

# **Media Law Handbook for Eastern Africa**

**VOLUME 2**



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Published by Konrad-Adenauer-Stiftung Regional Media Programme: Sub-Saharan Africa

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ISBN: 978-0-9870243-4-3

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Printing: United Litho, South Africa

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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](http://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](http://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](http://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
GDP	Gross domestic product
ICT	Information and communications technology
KAS	Konrad-Adenauer-Stiftung
MP	Member of Parliament
NGO	Non-governmental organisation
PAP	Pan African Parliament
UK	United Kingdom

## Kenya

AI	Access to Information
ALP	AIDS Law Project
BSD	Broadcasting signal distribution
CA	Communications Authority of Kenya
CAJ	Commission on Administrative Justice
CMA	Capital Markets Authority
COFEK	Consumer Federation of Kenya
DG	Director general
EAC	Ethics and Anti-Corruption Commission
ICC	International Criminal Court
IEBC	Independent Electoral and Boundaries Commission
JSC	Judicial Service Commission
KAU	Kenyan African Union
KBC	Kenya Broadcasting Corporation
KNHREC	Kenya National Human Rights and Equality Commission
MOA	Media Owners Association
NCIC	National Cohesion and Integration Commission
NGEC	National Gender and Equality Commission
PIN	Personal identification number

## Rwanda

DTT	Digital terrestrial television
HCJ	High Council of the Judiciary
MHC	Media High Council

MOU	Memorandum of understanding
NCHR	National Commission for Human Rights
RBA	Rwanda Broadcasting Agency
RMC	Rwanda Media Commission
RPF	Rwandan Patriotic Front
RURA	Rwanda Utilities Regulatory Authority
SSTV	Subscription satellite television

## **Uganda**

IG	Inspectorate of Government
IMCU	Independent Media Council of Uganda
IPTV	Internet protocol television/radio
JSC	Judicial Service Commission
NFA	National Forestry Authority
NIJU	National Institute of Journalists of Uganda
PCC	Pornography Control Committee
PSC	Public Service Commission
UBC	Uganda Broadcasting Corporation
UCC	Uganda Communications Commission
UCRA	Uganda Court Reporters Association
UCT	Uganda Communications Tribunal
UHRC	Uganda Human Rights Commission

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## 1 INTRODUCTION

The Republic of Kenya lies on the equator and overlies the East African Rift from Lake Victoria in the south-west to Lake Turkana in the north-west, and to the Indian Ocean, which forms its south-eastern border. Tanzania lies to the south, Uganda to the west, South Sudan to the north-west, Ethiopia to the north and Somalia to the north-east. The country covers some 581,000 km<sup>2</sup> and has an ethnically diverse population of about 47.3 million, 60% of whom are aged 24 years or younger. Kenya has two official languages – Kiswahili and English.

The Berlin Conference of 1884–85 divided Eastern Africa into territories of influence among European powers, leading Britain to found the East African Protectorate in 1895. Kenya officially became a British colony in 1920.

Resistance to colonialism was not long in coming. The Kenyan African Union (KAU) was formed in 1944 to campaign for independence, and in 1952 the Mau Mau guerrilla group launched an independence campaign against white settlers. The following year, the KAU was banned and its leader, Jomo Kenyatta, jailed for his links with the Mau Mau.

Though the rebellion was put down in 1956, the following year saw the first direct elections for Kenyans to the Legislative Council.<sup>1</sup> Kenyatta's party, now called the Kenya African National Union, won, as it did the general election in May 1963. Kenyatta became prime minister of the independent unitary state in December of the

same year. The constitution negotiated with Britain was amended less than a year later, however, making the country a republic with a president as head of the *de facto* one-party state and government.<sup>2</sup>

On his death in August 1978, Kenyatta was succeeded by former vice president, Daniel arap Moi. In June 1982, the National Assembly declared Kenya a *de jure* one-party state – a decision which prompted an attempted coup by Air Force personnel backed by university students to oust Moi, which was quickly suppressed by other military and police forces.<sup>3</sup> Following the coup attempt, Moi tightened his grip on the country, and his security forces subjected opposition leaders and pro-democracy activists to arbitrary arrest, detention without trial, abuse in custody and deadly force.<sup>4</sup>

In November 1991, concern over the denial of human rights led international donors to suspend new assistance pending economic and political reform. The following month Moi legalised multi-party politics and shelved threats to the freedom of the press and the independence of the judiciary.<sup>5</sup> Moi won elections in 1992 and 1997.

Constitutionally barred from running in the 2002 election, Moi retired. The election resulted in a landslide victory for opposition National Alliance Party leader and former vice president, Mwai Kibaki, an economist and long-serving finance minister under both Kenyatta and Moi.<sup>6</sup>

Though Kibaki's first term was hampered by ill health, he gained admiration for introducing a free primary education initiative designed to give more than a million children, who would not have been able to afford school, the chance to attend. Unfortunately, the promise failed to achieve its aims, largely because the pledge was not translated into policy supported by resources and skilled personnel.<sup>7</sup> In 2004 and again in 2006, drought and crop failure caused hunger on a scale that the government labelled 'national disasters'.<sup>8</sup>

In July 2005, Parliament approved a draft constitution despite days of violent protests by demonstrators, who said it would give too much power to the president. Later in the year voters rejected the draft in a referendum. Nevertheless, Kibaki was declared winner of the next presidential election in December 2007. The result sparked a political, economic and humanitarian crisis when supporters of the Orange Democratic Movement's Raila Odinga alleged electoral manipulation. Amid large-scale ethnic violence, former United Nations (UN) secretary general Kofi Annan arrived in the country about a month after the election and brought the two sides to the negotiating table. On 28 February 2008, Kibaki and Odinga signed a power-sharing agreement that established the Office of the Prime Minister and created a coalition government with Odinga as prime minister.<sup>9</sup>

The makeshift alliance was an uneasy one, and when Odinga suspended Agriculture Minister William Ruto and Education Minister Samuel Ongeri for suspected corruption, his order was quickly overturned by Kibaki.

Odinga, son of Kenya's first vice president, Oginga Odinga, ran for president in the March 2013 election, but lost to Uhuru Kenyatta, son of the country's first president, by a margin of 6.81% of votes cast.

Kenyatta had previously been named by International Criminal Court (ICC) prosecutor Luis Moreno Ocampo as being suspected of crimes against humanity for planning and funding the violence that followed the 2007 elections, in which some 1300 people are believed to have died. Kenyatta appeared before the ICC in The Hague on 8 October 2014, making history as the first sitting head of state to do so. Two months later, however, ICC prosecutors withdrew the charges saying that his government had refused to hand over evidence vital to the case.<sup>10</sup>

Kenyatta has prioritised economic development, signing major agreements with China, Italy, Rwanda, Uganda and the United States, and promoting infrastructure projects. His economic policies have been praised by the International Monetary Fund and the World Bank. With gross domestic product (GDP) of \$63.4 billion, Kenya was the eighth ranked African country in 2015,<sup>11</sup> though with GDP per capita at \$1800, the country ranks in the world's bottom 14%.<sup>12</sup> A further sign of progress, however, is a July 2016 Institute of Directors report ranking Kenya 14th in Africa in corporate governance; it said the country is one of the top five improving nations.<sup>13</sup>

Kenya has a diverse media scene, supported by a sizeable middle class that sustains a substantial advertising market. Television is the main news source in cities and towns, with the state-run Kenya Broadcasting Corporation, which is part funded by the government as well as advertising, dominant. The main satellite pay-TV platforms are the Wananchi Group, which operates Zuku TV, and South Africa's MultiChoice. The spread of viewing in rural areas has been slower, hampered by limited access to mains electricity. Accordingly, radio remains the main medium in rural areas, where most Kenyans live.

