welfare of the country and commercial activities of public bodies:* Where disclosure would be likely to jeopardise the economic interests or financial welfare of the nation or the ability of the government to manage the economy of the country. The article sets out detailed examples – article 25.
- *Operations of public bodies:* Where disclosure could reasonably be expected to jeopardise the effectiveness of monitoring, auditing, examining or testing of procedures or methods used by a public body; where the record contains evaluative material or draft notes – article 26(2).

It is important to note that article 28 contains a public interest override which provides that notwithstanding the grounds for refusal to provide access to information set out above, a public body may not refuse a request for information unless the harm to the protected interest which would be caused by disclosure outweighs the public interest in disclosure. Further, article 29 provides for severability of a record in the event that only part thereof is exempted from disclosure. Article 32 sets out various responsibilities of the ombudsman in relation to ensuring access to information.

The Access to Information Proclamation is critically important for the media. If used properly, particularly in respect of ongoing investigative journalism, it can provide access to extremely valuable information. However, it is only as effective as the willingness of public officers in government departments to comply with its provisions and of the courts to enforce them.

❖ **Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation, 2010**

In looking at the Protection of Witnesses and Whistleblowers of Criminal Offences Proclamation, No. 699/2010 (Whistleblowers Proclamation), we focus on those provisions that protect whistleblowers, although it is important to note that the Whistleblowers Proclamation also deals with protection of witnesses.

The Whistleblowers Proclamation is aimed at granting protection to persons who have given, or have agreed to give, information in the investigation or trial of an offence involving a suspect punishable with rigorous imprisonment for 10 or more years or with death, and where the offence may not be revealed or established by means other than the information provided by the whistleblower, and where it is believed that the threat of serious danger exists to the life, security, freedom or

property of the whistleblower – article 3. Article 4 sets out the various types of protection measures that are available to a whistleblower, including being part of a witness protection programme and immunity from prosecution.

Whistleblower legislation is important because it assists in the uncovering of serious crimes, often in respect of corruption at senior levels of government. It is obviously only as effective as the effectiveness of the protections provided to whistleblowers.

4 REGULATIONS AFFECTING THE MEDIA

In this section you will learn:

- ❑ What regulations are
- ❑ Key regulations that affect the media – print and broadcast
- ❑ Key regulations that regulate the making of films

4.1 Definition of regulations

Regulations are subordinate legislation. They are legal rules that are made in terms of a statute or proclamation. Regulations are legal mechanisms for allowing a body other than parliament to make legally binding rules governing an industry or sector without needing parliament to pass a specific statute thereon.

4.2 Key regulations governing the print and broadcast media

4.2.1 Code of Conduct for the Mass Media and Journalists on the Manner of Reporting About Elections Regulations, No. 6/2010

Article 59(4) of the Electoral Law Amendment Proclamation 532 of 2007 empowers the National Electoral Board to develop a set of regulations containing a code of conduct for the mass media and journalists when reporting on elections. These have been promulgated in the Code of Conduct for the Mass Media and Journalists on the Manner of Reporting About Elections Regulations, No. 6/2010 (Elections Regulations). Key features of the Elections Regulations which apply to any journalist or media house engaged in the production or dissemination of news, reportage or information concerning elections, include the following:

RESPECT FOR THE LAW

Article 5 of the Elections Regulations requires every journalist and media entity to comply with the constitution and other laws and regulations.

RESPONSIBILITIES OF JOURNALISTS

Article 6(1)–(12) of the Elections Regulations sets out the responsibilities of journalists, which include:

- Reporting accurately and without bias
- Reporting only fact-based information, the origin of which is known to the journalist
- Not suppressing essential information
- Observing professional secrecy regarding the source of information obtained in confidence
- Reporting in a balanced manner, which requires seeking comment from all sides to a story
- Correcting published information that is found to be 'harmfully inaccurate'
- Reporting the views of candidates and political parties directly and in their own words where possible
- Avoiding language or expressions that may further discrimination or violence on any grounds including race, sex, sexual orientation, language, religion, political or other opinions, and national or social origins
- Properly contextualising when reporting the opinions of those who advocate discrimination or violence and reporting the opinions of those against whom such opinions are directed
- Not accepting any inducement from a political party, candidate or any other source
- Not making any promises to a political party or candidate about the content of a news report
- Taking due care in reporting the findings of opinion polls, including informing the public on who commissioned and carried out the poll and when, how many people were interviewed and where, the margin of error and the exact wording of questions

- Avoiding the following 'grave professional offences':
  - Plagiarism
  - Malicious misrepresentation
  - Calumny, slander, libel or unfounded accusations
  - Acceptance of a bribe in any form in consideration for either publication or suppression of publication.

RESPONSIBILITIES OF THE MEDIA

Article 7(1)–(14) of the Elections Regulations sets out the responsibilities of the media, which include the following:

- The media must clearly separate facts from comment.
- When reporting the new, the media must reflect the facts as honestly perceived by the journalist.
- Comment may reflect the editorial policy of the publication.
- Publicly owned media ought not to express an editorial opinion for or against any political party or candidate.
- Publicly owned broadcast media have a duty to be balanced and impartial in their election reporting and not to discriminate against any party in granting access to on-air time.
- If media houses accept paid political advertising, they shall do so on a non-discriminatory basis and at equal rights for all political parties.
- Media houses shall cover news, interviews, information or current affairs programmes or articles.
- The public media shall not be biased in favour of or against any party or candidate.
- The media shall provide equitable and regular coverage to all political parties, candidates and platforms.
- The media shall encourage and provide access to voters to express their opinions.
- The media shall promote democratic values such as the rule of law, accountability and good governance.

- The media shall ensure that every candidate or party that makes a reasonable claim of having been defamed or otherwise injured by a broadcast or publication, shall either be granted the opportunity to reply or shall be entitled to a correction or retraction. The reply, correction or retraction shall be broadcast or published as soon as possible.

- The media shall provide news coverage of press conferences and public statements concerning matters of political controversy caused or made by the head of government, government ministers or members of Parliament subject to a right of reply, particularly by those also standing for office.

- Publicly owned media shall publish or broadcast voter education material.

- Every media outlet shall provide voter education that is accurate and impartial and must effectively inform voters about the voting process including: how, when and where to vote; how to register to vote; the secrecy of the ballot; the importance of voting; the functions of the offices that are under contention; and similar matters.

- Every media outlet shall provide voter education in minority languages and targeted at groups that traditionally may have been excluded from the political process, such as women and people with disabilities.

- Every media outlet shall monitor their own output to ensure that it conforms to the requirements set out in these regulations.

4.2.2 Broadcasting Service Grievance Handling Directive, No. 3/2008

The Council of Ministers has issued the Broadcasting Service Grievance Handling Directive, No. 3/2008 (Grievance Directive) acting in terms of article 47 of Proclamation 533, the Broadcasting Proclamation. Key features of the Grievance Directive include the following:

FORMS OF GRIEVANCE

Article 3 of the Grievance Directive grants any person the right to petition the Ethiopian Broadcasting Authority (EBA) in respect of any broadcaster. Note that article 9 of the Grievance Directive makes it applicable to all public, commercial and community broadcasting services in Ethiopia. Such a petition must include:

- The name and address of the petitioner

- The name of the broadcaster, type of broadcasting service, causes of the grievance and date and time thereof and title of the relevant programme
- The violation of the right or injury giving rise to the grievance
- If the grievance has previously been submitted to the broadcaster, the results thereof or the reply thereto are to be stated.

If similar grievances in respect of the same broadcaster are submitted by different aggrieved persons, they can be considered together by the EBA.

UNACCEPTABLE GRIEVANCES

Article 4 provides that the following kinds of grievances may be rejected out of hand:

- Where a court has jurisdiction
- If the case is still pending before court
- If the cause of the grievance is older than 30 days. Note, however, that where a complainant submits copies of the transmitted programme, the complaint may be considered for a period of up to six months.

DISCLOSURES OF TRANSGRESSIONS OF LAW BY BROADCASTERS

Article 5 of the Grievance Directive empowers any person to give information to the EBA when a broadcaster transgresses the laws of the country, and the inspector of the EBA shall make a ruling thereon after examining the information provided.