The highly competitive press sector is the most sophisticated in the region. Print media are dominated by two publishing houses, the Nation and the Standard. Reporters Without Borders ranked Kenya at 90th (out of 180 countries) in its 2014 global Press Freedom Index.<sup>14</sup>

Internet use is high by regional standards, and submarine cables have boosted Kenya's global connectivity. As of September 2015, the country had almost 32 million internet

users, 69.6% of the population, according to the Communications Authority of Kenya.<sup>15</sup> Widespread use of mobile phones enables millions to access the web, and the M-pesa mobile phone-based platform for money transfer and financial services has some 13 million active monthly users. In the 1914–15 financial year, transactions amounting to 4.2 trillion shillings, equivalent to 42% of Kenya's GDP, went through the system.<sup>16</sup>

Despite notable successes, however, numerous long-term problems remain. Even before independence, Kenya was beset by conflict with ethnic Somalis within its borders who want to unite with Somalia. Petty skirmishes have sometimes erupted into worse situations, including massacres of Somalis in 1980 and 1984.<sup>17</sup> Since late 2011, Kenya has been embroiled with al-Shabaab, a jihadist group that has also declared war on the Federal Government of Somalia. The group has carried out numerous attacks on Kenya since 2011, including the massacre of customers at Nairobi's Westgate shopping mall in September 2013, and students identified as Christians at Garissa University College in April 2015.<sup>18</sup>

In this chapter, working journalists and other media practitioners will be introduced to the legal environment governing media operations in Kenya. 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 the chapter is to equip the reader with an understanding of the main laws governing the media in Kenya. Key weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Kenya, 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 Kenya
- 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 Kenya 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 Kenya, revised edition 2010, sets out the foundational rules for the Republic of Kenya. These are the rules upon which the entire country operates. The Constitution contains the underlying principles and values of the laws of Kenya. A key provision is article 1, which gives sovereign power to the people of Kenya, and commits to it being exercised only in accordance with the Constitution. That power is delegated to the following state organs:

- Parliament and the legislative assemblies in the county governments
- The national executive and the executive structures in the county governments
- The judiciary and independent tribunals.

Sovereign power is exercised at national and county level.

Key constitutional provisions are articles 4(1) and 4(2), which state that 'Kenya is a sovereign Republic', and 'Kenya shall be a multi-party democratic State founded on the national values and principles of governance as referred to in article 10'. Article 10, 'National values and principles of governance', specifies the national values and principles, which include:

- Sharing and devolution of power
- The rule of law
- Democracy and participation of the people
- Human dignity and equality

- Human rights
- Non-discrimination and protection of the marginalised
- Good governance
- Integrity, transparency and accountability.

The Bill of Rights, Chapter Four of the Constitution of Kenya, is described in article 19(1) as ‘the framework for social, economic and cultural policies’. Article 19(3)(a) states that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the state.

## **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 Kenya makes provision for constitutional supremacy. Article 2(1) states that ‘[t]his Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government’. Article 2(3) specifies that the validity or legality of the Constitution is not subject to challenge by or before any court or other state organ. Further, article 2(4) states that ‘[a]ny law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid’.

The Kenyan Constitution provides that any treaty or convention ratified by Kenya forms part of the law of Kenya – article 2(6).

## **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 be done only in accordance with the constitution.

The Kenyan Constitution makes provision for legal limitations on the exercise and protection of rights and fundamental freedoms contained in Chapter Four of the Constitution of Kenya, the Bill of Rights. Article 19(3)(c) specifically provides that the various rights provided for in the Bill of Rights ‘are subject only to the limitations contemplated in this Constitution’.

The Constitution of Kenya makes provision for three kinds of legal limitations on the exercise and protection of rights contained in Chapter Four of the Constitution of Kenya, ‘The Bill of Rights’.

### **2.3.1 Internal limitations**

These are limitations that are right specific and contain limitations or qualifications to the particular right that is provided for in the constitution. These will be dealt with in more detail when discussing the applicable rights below.

It is not clear why it is necessary to have any internal limitations clauses if there is a general limitations clause as well. Often, internal limitations clauses undermine rights which appear to be substantive but which are actually not very effective, as a result.

### **2.3.2 General limitations**

The second type of limitation is a general limitations provision. General limitations provisions apply to the provisions of a bill of rights or other statement setting out the fundamental rights. These types of clauses allow a government to pass laws limiting rights, generally provided this is done in accordance with the constitution.

The specifics of the general limitations clause are set out in article 24 of the Kenyan Constitution, which states that rights can be limited only by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- The nature of the right or fundamental freedom
- The importance of the purpose of the limitation
- The nature and extent of the limitation
- The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others

- The relation between the limitation and its purpose, and whether or not there are less restrictive means to achieve the purpose.

These factors are important because they show that the limitation of a right has to be narrowly tailored and that its purpose must be interrogated by a court when deciding whether or not the limitation of the right is constitutionally sound.

### **2.3.3 Constitutional limitations – state of emergency provisions**

It is critically important to note the provisions of the Constitution of Kenya which deal with the terms of a state of emergency. In terms of article 58(1), a state of emergency may be declared by the president only under article 132(4)(d), and ‘only when the State is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency’.

Further, the declaration has to be necessary to meet the circumstances for which the emergency is declared. It may not exceed a period of 14 days, and the first extension thereof requires a supporting vote of at least two-thirds of the National Assembly. Any subsequent extension requires a minimum of a three-quarters supporting vote. Such extensions can be for no more than two months at a time.

The method by which the initial proclamation of extension of the state of emergency is made known to the people is not stated in the Constitution of Kenya, although article 58(6)(b) does specify that ‘[a]ny legislation enacted in consequence of the state of emergency’, including limitations of rights specified in the Bill of Rights, ‘shall not take effect until it is published in the *Gazette*’.

Despite any other provision in the Constitution, there are rights and fundamental freedoms that are non-derogable. These are listed in article 25 and comprise: freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial; and the right to an order of *habeas corpus* (requiring a person to be brought to court). Unfortunately, many of the critical rights for the media, including the basic right to freedom of expression and the right to information, can be derogated from in a state of emergency.

Particularly important are the provisions of article 58(6)(a), which deal with derogations from fundamental rights during a declaration of a state of emergency.

A limit on a right or fundamental freedom in the Bill of Rights resulting from any legislation enacted in consequence of a declaration of a state of emergency is itself limited to the extent that the:

- Limitation is strictly required by the emergency, and
- Legislation is consistent with the Republic's obligations under international law applicable to a state of emergency – article 58(6).

Article 29, 'Freedom and security of the person', gives every person the right to freedom and security of the person, but article 29(b) adds a caveat: every person has the right not to be 'detained without trial, except during a state of emergency, in which case the detention is subject to article 58'.

Importantly, article 58(7) holds government, its agents and all people accountable for actions taken during the state of emergency: '[a] declaration of a state of emergency, or legislation enacted or other action taken in consequence of any declaration, may not permit or authorise the indemnification of the State, or of any person, in respect of any unlawful act or omission.'

## **2.4 Constitutional provisions that protect the media**

The Constitution of Kenya contains a number of important provisions in Chapter Four, 'The Bill of Rights', which directly protect the media, including publishers, broadcasters, journalists, editors and producers. There are, however, provisions elsewhere in the Constitution that assist the media as it goes about its work of reporting on issues in the public interest, and we include these in this section too.

### **2.4.1 Rights that protect the media**

#### **RIGHT TO FREEDOM OF THE MEDIA**

Article 34(1) specifies that '[f]reedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in article 33(2)', which reads:

33(2) The right to freedom of expression does not extend to –

- (a) propaganda for war;
- (b) incitement to violence;
- (c) hate speech; or
- (d) advocacy of hatred that –

- (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or
- (ii) is based on any ground of discrimination specified or contemplated in Article 27(4).

All the clauses in article 34 emphasise the intention that the media should be independent of state interference.

- Article 34(2) specifically precludes the state from interfering with ‘any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium’ and further forbids the state to penalise ‘any person for any opinion or the content of any broadcast, publication or dissemination’. This is a fundamental aspect of freedom of the media as it protects the media’s right to write opinion pieces and comment on important issues of the day.
- Article 34(3) allows broadcasting and other electronic media freedom of establishment, subject only to licensing procedures that are:
  - Necessary to regulate the airwaves and other forms of signal distribution
  - Independent of control by government, political interests or commercial interests.

Article 34(1), the right to freedom of the media, is limited by an internal limitation to the right which is set out in article 33(2) and which states:

The right to freedom of expression does not extend to –

- (a) propaganda for war;
- (b) incitement to violence;
- (c) hate speech; or
- (d) advocacy of hatred that –
  - (i) constitute ethnic incitement, vilification of others or incitement to cause harm; or
  - (ii) is based on any ground of discrimination specified or contemplated in Article 27(4).

The provisions of article 34(1) read with article 33(2) of the Constitution, the internal limitation to the right to freedom of the media, require some explanation.

- While the provisions of article 33(2) are not in themselves controversial, it is noteworthy that the internal limitation provides that the right to freedom of the media does not extend to both hate speech – article 33(2)(c) and to the advocacy of hatred – article 33(2)(d). However, no indication is given as to what the difference is between hate speech and the advocacy of hatred as provided for in article 33(2)(c) and (d).

- The effect of the internal limitation is that hate speech and the advocacy of hatred are not protected expression and any legislation designed to regulate hate speech or the advocacy of hatred in terms of article 33(2)(c) and (d) would not have to meet the requirements of the general limitations clause provided for in section 24 of the Constitution.