DECISION-MAKING PROCEDURES

Article 6 read with article 8 of the Grievance Directive deals with the decision-making process on grievances and provides as follows:

- The EBA is to assign an expert to register complaints.
- Once it is found that it is necessary to examine a complaint, a grievance hearing team reviews the case by gathering necessary evidence and information, including calling for the broadcaster's response to the grievance, which must be responded to within five days.

- A decision of the grievance hearing team must be communicated to the petitioner and the broadcaster in writing.
- An appeal against the grievance hearing team's decision can be made to the EBA's management committee within 14 days.
- The management committee's decision is given after examining the grievance and the decision of the grievance hearing team.
- If the complainant or the broadcaster is dissatisfied with the decision of the management committee, a further appeal can be submitted to the board of the EBA within 14 days. The board's decision is final.

MEASURES THAT CAN BE IMPOSED ON BROADCASTERS AS A RESULT OF A GRIEVANCE

Article 7 of the Grievance Directive provides for the following kinds of measures that can be imposed on a broadcaster found to have caused a legitimate grievance:

- The broadcaster must arrange a proportional amount of airtime to give the corrected version within two days of the grievance.
- If the transmitted programme cannot be corrected, it must not be rebroadcast.
- The decision is to be broadcast.
- The broadcasters broadcasting service licence may be suspended or revoked.
- The matter may be referred to court if the case involves criminal or civil liability.

4.2.3 Community Radio Broadcasting Service Directive, No. 3/2008

The Council of Ministers has issued the Community Radio Broadcasting Service Directive, No. 2/2008 (Community Radio Directive) acting in terms of article 47 of the Broadcasting Proclamation No. 533/2007. Key features of the Community Radio Directive that are not repetitious of the provisions of Proclamation 533, include the following:

CATEGORIES OF COMMUNITY RADIO SERVICES

Article 3 of the Community Radio Directive provides for the following categories of community radio services:

- *Geographical:* To serve the needs of a community which is living in a specific geographical area and having common languages, culture, values and whose interest is not covered by any other media.

- *Common interest:* To serve the needs of the community which is not restricted to a geographical area and which has a common interest, such as:
  - An organisation of individuals or an institution that is providing a service in regard to education or work to satisfy the needs of those people or the institution
  - A common culture and history, where the service promotes and develops such common culture and history, including in respect of artistic value
  - An association of professionals, women and others in order to fulfil their objectives.

POWER OF TRANSMISSION EQUIPMENT FOR COMMUNITY BROADCASTING SERVICES

Article 9 of the Community Radio Directive limits the effective radiated power of transmission equipment to 1 kW.

NOTIFICATION OF CHANGES OF INFORMATION

Article 18 of the Community Radio Directive requires a licensee to notify the EBC in writing within 14 days:

- When transmission is terminated for more than one month
- Of a change of management
- Of a change of programme or transmission times
- Of a change of address.

PROGRAMMING REQUIREMENTS

Articles 19–24 deal with programming requirements applicable to community radio services:

- A community radio station is required to focus 60% of its programmes on community issues.

- A community radio station is required to give priority to music, singers and artists from the community.

- A community radio station is required to transmit programming in the languages chosen by the community.

- A community radio station is required to mention its name, address and motto on air.

- A community radio station is required to provide a scheduled programme and, except in the case of emergency government and public statements and current and necessary community issues, the licensee shall not transmit any programmes outside of the schedule.

MANAGEMENT REQUIREMENTS

Article 25 of the Community Radio Directive sets out the management requirements of a community radio service. These include:

- Having a general assembly of members or representatives of the community

- Having a board of no fewer than five and no more than nine members, elected from the community in a democratic way and on a voluntary basis

- Employing a general manager and technical manager on a permanent basis

- Having members of the community participate in administrative and programme preparation activities

- Requiring the management to ensure community participation in programme preparation, programme appraisals, and administrative and financial aspects in order to run the community radio service together

- Submitting an organisational document, in accordance with the EBA's requirements, to the EBA.

EDITORIAL POLICY

Article 26 of the Community Radio Directive requires a community radio licensee to develop editorial policies in accordance with the laws and directives of Ethiopia, and provide a broadcasting service that is credible, balanced and accurate.

4.2.4 The Commercial Radio Broadcasting Services Directive No. 1/2008

The Council of Ministers has issued the Commercial Radio Broadcasting Services Directive, No. 1/2008 (Commercial Radio Directive) acting in terms of article 47 of the Broadcasting Proclamation No. 533/2007. Key features of the Commercial Radio Directive that are not repetitious of the provisions of Proclamation 533, include the following:

INVITATION OF APPLICANTS

Article 6 of the Commercial Radio Directive makes provision for the EBA to invite applications for commercial radio broadcasting service licences by way of a notice published in the mass media. Note that the EBA has the discretion to invite public comment on the applicants but that this is not a legal requirement.

PROCEDURE FOR THE ISSUANCE OF COMMERCIAL RADIO LICENCES

Article 9 of the Commercial Radio Directive sets up the process for deciding upon the issuance of the commercial radio licence, namely:

- The licence team of the EBA submits the results of its initial screening (in accordance with article 23 of Proclamation 533, which is dealt with elsewhere in this chapter) with due explanations thereon to the chief executive (that is, the director-general in terms of article 12(2) of Proclamation 533) of the EBA.

- The director-general of the EBA makes a decision indicating those applicants who are to proceed to a second round.

- The licence team of the EBA evaluates those applicants against the criteria set out in article 8 of the Directive (which mirror the criteria set out in article 21 of Proclamation 533, which is dealt with elsewhere in this chapter) and forwards its recommendation to the chief executive with the list of applicants entitled to a licence and those to whom it would deny a licence.

- The chief executive makes a decision thereon, indicating who is entitled to a licence and who was denied a licence.

- Those applicants entitled to a licence must pay the prescribed fee within one month and sign the necessary documentation prepared by the EBA, failing which the licence shall be cancelled.

- Those applicants denied a licence are entitled to reasons for such denial and may appeal to the board of the EBA within 14 days of the decision of the chief executive.

- All licensees are required to register the licence issued by the EBA with the Ministry of Trade and Industry or the Regional Bureau of Trade and Industry as the case may be.

DUTIES AND RESPONSIBILITIES OF THE LICENSEE

Article 11 of the Commercial Radio Directive sets out the duties and responsibilities of the licensee. These are largely repetitious of the provisions of Proclamation 533 and it is not necessary to set them out in detail here.

LICENCE CONDITIONS

Article 12 of the Commercial Radio Directive provides that the EBA is to prepare a set of licence conditions based on conditions contained in the licence application and the licensee is required to sign these.

CHANGES IN RESPECT OF LICENCES

- Article 19 of the Commercial Radio Directive provides that the EBA's prior approval is required for:
  - An increase or reduction in the permitted capacity of the transmitter
  - Changes to the type, length and height of the antennae
  - Changes to the location of the transmitter or antennae
  - Variations in the contracts relating to the position or ownership of the broadcasting property
  - Changes in the holding of shares or transfers of shares in the licensee
  - Receipt of radio programming from foreign or domestic broadcasters to be transmitted on the commercial radio service.

- Article 20 of the Commercial Radio Directive requires notification to be given to the EBA for:
  - Discontinuance of transmission due to equipment failure
  - Dismissal or a change in the programme director
  - Changes of programmes and transmission hours
  - Changes of address.

RECORD KEEPING

Besides the programming records which are to be kept in terms of article 38 of Proclamation 533 (and which are dealt with elsewhere in this chapter), article 22 of the Commercial Radio Directive sets out the particulars that licensees are required to keep a record of, namely:

- Business plan and annual budget
- Accounting records and annual audit reports
- Investment activities
- Contracts and agreements concluded by the licensee or its agent
- Donors and non-monetary aid received
- A list of employees together with their position, years of service and a training scheme designed by the licensee
- The programme schedule and any amendments thereto.