The provisions regarding advocacy of hatred in article 33(2)(d) are extremely broadly framed. In this regard:

- They include wording such as ‘vilification of others’, the effect of which is that ‘vilification’ accordingly constitutes advocacy of hatred, irrespective of the basis for such vilification or level of vilification, which term is undefined
- They include incitement to cause ‘harm’ on whatever basis without giving an indication as to what is meant by ‘harm’. One can assume that ‘harm’ is less than ‘violence’, as incitement to violence is already provided for in article 33(2)(b)
- They include advocacy of hatred based on any ground of discrimination specified or contemplated in article 27(4), namely race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth
- The provisions of article 33(2)(d)(i) and (ii) are not cumulative. They are framed in the alternative. This is unusual as hate speech provisions usually require that advocacy of hatred be based on certain specified grounds AND constitute incitement to cause harm.

The effect of this is that a wide range of expression could conceivably fall within the definition of ‘advocacy of hatred’ and/or ‘hate speech’ therefore be unprotected in terms of the constitutional right to freedom of expression.

## FREEDOM OF EXPRESSION

Another important provision that protects the media is article 33(1)(a), part of the article headed ‘Freedom of expression’, which states:

Every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas.

This provision needs explanation.

- These freedoms apply to all persons and not just to certain people, such as citizens.
- The freedom is not limited to speech (whether oral or written) but extends to non-verbal and non-written ‘expression’, such as physical expression (including mime, dance or theatre), photography or graphic art.
- Article 33(1)(a) specifies that the right to freedom of expression includes the ‘freedom to seek, receive or impart information or ideas’. This freedom of everyone to receive and impart ideas and information is a fundamental aspect of freedom of expression, and this subsection effectively enshrines the right to the free flow of information. Thus, the information rights of audiences, for example, as well as the expression rights of the media, are protected.
- Article 33(1)(a) specifies that the right to freedom of expression includes the ‘freedom to ... impart information or ideas’. This is a vitally important provision because it protects the right to communicate information and ideas *to the public* – a critically important role of the press and the media more generally. Therefore, although the Constitution of Kenya does not specifically mention the press or the media in this provision, the freedom to perform that role – namely, to communicate information to the public – is protected.

Article 33(1), the right to freedom of expression, is limited by an internal limitation to the right which is set out in article 33(2) and which states:

The right to freedom of expression does not extend to –

- (a) propaganda for war;
- (b) incitement to violence;
- (c) hate speech; or
- (d) advocacy of hatred that –
  - (i) constitute ethnic incitement, vilification of others or incitement to cause harm; or
  - (ii) is based on any ground of discrimination specified or contemplated in Article 27(4).

The provisions of article 33(1) read with article 33(2) of the Constitution, the internal limitation to the right to freedom of expression, require some explanation.

- While the provisions of article 33(2) are not in themselves controversial, it is noteworthy that the internal limitation provides that the right to freedom of expression does not extend to both hate speech – article 33(2)(c) and to the

advocacy of hatred – article 33(2)(d). However, no indication is given as to what the difference is between hate speech and the advocacy of hatred as provided for in article 33(2)(c) and (d).

- The effect of the internal limitation is that hate speech and the advocacy of hatred are not protected expression and any legislation designed to regulate hate speech or the advocacy of hatred in terms of article 33(2)(c) and (d) would not have to meet the requirements of the general limitations clause provided for in section 24 of the Constitution.

The provisions regarding advocacy of hatred in article 33(2)(d) are extremely broadly framed. In this regard:

- They include wording such as ‘vilification of others’, the effect of which is that ‘vilification’ accordingly constitutes advocacy of hatred, irrespective of the basis for such vilification or level of vilification, which term is undefined
- They include incitement to cause ‘harm’ on whatever basis without giving an indication as to what is meant by ‘harm’. One can assume that ‘harm’ is less than ‘violence’, as incitement to violence is already provided for in article 33(2)(b)
- They include advocacy of hatred based on any ground of discrimination specified or contemplated in article 27(4), namely race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth
- The provisions of article 33(2)(d)(i) and (ii) are not cumulative. They are framed in the alternative. This is unusual as hate speech provisions usually require that advocacy of hatred be based on certain specified grounds AND constitute incitement to cause harm.

The effect of this is that a wide range of expression could conceivably fall within the definition of ‘advocacy of hatred’ and/or ‘hate speech’, and could therefore be unprotected in terms of the constitutional right to freedom of expression.

## RIGHT OF ACCESS TO INFORMATION

Another critically important provision that protects the media is article 35(1), which enshrines the right of every citizen to access to information held by the state, as well as to information held by another person which is required for the exercise or protection of any right or fundamental freedom.

This right requires some explanation.

- Article 35 essentially provides for access to two types of information:
  - Any information held by the state
  - The second type is, paradoxically, both broader and narrower. It is broader because it grants every citizen the right to information ‘held by another person’ – other than the state, that is. Essentially, this grants citizens the right to information held by private persons whether individuals or institutions. However, this type is more narrowly tailored as one has the right to information held by a non-state person only where access to the information is ‘required for the exercise or protection of any right or fundamental freedom’. Thus one needs to demonstrate that the information is required in order to protect or exercise a right or fundamental freedom.
- This right is limited to citizens. In 2012, the High Court of Kenya held (see elsewhere in this chapter for a full discussion of the case) that the effect of the use of the word ‘citizen’ in article 35 of the Constitution is that all juristic persons (such as companies, which would include media houses or NGOs, which would include media freedom organisations), whether foreign registered or controlled, or registered and controlled in Kenya itself, are denied this right of access to information. This was a devastating blow to the usefulness of the right of access to information as it severely constrained who may access information, limiting the right of access only to Kenyan natural persons. However, the recently passed Access to Information Act, 2016 (also discussed elsewhere in this chapter) has defined ‘citizen’ as including ‘any private entity that is controlled by one or more Kenyan citizens’. This is welcome as it restores the right of access to information to juristic persons controlled by Kenyan citizens.
- The right of access to information is vital in the information age in which we live. When states wield enormous power, particularly with regard to the distribution of resources, the right of access to information is one of the most important rights in ensuring transparency and holding government accountable. If one considers that the media plays an enormous role in ensuring transparency and government accountability through providing the public with information, having this right of *access* to information is critical to enable the media to perform its functions properly.

## RIGHT TO FAIR ADMINISTRATIVE ACTION

Another important provision that protects the media is article 47, ‘Fair administrative

action'. Article 47(1) provides that every person 'has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair', and article 47(2) provides that '[i]f a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action'.

This right requires explanation.

- The reason why this provision is important for journalists and the media is that it protects them (as it does all people) from administrative officials who act unfairly and unreasonably and who do not comply with legal requirements.
- It also entitles journalists and the media to written reasons when administrative action results in their rights being adversely affected.
- An administrative body is not necessarily a state body; indeed, these bodies are often private or quasi-private institutions. These constitutional requirements would therefore apply to non-state bodies too, such as an independent broadcasting regulator.
- 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 written reasons is a powerful tool in ensuring rational and reasonable behaviour on the part of administrative bodies, and aids in ensuring transparency and, ultimately, accountability.

Importantly, article 47(3) provides that legislation must be enacted to give effect to the right to just administrative action and that the legislation shall provide for the review of administrative action by a court or independent and impartial tribunal. This legislation has been passed and is dealt with below in this chapter.

## RIGHT TO PRIVACY

Article 31 enshrines the right to privacy in the Constitution of Kenya. It gives every person the right not to have:

- Their person, home or property searched
- Their possessions seized
- Information relating to their family or private affairs unnecessarily required or revealed

- The privacy of their communications infringed.

This last provision, article 31(d), protects communications (including letters, emails, telefaxes and telephone conversations) and is an important right for working journalists.

## RIGHT TO FREEDOM OF THOUGHT AND OPINION

Article 32(1) gives every person the right to freedom of thought and opinion. Freedom of thought and opinion are especially important for the media as they protect commentary on public issues of importance.

## RIGHT TO FREEDOM OF ASSOCIATION

Article 36(1) of the Constitution of Kenya gives every person the right to freedom of association, which includes the right to ‘form, join or participate in the activities of an association of any kind’.

Article 36(3)(a) specifies that registration of an association may not be withheld or withdrawn unreasonably where such a requirement is legislated, and 36(3)(b) entitles an association to a fair hearing before a registration is cancelled.

Similarly, article 41 of the Constitution of Kenya deals with the rights to form and join trade unions and employers’ organisations, with article 41(5) enshrining the right to collective bargaining.

Article 41(2)(c) entitles every worker ‘to form, join or participate in the activities and programmes of a trade union’.

Article 41(3) entitles every employer:

- To form and join an employers’ organisation
- To participate in the activities and programmes of an employers’ organisation.

Article 41(4) protects the right of every trade union and employers’ organisation to organise and to form and join a federation.

Article 36(2) states that ‘[a] person shall not be compelled to join an association of any kind’, which implies that non-membership of an association should not prohibit a content creator from having his or her content published in the media.

These rights not only guarantee 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.

### RIGHT TO FREEDOM OF MOVEMENT

The right in article 39(1) of the Constitution of Kenya applies to ‘all persons’, and entitles them to freedom of movement. This right is important because it permits journalists to travel throughout the country in the course of their duties.

### RIGHT TO OPEN JUSTICE

Article 50(1) gives every person the right to have any dispute that can be resolved by the application of law decided in a public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

This right to ‘open justice’ in the Constitution of Kenya is important because it is not just important for the protection of litigants; it is also important to secure public faith in the judiciary. In other words, the public (and, as part of that, the media) generally have the right to attend judicial proceedings.

As discussed previously, constitutional rights are never absolute. As specified in article 50(8), ‘this article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security’.

#### 2.4.2 Other constitutional provisions that assist the media

It is important to note that there are provisions in the Kenyan Constitution, apart from the Bill of Rights provisions, that are important and that 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 117(1) specifically states that there shall be freedom of speech and debate in Parliament.

- Article 118 specifies that Parliament shall conduct its business in an open manner, and its sittings and those of its committees are required to be open to the public. Further, Parliament must facilitate public participation and involvement in the legislative and other business of Parliament and its committees. Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances which the speaker determines justify the exclusion.
- Article 124(4)(c) specifies that when a house of Parliament considers any appointment for which approval is required under the Constitution or an act of Parliament, the proceedings of the committee and the house have to be open to the public.

These provisions assist the media in two key ways. First, they ensure that the media has a great deal of access to the workings of Parliament – that is, the media is physically able to be in Parliament. Second, they protect parliamentarians. The provisions allow members of Parliament (MPs) and other people participating in parliamentary proceedings to speak freely during parliamentary proceedings, in front of the media, without facing arrest or civil proceedings for what they say.

## PROVISIONS REGARDING THE FUNCTIONING OF COUNTY ASSEMBLIES

A number of provisions in the Constitution regarding the functioning of county assemblies are important for the media, including the following:

- Article 196(1) specifies that a county assembly has to conduct its business in an open manner, and hold its sittings and those of its committees, in public.
- Article 196(2) specifies that neither the public, nor any media, may be excluded from any sitting unless in exceptional circumstances which the speaker determines justify the exclusion.
- Article 196(3) requires Parliament to enact legislation providing the powers, privileges and immunities of county assemblies, their committees and members.

These provisions assist the media in two key ways. First, they ensure that the media has a great deal of access to the workings of the county government – that is, the media is physically able to be in the assemblies. Second, they protect members of the assemblies. The provisions allow assembly members and other people participating in county assembly proceedings to speak freely during assembly proceedings, in front of the media, without facing arrest or civil proceedings for what they say.

## PROVISIONS REGARDING ‘CULTURE’

The Constitution of Kenya recognises culture ‘as the foundation of the nation’ in article 11(1), and specifies that ‘[t]he state shall promote all forms of national and cultural expression through literature, the arts, ... communication, information, mass media, publications ...’ in article 11(2). The recognition of the role of the media in promoting Kenyan culture is important.

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

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

#### **2.5.1 The right to human dignity**

Constitutional article 10(2)(b) in Chapter Two, which relates to the republic, specifies human dignity as one of the national values and principles of governance. 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 the press, requiring a balancing of constitutional rights.

The right to human dignity is provided for in several sections in Chapter Four, ‘The Bill of Rights’, in the Kenyan Constitution:

- ‘The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities ...’ – article 19(2).
- ‘In interpreting the Bill of Rights, a court, tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity ...’ – article 20(4)(a).
- ‘Every person has inherent dignity and the right to have that dignity respected and protected’ – article 28.

The right to freedom of expression is specifically limited by the provisions of article 33(3), which states that in exercising the right to freedom of expression, ‘every

person shall respect the rights and reputation of others'. This limitation could be used to justify defamation claims, including the 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 Privacy**

A second right that requires caution from the media is contained in article 31 of the Constitution of Kenya, which guarantees the right to privacy. It reads:

Every person has the right to privacy, which includes the right not to have –

- (a) their person, home or property searched;
- (b) their possessions seized;
- (c) information relating to their family or private affairs unnecessarily required or revealed; or
- (d) the privacy of their communications infringed.

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 Internal limitations to the right to freedom of expression and the right to freedom of the media**

It is important to note that the rights to freedom of expression and to the media contain internal limitations. Articles 33(1) and 34(1) set out the contents of the right to freedom of expression and of the media respectively, and both are subject to article 33(2), which reads:

33(2) The right to freedom of expression does not extend to –

- (a) propaganda for war;
- (b) incitement to violence;
- (c) hate speech; or
- (d) advocacy of hatred that –

- (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or

(ii) is based on any ground of discrimination specified or contemplated in Article 27(4).

The provisions of article 33(2) of the Constitution, the internal limitation to the rights to freedom of expression and the media, require some explanation.

- While the provisions of article 33(2) are not in themselves controversial, it is noteworthy that the internal limitation provides that the right to freedom of the media does not extend to both hate speech – article 33(2)(c) and to the advocacy of hatred – article 33(2)(d). However, no indication is given as to what the difference is between hate speech and the advocacy of hatred as provided for in article 33(2)(c) and (d).
- The effect of the internal limitation is that hate speech and the advocacy of hatred are not protected expression and any legislation designed to regulate hate speech or the advocacy of hatred in terms of article 33(2)(c) and (d) would not have to meet the requirements of the general limitations clause provided for in section 24 of the Constitution.

The provisions regarding advocacy of hatred in article 33(2)(d) are extremely broadly framed. In this regard:

- They include wording such as ‘vilification of others’, the effect of which is that ‘vilification’ accordingly constitutes advocacy of hatred, irrespective of the basis for such vilification or level of vilification, which term is undefined
- They include incitement to cause ‘harm’ on whatever basis without giving an indication as to what is meant by ‘harm’. One can assume that ‘harm’ is less than ‘violence’, as incitement to violence is already provided for in article 33(2)(b)
- They include advocacy of hatred based on any ground of discrimination specified or contemplated in article 27(4), namely, race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth
- The provisions of article 33(2)(d)(i) and (ii) are not cumulative. They are framed in the alternative. This is unusual as hate speech provisions usually require that advocacy of hatred be based on certain specified grounds AND constitute incitement to cause harm.

The effect of this is that a wide range of expression could conceivably fall within the

definition of ‘advocacy of hatred’ and/or ‘hate speech’ therefore be unprotected in terms of the constitutional rights to freedom of expression and the media.

#### **2.5.4 Limitations on the right to open justice**

Article 50(8) permits the exclusion of the press or other members of the public from any court proceedings if the exclusion is deemed necessary to protect witnesses or vulnerable persons, morality, public order or national security.

#### **2.5.5 Exclusion from parliamentary and county assembly sittings**

Article 118(2) permits the exclusion of the press or other members of the public from any parliamentary sitting if the relevant speaker has determined that the circumstances are exceptional and that there are justifiable reasons for the exclusion.

Article 196(2) makes the same provision for county proceedings.

#### **2.5.6 State of emergency provisions**

The constitutional provisions dealing with a state of emergency have already been dealt with in this chapter under the discussion on constitutional limitations. Suffice it to note here that many rights critical to protecting a free press can be derogated from during a state of emergency.

### **2.6 Key institutions relevant to the media established under the Constitution of Kenya**

A number of institutions that are relevant to the media have been established under the Kenyan Constitution. These include:

- A body to set media standards which is, in practice, the Media Council of Kenya
- The Kenya National Human Rights and Equality Commission – which has been restructured to establish additional commissions, namely:
  - The Commission on Administrative Justice; and
  - The National Gender and Equality Commission,both of which are also dealt with below
- The Ethics and Anti-Corruption Commission,
- The judiciary.

### **2.6.1 The media standards body: The Media Council of Kenya**

Article 34(5) of the Constitution of Kenya specifically instructs Parliament to make provision for the establishment of a body to set media standards and to regulate and monitor compliance with those standards. It specifies that the body should be independent of control by government, political or commercial interests, and that it should reflect the interests of all sections of society. The Media Council Act, Act 46 of 2013, establishes the Media Council of Kenya as this constitutional body, and we deal with this in detail below in this chapter.