PROHIBITION ON TRANSFER OF THE RADIO STATION

Article 23 of the Commercial Radio Directive prohibits the transfer, sale, lease or pledge of the licence or of any rights acquired in the licence. If the licensee is unable to carry out the broadcasting operations of the licence, it may return the licence to the EBA and apply for the necessary transfer to another party. However, only upon the approval of the EBA can a licensee transfer the broadcast equipment to another party.

This is a significant provision because it makes the commercial trade in broadcasting assets potentially extremely cumbersome and difficult because it requires a return of the licence prior to the transfer thereof, which is obviously fraught with commercial risk.

4.2.5 The Subscription Broadcasting Service Directive No. 4/2009

The Council of Ministers has issued the Subscription Broadcasting Service Directive, No. 4/2009 (Subscription Broadcasting Directive) acting in terms of article 47 of the Broadcasting Proclamation No. 533/2007. Key features of the Subscription

Broadcasting Directive that are not repetitious of the provisions of Proclamation 533, include the following:

DEFINITION OF A SUBSCRIPTION BROADCASTING SERVICE

Article 1(1) of the Subscription Broadcasting Directive defines a 'subscription broadcasting service' as 'a foreign country broadcast transmission program service… and giving the service by using the set device or password'.

As one can see, the definition is extremely poorly drafted but it does make it clear that subscription broadcasting services appear to be defined only in terms of foreign programming.

APPLICATIONS FOR A SUBSCRIPTION LICENCE

- Article 4 of the Subscription Broadcasting Directive deals with the application form and supporting documentation that must be submitted by an applicant for a subscription broadcasting licence. Besides the usual information required in terms of Proclamation 533 (and which is dealt with elsewhere in this chapter), article 4(1) requires that the EBA's application form include:
  - The types and numbers of channels to be transmitted
  - The system used to provide the service to customers.

- Article 4(2) also requires the following documentation to be submitted with a subscription licence application, namely:
  - The applicant's memorandum and articles of association
  - Confirmatory documentation that the applicant is established by Ethiopian citizens
  - The agreement document between the applicants and the foreign country broadcast service organisation to provide the programming to the customers
  - A project study of the service
  - Other necessary documentation.

  Note that applications for a subscription licence can be made at any time and do not require an invitation to apply to have been issued by the EBA. This is specifically provided for in article 5(1) of the Subscription Broadcasting Directive.

PROCEDURE FOR THE ISSUANCE OF SUBSCRIPTION BROADCAST LICENCES

Articles 5 and 6 of the Subscription Broadcasting Directive set up the process for deciding upon the issuance of a subscription broadcasting licence, namely:

- The EBA licence team evaluates the applicants and forwards its recommendation to the director-general with the list of applicants entitled to a licence and those to whom it would deny a licence.

- The EBA chief executive makes a decision thereon, indicating who is entitled to a licence and who was denied a licence.

- Those applicants entitled to a licence must pay the prescribed fee within one month and sign the necessary documentation prepared by the EBA, failing which the licence shall be cancelled.

- Those applicants denied a licence are entitled to reasons for such denial.

LICENCE CONDITIONS

Article 7 of the Subscription Broadcasting Directive provides that the EBA is to prepare a set of licence conditions based on conditions contained in the licence application and the licensee is required to sign these.

DUTIES AND RESPONSIBILITIES OF THE LICENSEE

Article 8 of the Subscription Broadcasting Directive sets out the duties and responsibilities of the licensee. These are largely repetitious of the provisions of Proclamation 533 and it is not necessary to set them out in detail here, save for those which relate only to subscription broadcasting, namely:

- Notifying the EBA of any change in any payment tariff charged for the service

- Notifying the EBA of channel type, channel numbers and content of the programmes transmitted to the customers

- Submitting programmes to the EBA which are provided to customers without payment.

PERIOD OF VALIDITY OF A SUBSCRIPTION LICENCE

Article 9 provides that a subscription licence is valid for a period of five years and may be renewed.

ADDITIONAL CHANNEL ACCREDITATION

Article 15 requires a licensee to obtain channel accreditation from the EBA for channels in addition to those previously licensed. Accreditation application is to be made on the prescribed form and the EBA is required to give written reasons for any refused channel.