### **2.6.2 The Kenya National Human Rights and Equality Commission**

Bodies such as a human rights commission are important for the media because if they are truly independent of government, ordinary people as well as institutions like the media can turn to them for protection of their human rights, such as the right to freedom of expression. Such bodies are important in preserving human rights and can act as a bulwark against heavy handed or illegal government restrictions on fundamental rights. It goes without saying that the effectiveness of such institutions is usually linked to the level of genuine independence they enjoy.

The Kenya National Human Rights and Equality Commission (KNHREC) is established in article 59(1) of the Constitution. According to article 59(2), among the functions of the Commission are that it performs a watchdog role over state affairs, public administration and government, as well as investigating complaints. Every person has the right to complain to the KNHREC.

Further, article 59(2)(g) states that a function of the KNHREC is to act as the principal organ of the state in ensuring compliance with obligations under treaties and conventions relating to human rights.

In articles 59(4) and 59(5), Parliament is given authority to enact legislation that may restructure the KNHREC into two or more separate commissions with equivalent powers. Each successor commission has to be a commission within the meaning of Chapter 15 of the Constitution, and have the status and powers of a commission under that chapter. Two bodies have been created and are dealt with below.

A member of a commission (other than an *ex officio* member) or the holder of an independent office may be removed from office only for: serious violation of the Constitution or any other law; gross misconduct, whether in the performance of his or her functions or otherwise; physical or mental incapacity to perform the functions of office; incompetence; or bankruptcy. A person wishing to remove a member of a

commission must present a petition to the National Assembly setting out the alleged facts constituting that ground, according to article 251.

Article 254(3) specifies that every report required from a commission under this article must be published and publicised.

### **2.6.3 The Commission on Administrative Justice**

The Commission on Administrative Justice (CAJ) is established in terms of the Commission on Administrative Justice Act, Act No. 23 of 2011. It came out of the constitutionally permissible restructuring of the KNHREC – article 59(4).

Under section 3(2) of the CAJ Act, the CAJ is the successor to the Public Complaints Standing Committee of the KNHREC and has taken over the ombudsman function of the KNHREC. The CAJ's functions under section 8 include:

- Investigating any conduct in state affairs, an act or omission, that is alleged or suspected to be prejudicial or improper, or that might lead to such
- Investigating complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector
- Reporting to the National Assembly bi-annually on the complaints investigated and remedial action taken
- Recommending compensation or other appropriate remedies against persons or bodies to which this act applies
- Providing advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures
- Publishing periodic reports on the status of administrative justice in Kenya
- Promoting public awareness of policies and administrative procedures on matters relating to administrative justice
- Taking appropriate steps in conjunction with other state organs and commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration

- Working with the Kenya National Commission on Human Rights to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration.

The chairperson and members of the CAJ are appointed for a single term of six years – section 14(1), and its secretary, who is the chief executive officer and appointed through a competitive process, is appointed for a five-year term, renewable once – section 21.

In the performance of its functions, the CAJ has the powers of the court to issue summonses, question any person with respect to the matter under investigation, and require any person to disclose any information within the person's knowledge relevant to the investigation – section 27.

The CAJ is required to investigate any complaint but may, on its own initiative, investigate any other matter arising from the carrying out of an administrative action of a public office, a state corporation or any other body or agency of the state – section 29. However, among the things it may not investigate are:

- Proceedings or a decision of the Cabinet or a committee of the Cabinet
- A criminal offence
- A matter pending before a court or judicial tribunal
- The grant of honours or awards by the president – section 30.

Complaints to the CAJ may be made by the person aggrieved by the matter, or on that person's behalf by a family member or other suitable representative if the aggrieved person is dead or not able to act for themselves, or by a member of the National Assembly with the consent of the aggrieved person or their suitable representative – section 32.

The CAJ is funded by Parliament, monies or assets that accrue to it in the course of the performance of its functions and all monies from any other source provided, donated or lent to it – section 45.

A person who obstructs the CAJ or its staff, submits false or misleading information, fails to honour a summons, or misrepresents or knowingly misleads the CAJ commits an offence punishable by a fine, imprisonment or both – section 52.

The annual report of the CAJ under article 254 of the Constitution has to be published in the Gazette and at least one national newspaper – section 53.

The CAJ is empowered by section 56 to make regulations for the better carrying into effect of the provisions of the CAJ Act.

The CAJ is important for the media because it is a body with a particular focus on the operations of the public sector. Operating effectively, it could only have a beneficial impact, improving transparency, accountability and responsiveness of the public sector – issues that are important when reporting on the activities of the public sector.

#### **2.6.4 The National Gender and Equality Commission**

The National Gender and Equality Commission (NGEC) is also a successor commission of the KNHREC, in accordance with article 59 of the Constitution, and has the status and powers of a commission under Chapter Fifteen of the Constitution. It was established in terms of the National Gender and Equality Commission Act of 2011.

The NGEC's role is, essentially, to promote equality and freedom from discrimination. While the NGEC's objectives appear far removed from the work of the media, it is important for the media to be aware that such a body exists and that discriminatory publications are likely to be acted upon by this body.

#### **2.6.5 The Ethics and Anti-Corruption Commission**

The Ethics and Anti-Corruption Commission (EAC) is provided for in section 79 of the Constitution and it has the status and powers of other commissions established under Chapter Fifteen of the Constitution.

The EAC's role is to ensure compliance with, and enforcement of, the provisions of Chapter 6 of the Constitution, which is headed 'Leadership and Integrity' and which contains standards for the conduct of public officials, including in respect of ethical standards, financial probity and other employment.

This body is important for the media because it enforces compliance by public officials with constitutional standards of ethics and tries to root out corruption. These kinds of activities lead to more transparent and accountable government, which ultimately assists the media in its work.

Parliament has passed the Ethics and Anti-Corruption Commission Act, No. 22 of 2011 to regulate the establishment and functioning of the EAC. We do not set out its provisions in detail here.

## 2.6.6 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 1 of Chapter Ten of the Constitution of Kenya is headed 'Judicial Authority and Legal System'. In terms of article 159 of the Constitution of Kenya, judicial authority vests in and is exercised by the courts and tribunals established under the Constitution.

Article 160(1) states: 'In the exercise of judicial authority, the Judiciary ... shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority'. Article 159 requires that justice shall be done to all irrespective of status, and shall not be delayed.

A guiding principle for courts and tribunals in article 159(2)(d) states that 'justice shall be administered without undue regard to procedural technicalities'.

In terms of article 162, the system of courts in Kenya consists of three superior courts, namely:

### ■ *The Supreme Court*

- The Supreme Court is the apex court in Kenya. In terms of article 163(7) of the Constitution of Kenya, all courts other than the Supreme Court, are bound by the decisions of the Supreme Court. Article 163(8) gives it the power to make rules for the exercise of its jurisdiction, and article 163(9) specifies that an act of Parliament may make further provision for its operation.
- The Supreme Court has exclusive original jurisdiction to hear and determine disputes relating to the elections to Office of the President – article 163(3)(a).
- In terms of article 163(1) of the Kenyan Constitution, the Supreme Court consists of: the chief justice, who shall be the president of the court; the deputy chief justice, who shall deputise for the chief justice and be the vice president of the court; and five other judges. However, article 163(2) states that it 'shall be properly constituted

for the purposes of its proceedings if it is composed of five judges'. All of the above are appointed by the president, upon the recommendation of the Judicial Service Commission (JSC), and subject to the approval of the National Assembly, in terms of article 166(1).

■ *The Court of Appeal*

- In terms of article 164(3) of the Constitution of Kenya, the Court of Appeal has jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by an act of Parliament.
- It consists of no fewer than 12 judges and is organised and administered as prescribed by an act of Parliament (article 164(1)(a)). The president of the Court of Appeal is elected by the judges of the court from among themselves (article 164(2)).

■ *The High Court*

- The High Court, and courts with the status of High Court established by Parliament, are the third kind of superior court in Kenya. The courts established by Parliament deal with employment and labour relations, the environment and the use and occupation of land and title thereto.
- In terms of article 165 of the Kenyan Constitution, the High Court has unlimited original jurisdiction to determine any civil or criminal proceedings under law, except issues reserved for the courts established by Parliament with the status of the High Court. It also has jurisdiction under article 165(3)(d) to hear any question respecting the interpretation of the Constitution. Effectively, this ambit allows the High Court to enquire into any matter of law in Kenya.
- In terms of article 165(1) of the Kenyan Constitution, the High Court is made up of the principal judge (who is elected by the judges of the High Court from among themselves) and such number of *puisne* judges (judges other than the chief justice) as may be prescribed by Parliament. In terms of article 166(1) of the Kenyan Constitution, the *puisne* judges shall be appointed by the president in accordance with the recommendation of the JSC.

A superior court judge may be removed from office only for inability to perform the functions of his or her office arising from mental or physical incapacity, a breach of a code of conduct prescribed for judges of the superior courts by an act of Parliament, bankruptcy, incompetence, or gross misconduct or misbehaviour. The process for

removal is set out in article 168(2)–(7). Essentially, the removal of a judge may be initiated only by the JSC. It sends a petition to the president and he is required to suspend the judge from office within 14 days of receipt thereof.

Appeals lie from the Court of Appeals to the Supreme Court as of right in any case involving the interpretation and application of the Constitution, and in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved – article 163(4)(a). However, the High Court has jurisdiction to hear any question in respect of the interpretation of the Constitution including the determination of:

- Whether any law is in contravention of the Constitution – article 165(3)(d)(i)
- Matters relating to Constitutional powers of state organs in respect of county governments and the constitutional relationship between levels of government –article 165(3)(d)(iii).

It should be noted that this authority is subject to article 165(5), which specifies that the High Court does not have jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court, or matters falling within the jurisdiction of the Parliament-established courts, which determine employment and labour relations issues, and environment and land issues.

In terms of article 169, the system of courts in Kenya also comprises subordinate courts, namely:

- *The magistrates' courts*
  - The Constitution does not provide information regarding the jurisdiction of the magistrates' courts, but does state in article 169(2) that Parliament shall enact legislation conferring jurisdiction, functions and powers on the subordinate courts established under article 169(1). The Magistrates' Courts Act, No. 26 of 2015, gives effect to articles 23(2) and 169(1)(a) and (2) of the Constitution by conferring jurisdiction, functions and powers on the magistrates' courts, and providing the procedure of the magistrates' courts.
- *The kadhis' courts*
  - These courts have jurisdiction only over questions of Muslim law relating to personal status, marriage, divorce or inheritance, according to article 170(5). They are established under the Kadhis' Courts Act, Chapter 11 R(2012).

**■ *Courts martial***

- The Constitution does not provide information regarding the jurisdiction of the courts martial, but does state in article 169(2) that Parliament shall enact legislation conferring jurisdiction, functions and powers on the subordinate courts established under article 169(1). Section 160 of the Kenya Defence Force Act, No. 25 of 2012, provides for the constitution of the courts martial. Guiding principles of these courts are set out in section 161 of that act. Acts of Parliament confer jurisdiction, functions and powers on these subordinate courts, and may establish any other court or local tribunal – section 169(2).

### **2.6.7 The Judicial Service Commission**

The JSC is a constitutional body that is established in terms of article 171(1) of the Kenyan Constitution to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice.

Its functions are to:

- Recommend persons for appointment as judges to the president
- Review and make recommendations on conditions of service of judges and judicial officers (excluding remuneration), and the staff of the judiciary
- Appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the judiciary, in the manner prescribed by an act of Parliament
- Prepare and implement programmes for the continuing education and training of judges and judicial officers
- Advise the national government on improving the efficiency of the administration of justice.

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 whom are essential for democracy.

Article 171(2) of the Kenyan Constitution specifies that the JSC is made up of 11 members, namely:

- The chief justice (the chairperson)
- A Supreme Court judge elected by his fellows
- One Court of Appeal judge elected by his fellows
- One High Court judge and one magistrate (one of whom must be a woman and the other a man, elected by the members of the association of judges and magistrates)
- The attorney general
- Two advocates (one of whom must be a woman and the other a man, each of whom has at least 15 years' experience, elected by the members of the statutory body responsible for the professional regulation of advocates)
- One person nominated by the Public Service Commission
- One woman and one man to represent the public, not being lawyers, appointed by the president with the approval of the National Assembly.

The chief registrar of the judiciary is the secretary to the JSC, and members of the JCS, apart from the chief justice and the attorney general, hold office, provided that they remain qualified, for a term of five years and shall be eligible to be nominated for one further term of five years.

## **2.7 Enforcing rights under the Constitution**

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

Section 20(1) of the Constitution specifies that the Bill of Rights applies to all law and binds all state organs and all persons, though it does not clarify whether this includes juristic persons (such as a company). It is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights – section 21(1).

While rights are generally enforceable through the courts, the Constitution itself also envisages the right of people, including the media, to approach a constitutional body such as the EAC, NGEC and the KNHREC, to assist in the enforcement of rights.

Article 23, ‘Authority of the courts to uphold and enforce the Bill of Rights’, gives the High Court jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

According to article 23(2), Parliament must enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Article 23(3) lists the reliefs available, including:

- Declaration of rights
- An injunction
- A conservatory order
- A declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24, the general limitations clause
- An order for compensation
- An order of judicial review.

Perhaps one of the most effective ways in which rights are protected under the Constitution is through the provisions of the Constitution – that is, articles 255–257 – that require a constitutional amendment of the Bill of Rights to be put to a referendum, as well as requiring the support of at least two-thirds of the National Assembly and the Senate, respectively, at its second and third readings.

## **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 129(1) of the Constitution of Kenya states that executive authority derives from the people of Kenya, and article 130 of the Constitution of Kenya provides for a national executive consisting of:

- The president
- The deputy president
- The rest of the Cabinet, which must reflect the regional and ethnic diversity of the people of Kenya.

Additional authority of the president is covered in the remaining parts of article 131(1) of the Constitution of Kenya, and provide that the president of the Republic of Kenya shall be the head of state and government as well as the commander-in-chief of the defence force and chairperson of the National Security Council.

The president is elected in a national election conducted on the same day as a general election – article 136(2)(a), or assumes office whenever the Office of the President becomes vacant, in terms of article 139 read with articles 144, 145 and 146 of the Constitution. The presidential election procedure is set out in article 136, and the election is by registered voters (who must be citizens over the age of 18) and by secret ballot.

Article 152 of the Constitution of Kenya provides for a cabinet consisting of the president, the deputy president, the attorney general and not fewer than 14 and not more than 22 Cabinet secretaries. The main role of Cabinet is to advise the president with respect to the policy of the government. In terms of article 153(2), Cabinet secretaries are accountable individually and collectively to the president for the exercise of their powers and the performance of their functions. They are required, under article 153(4)(b), to provide Parliament with full and regular reports concerning matters under their control.

Each candidate in a presidential election nominates another person, who is qualified for nomination for election as president – article 137, as a candidate for deputy president – article 148. There is no separate nomination process for deputy president. The Independent Electoral and Boundaries Commission (IEBC) declares the candidate nominated by the person elected as president to be elected as deputy president. The general role of the deputy president is to be the principal assistant to the president and to deputise for the president in the execution of the president's

functions – article 147. The deputy president is to perform functions specified in the Constitution, and any other functions as assigned to him by the president. Subject to article 134, when the president is absent or is temporarily incapacitated, and during any other period that the president decides, the deputy president shall act as the president. The deputy president shall not hold any other state or public office – article 147(4).

In terms of article 152 of the Constitution of Kenya, the president nominates and, with the approval of the National Assembly, appoints cabinet secretaries. A Cabinet secretary may not be an MP. The president may reassign or dismiss a Cabinet secretary, but *has* to dismiss a Cabinet secretary if required to do so by a resolution adopted by a majority of the members of the National Assembly after conducting the processes provided for in article 152(6)–(10).

## THE LEGISLATURE

Legislative or law-making power in Kenya vests in Parliament, which, in terms of article 93 of the Kenyan Constitution, consists of the National Assembly and the Senate. Article 109(1) provides that the legislative power of Parliament is exercised through bills passed by Parliament and assented to by the president.

In terms of article 97(1), the National Assembly consists of:

- 290 elected members, each elected by the registered voters of single member constituencies, as specified in article 89(1)
- 47 women, each elected by the registered voters of the counties, each county constituting a single member constituency
- 12 members nominated by parliamentary political parties according to their proportion of members of the National Assembly, in accordance with article 90, to represent special interests, including the youth, persons with disabilities and workers
- The speaker, who is an *ex officio* member. Article 106(1)(a) provides for a speaker for each house of Parliament who is elected in accordance with the Standing Orders, from among persons who are qualified to be elected as MPs but are not such members. Article 106(1)(b) provides for a deputy speaker for each house of Parliament, but election is from among the members of the relevant house.