CHANGES IN RESPECT OF LICENCES

Article 16 of the Subscription Broadcasting Directive provides that notification is to be given to the EBA within five days of any of the following happening:

- Changes of address
- When the licensee changes or terminates the agreement with the foreign country broadcasters
- Any other change of information provided to the EBA at the time of the licence application.

4.3 Key regulations that regulate the making of films

The Council of Ministers issued the Film Shooting Permit Council of Ministers Regulations 66/2000 (Film Regulations) in terms of article 5 of the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 4/1995.

Article 5 of the Film Regulations provides that a foreigner wishing to shoot a feature or documentary film in Ethiopia shall obtain a permit from the Ministry of Information and Culture.

Note that article 3(1) of the Film Regulations specifically exempts film establishments 'which are permanently established and licensed in Ethiopia'.
Article 6 of the Film Regulations requires a foreigner to submit an application to the Ministry of Information and Culture not later than 10 days prior to the day on which he or she is due to commence filming. The application is to contain the following information and submissions:

- The purpose and title of the film
- The duration and location of the proposed film shoot

- The proposed total production cost of the film and the portion thereof that is to be spent in Ethiopia
- A copy of the film script together with a synopsis thereof
- Where a particular Ethiopian personality is to be portrayed in the film, a copy of a certified document of no objection from that person or his or her heirs
- In the case of a co-production involving an Ethiopian entity, a copy of the agreement indicating the responsibilities and liabilities of each party
- The nationality of the film crew, including passport numbers, countries issuing the passports, permanent and temporary addresses, and any other information required by the Ministry.

Article 7(1) of the Film Regulations requires the Ministry of Information and Culture to issue the necessary permit within three days provided the application has been duly made and the film permit fee (determined in terms of article 12 of the Film Regulations) has been duly paid.

Note that in terms of article 7(2) of the Film Regulations, the permit may indicate locations prohibited for filming.

Article 8 of the Film Regulations provides that where an applicant for a film permit wishes to use an aircraft for shooting the film, the applicant shall also obtain a flight permit from the Ethiopian Civil Aviation Authority, which may be applied for through the Ministry of Information and Culture.

Article 9 of the Film Regulations requires a permit holder to appear in person and sign an undertaking to adhere to the conditions of the permit and to respect the laws of the country, and on completion of the project to submit two English copies of the film produced to the Ministry of Information and Culture.

5 MEDIA SELF-REGULATION

Self-regulation is a form of regulation that is established voluntarily. A grouping or body establishes its own mechanisms for regulation and enforcement that are not imposed, for example, in a statute or regulation. Media bodies often introduce self-regulation in the form of codes of media ethics and good governance.

Sadly, media-self regulation does not appear to be effective in Ethiopia and we have

not been provided with any examples of self-regulatory codes which have been developed by Ethiopian media houses or organisations.

6 CASE LAW AND THE MEDIA

We were not provided with any case law dealing with media law issues as at the date of writing.

NOTES

1 https://www.cia.gov/library/publications/the-world-factbook/geos/et.html and https://www.google.co.za/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=Population+Ethiopia, last accessed 30 June 2016.
2 http://www.bloomberg.com/news/articles/2015-12-14/ethiopia-oromo-protests-trigger-fatal-ethnic-clashes-group-says and https://www.hrw.org/world-report/2015/country-chapters/ethiopia, last accessed 30 June 2016.
3 http://www.worldbank.org/en/topic/poverty/publication/ethiopia-poverty-assessment, last accessed 30 June 2016.
4 http://www.budde.com.au/Research/Ethiopia-Telecoms-Mobile-and-Broadband-Statistics-and-Analyses.html, last accessed 30 June 2016.
5 http://www.pressreference.com/Co-Fa/Ethiopia.html, last accessed 30 June 2016.
6 https://www.eff.org/deeplinks/2015/10/zone-9-bloggers-are-free-ethiopia-still-thinks-encryption-terrorism, last accessed 30 June 2016.
7 https://www.hrw.org/news/2015/01/21/ethiopia-media-being-decimated, last accessed 30 June 2016.