In terms of article 98(1), the Senate consists of:

- 47 elected members, each elected by the registered voters of the counties, each county constituting a single member constituency, as per article 98(1)(a)
- 16 women who are nominated by political parties according to their proportion of members of the Senate elected under article 98(1)(a) in accordance with article 90, which details the allocation of party list seats
- Two members – one man and one woman – representing the youth
- Two members – one man and one woman – representing persons with disabilities
- The speaker, who is an *ex officio* member. Article 106(1)(a) provides for a speaker for each house of Parliament who is elected in accordance with the Standing Orders, from among persons who are qualified to be elected as MPs but are not such members. Article 106(1)(b) provides for a deputy speaker for each house of Parliament, but election is from among the members of the relevant house.

The quorum of Parliament is 50 members in the case of the National Assembly and 15 members in the case of the Senate – article 121.

Election is by universal adult suffrage (citizens over the age of 18, as defined in article 260) and by secret ballot – article 38. The elections for the seats in Parliament and for the members of county assemblies is on the basis of proportional representation by use of party lists – article 90(1). The IEBC is responsible for the conduct and supervision of the elections, as well as ensuring that the party lists are correctly formulated – lists must alternate between male and female candidates in the priority in which they are listed, and except in the case of county assembly seats, each party list must reflect the regional and ethnic diversity of the people of Kenya – article 90(2)–(3).

## 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.

## 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 Kenya 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 others. 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**

The Constitution of Kenya contains many protections and freedoms for the media, however, there are weaknesses that ought to be strengthened to better protect the media.

### **2.9.1 Remove internal constitutional qualifiers to certain rights**

The Constitution of Kenya, 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 Kenya. 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 expression and of the media 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 would be strengthened if the rights were subject only 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 24 of the Kenyan Constitution and so it is not clear why the internal limitations clauses are even necessary.

### **2.9.2 Independent public broadcaster and broadcasting regulator**

There is no doubt that the broadcasting sector would be greatly strengthened if the Kenyan Constitution gave constitutional protection for a truly independent public broadcaster and broadcasting regulator. Given the importance of the public broadcaster and broadcasting regulator 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 Kenya.

### 3 THE MEDIA AND LEGISLATION

In this section you will learn:

- What legislation is and how it comes into being
- Legislation governing journalists
- Legislation governing the print media
- Legislation governing the making, exhibition and broadcasting of films
- Legislation governing the internet
- Legislation governing the broadcast media generally
- Legislation that regulates the state broadcaster
- Legislation governing broadcasting signal distribution
- Legislation that threatens a journalist's duty to protect sources
- Legislation that prohibits the publication of certain kinds of information
- Legislation relating to the interception of communication
- Legislation that specifically assists the media in performing its functions

#### 3.1 Legislation: An introduction

Note: The practice in Kenya is to refer to legislation by chapter (e.g. CAP 63 of the Laws of Kenya), as opposed to year of enactment, and in citing the chapter, all amendments thereto should be considered to have been taken into consideration. However, this reference work is intended for a wider audience than just Kenyans, and so the year of commencement has been included in the CAP references.

Note that a reference to the Cabinet secretary in any law is a reference to the Cabinet secretary responsible for the administration of that law.

##### 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 Kenya vests in Parliament, which is made up of the National Assembly and the Senate. The president is involved in enacting legislation.

There are detailed rules in the Constitution of Kenya 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 Kenya requires different types of legislation to be passed in accordance with particular

procedures, as contained in Part 4, ‘Procedures for Enacting Legislation’. The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the Constitution of Kenya, there are four kinds of legislation, each of which has particular procedures and/or rules applicable to it. These are:

- Legislation that amends the Constitution – articles 255–257 of the Constitution
- Legislation not concerning county government – articles 109 and 122 of the Constitution
- Legislation concerning county government – articles 109–113 and 122–123 of the Constitution
- Legislation that deals with financial measures – articles 109 and 114 of the Constitution

### **3.1.2 The difference between a bill and an act**

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

In Kenya, 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 articles 115(1)(a), 115(5)(b) or 115(6) of the Constitution of Kenya. Article 115 contains mechanisms for the president to refer a bill back to Parliament should he or she have any reservations, and for a deadlock between Parliament and the president to be broken by a two-thirds vote in both the National Assembly and the Senate (if Senate’s approval is required).

An act must be published in the Gazette and becomes law only when it has been so published – article 116(1)–(2). Note, however, that it is possible for Parliament to make retrospective laws, in terms of article 116(2).

It is also important to be aware that some laws governing certain media-related aspects came into force prior to the coming into effect of the 2010 Constitution of Kenya. As they were passed by the governing authority of the time and have yet to be repealed, they are still good law.

## **3.2 Legislation governing journalists**

Section 5(1) of the Media Council Act, Act 46 of 2013 establishes the Media Council of Kenya, a body which is independent of control by government, political and commercial interests – section 11. The appointments process for members of the

Media Council is dealt with elsewhere in this chapter. Section 6 describes its functions, and the ones that are of particular importance to journalists include:

- Promoting and protecting the freedom and independence of the media
- Prescribing standards for journalists, media practitioners and media enterprises, and promoting ethical and professional standards, as well as regulating and monitoring compliance therewith
- Ensuring the protection of the rights and privileges of journalists in the performance of their duties
- Advising the government and setting standards for the training of journalists
- Accrediting Kenyan and foreign journalists by certifying their competence, authority or credibility against official standards based on the quality and training of Kenyan journalists. Accreditation is valid for a renewable period of 12 months, according to section 46(2)
- Compiling and maintaining a register of accredited journalists, media enterprises and such other related registers as it may deem fit, and issuing accreditation documents
- Facilitating resolutions of disputes between the media and government, the media and the public, and intra-media disputes.

Section 27 of the Media Council Act establishes the Complaints Commission, a separate body whose members are appointed in the same manner as applies to the members of the Media Council. It is independent in its operations, functions and powers, according to section 30, and must be guided by article 159 of the Constitution. Section 30 states that its functions are to:

- Mediate or adjudicate in disputes between the government and the media, between the public and the media, and in intra-media ethical issues
- Ensure adherence to the Code of Conduct for the Practice of Journalism (Journalism Code) in the Second Schedule of the Media Council Act
- Achieve impartial, speedy and cost-effective settlement of complaints against journalists and media enterprises.

Any person aggrieved by a publication or the conduct of a journalist may complain

to the Complaints Commission, according to section 34(1)(a), as may any person aggrieved by anything done against a journalist that limits or interferes with the constitutional freedom of expression of the journalist – section 34(1)(b). Part of its mandate is almost identical to that of the Communications and Multimedia Appeals Tribunal under section 102A of the Kenya Information and Communications (KIC) Act, and these two bodies cross-refer complaints. The factors that would determine which body hears which complaint are unclear from the legislation. However, the Communications and Multimedia Appeals Tribunal hears appeals from decisions of the Media Council and the Communications Authority of Kenya (CA), while the Complaints Commission does not.

According to section 45(1), journalists shall at all times comply with the code of conduct set out in the Second Schedule of the Media Council Act (Journalism Code). Clause 1 of the Journalism Code clarifies that it applies to journalists, media practitioners and foreign journalists.

The Journalism Code contains 26 clauses detailing the required conduct of the media. In brief, these are the following:

■ *Undue pressure or influence*

- News must be gathered and reported without fear or favour.
- A journalist may not solicit or accept gifts, favours or payment from those who may seek to influence coverage, nor engage in activities that may compromise their integrity and independence.
- A journalist is to resist undue influence – financial or intimidatory – from any outside forces, including advertisers, sources, story subjects, powerful individuals and special interest groups, and news content is to be determined solely through editorial judgment.
- Self-interest or peer pressure that might undermine journalistic duty and service to the public is to be resisted.
- Journalists may not use financial information they receive in advance for their own benefit or pass the information to others, nor may they write or broadcast about any market instruments in which they or their close family have a significant financial interest in without disclosing the interest to the editor. Also, journalists may not buy or sell, directly or through an agent, market instruments about which they intend to write in the near future.

■ *Public interest*

- Stories of public interest are to be fair, accurate and unbiased, with all sides of the story reported wherever possible.

**■ *Payment for information***

- Story sources who have a vested interest in the story may not be paid.
- Sponsorship of the news may not determine, restrict or manipulate content.

**■ *Reporting of investigations***

- Surreptitious news gathering techniques, including hidden cameras or microphones, may be used only if there is no other way of obtaining stories of significant public importance, and the technique must be explained to the audience.

**■ *Privacy***

- The public's right to know must be weighed against the privacy rights of people in the news.

**■ *Intrusions into grief or shock***

- Pictures of grief and disaster are discouraged.
- Coverage must show respect, dignity and compassion to victims of tragedy.

**■ *Interviewing or photographing children***

- Except in matters of public interest, such as child abuse or abandonment, a journalist may not interview or photograph a child in the absence of and without the consent of the adult responsible for the child's welfare.
- Children may not be approached or photographed while at school.

**■ *Children in criminal cases***

- Children may not be identified in cases concerning sexual offences.

**■ *Victims of crime***

- Coverage must show respect, dignity and compassion to victims of crime.
- Victims of sexual assault are not to be identified, nor is material to be published that will facilitate their identification.

**■ *Innocent relatives or friends***

- Relatives or friends of persons convicted or accused of crimes are not to be identified unless it is necessary for full, fair and accurate reporting.

**■ *Gathering of information***

- Comment is to be sought from anyone mentioned in an unfavourable context and records of attempts to seek the comment are to be kept.
- Journalists must generally identify themselves, and not obtain information or photographs through misrepresentation or subterfuge. The latter is justifiable only when the information is in the public interest and cannot be obtained by any other means.

**■ *Presenting information***

- News is to be presented fairly and impartially, with primary value being placed on significance and relevance. Professional, analytical reporting is required, not personal bias.
- Corrections are to be done promptly without restating the error, except when clarity demands it. A correction must be given the same prominence as the information being corrected.

**■ *Discrimination and hate speech***

- The public is to be informed without bias or stereotype, and a diversity of expressions, opinions and ideas must be presented in context.
- Information on ethnic, religious or sectarian disputes may be published only after proper verification of the facts, and in a manner which will not inflame relations between groups.
- Pictures that embarrass and promote sexism are discouraged.
- Newspapers may not permit the columns to be used for writings which encourage or glorify social evils, warlike activities, or ethnic, racial or religious hostilities.
- Quoting persons making derogatory remarks based on ethnicity, race, creed, colour or sex is not allowed.

**■ *Comment***

- There must be clear differentiation between fact and comment or conjecture.

**■ *Headlines, posters, pictures and captions***

- Headings must reflect and justify the matter printed under them.
- Headings containing allegations made in statements must identify the source, or at least be in quotation marks.
- Techniques, including photo manipulations, that skew facts, distort reality or sensationalise events are to be avoided.

**■ *Confidential sources***

- All persons subject to the Media Council Act and the Journalism Code have a professional obligation to protect confidential sources.
- The identity of a confidential informant must be known to the editor and reporter.
- Sources are to be identified whenever possible. Confidential sources shall be used only when it is clearly in the public interest to gather or convey important information, or when the person providing the information may be harmed.

**■ *Violence and obscenity***

- Obscene material is not to be published, unless such material contains news.
- Publication of violent, bloody or abhorrent scenes must be avoided, unless the publication or broadcast will serve the public interest. Where possible, a warning must be issued to viewers or readers in advance.

**■ *General conduct***

- All subjects of news coverage are to be treated with respect and dignity.
- Taping or recording anyone may not be done without the person's knowledge. An exception may be made only if the recording is necessary to protect the journalist in a legal action or for some other compelling reason.
- Articles or broadcasts with the potential to exacerbate communal trouble shall be avoided.
- Women and men must be treated equally as news subjects and news sources.
- Advertisements are required to adhere to the terms of the Journalism Code as well, and it is the editor's responsibility to ensure that they do so.

Section 45(2) of the Media Council Act provides that the Journalism Code may be amended by the Cabinet secretary on the recommendation of the Media Council.

Section 7 of the Penal Code, CAP 63 of 1930, restates the principle that ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence, so journalists would do well to keep up to date with all law affecting their profession.

Another key law for journalists is the Kenya Information and Communications Act, CAP 411A of 1998 (KIC Act). The KIC Act was significantly amended by the Kenya Information and Communications (Amendment) Act, 2013.

In terms of the KIC Act, the Communications and Multimedia Appeals Tribunal is established. The Tribunal is empowered to receive complaints from any person aggrieved by any publication or conduct of a journalist, by anything done against a journalist that limits or interferes with the constitutional freedom of expression of such a journalist or media enterprise, or any action taken, omission made or decision made by any person under the KIC Act – section 102A. Part of its mandate is almost identical to that of the Complaints Commission under section 34 of the Media Council Act, and these two bodies cross-refer complaints. It is unclear from the legislation what factors would determine which body hears which complaint. However, the Communications and Multimedia Appeals Tribunal hears appeals from decisions of the Media Council and the CA, while the Complaints Commission does not.

After hearing the parties to a complaint, section 102E(1) of the KIC Act gives the Communications and Multimedia Appeals Tribunal authority to, among other things:

- Order the offending party to publish an apology or correction in such a manner as the Tribunal may specify
- Make any directive and declaration on freedom of expression
- Issue a public reprimand to the journalist involved
- Order the offending editor of the broadcast, print or online material to publish the Tribunal's decision in such a manner as the Tribunal may specify
- Impose a fine on the journalist adjudged to have violated the KIC Act
- Recommend the suspension or removal from the register of the journalist involved.

### **3.3 Legislation governing the print media**

Unfortunately, in terms of:

- The Books and Newspapers Act – CAP 111 of 1960
- The Media Council Act – Act 46 of 2013, and

- The Kenya Information and Communications Act – CAP 411A of 1998,

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

#### ❖ The Books and Newspapers Act, CAP 111 of 2013

The definition of a newspaper is extremely broad in the Books and Newspapers Act, and includes 'any ... printed matter containing news, or intelligence, or reports of occurrences, of interest to the public or any section thereof, or any views, comments or observations thereon, printed for sale or distribution and published periodically or in parts or numbers at intervals not exceeding three months'. The definition of a book includes 'any magazine, review, Gazette, pamphlet, leaflet, sheet of letterpress, sheet of music, map, plan and chart, which is separately published, and any part or division thereof, but does not include a newspaper' – section 2.

Section 22 gives the minister responsible for the administration of the Books and Newspapers Act wide powers relating to the implementation of the act, including prescribing:

- The forms of registers, returns, applications, notices, bonds to be used
- The particulars, matters and information to be entered in the registers
- Fees payable
- The penalties for contravention, which may include a fine, imprisonment or both.

Section 11(1) of the Books and Newspapers Act makes the starting or printing of a newspaper a costly exercise. It provides that no person may print a newspaper, or publish one printed in Kenya, unless a bond of one million Kenyan shillings has been lodged with the Registrar of Books and Newspapers, as specified in section 11(3). The bond must have one or more sureties, as may be required by the registrar. This bond is intended as security for the payment of any monetary penalty or damages that may be imposed upon or adjudged against the publisher. It is also for the payment of any damages or costs awarded against the publisher in respect of any libel (that is, defamation) – section 11(1). Anyone who prints or publishes a newspaper without complying with the bond requirements is guilty of an offence and is liable to a fine, imprisonment or both. Subsequent offences result in a longer term of imprisonment and being barred from publishing or printing any newspaper in Kenya – section 14.

The large bond puts newspaper printing and publishing outside the reach of anyone

without significant financial muscle. This financial barrier interferes with the public's right to know.

Section 17 requires every book and newspaper printed in Kenya to have, printed in English on its first or last printed page, the name and address of its printer and of its publisher as well as the names of the places in which it is printed and published. Non-compliance is an offence punishable by imprisonment, a fine or both, as well as possible forfeiture or destruction of the printed materials.

According to section 18, a printer is required to keep a copy of every printed book or newspaper for six months after its publication date, and write on it the name, business and residential or postal address of the person who engaged for it to be printed. The printer is required to produce it for the Registrar, a court, judge or magistrate if requested in writing to do so. Non-compliance is an offence punishable by imprisonment, a fine or both.

Section 19 contains provisions that cause concern. Any police officer may seize any book or newspaper which he reasonably suspects of having been printed or published in contravention of the Books and Newspapers Act – section 19(1). Section 19(3) is particularly alarming as it gives any police officer of assistant inspector rank or above the right to enter and search any place where it is suspected that publications are being produced in contravention of the act, and to do so without a warrant if he or she has reasonable cause to believe that the delay while obtaining such a warrant would defeat the purposes of this act.

Section 20 of the Books and Newspapers Act spreads the responsibility for non-compliance with the act to every person involved with managing the company and makes them guilty of an offence. The onus is then on the individuals to prove their non-involvement or innocence of the charges.

Part II of the Books and Newspapers Act is entitled 'Deposit and Registration of Books and Newspapers'. The requirements specified in this section do not apply to any book or newspaper printed or published by or on behalf of the government – section 5(1). All book (and thus, magazine) publishers are required, by section 6(2), to deliver at their own cost up to three copies of the publication to the registrar appointed by the minister, and two copies to the director of the Kenya National Library Service, within the timeframes specified in section 6(1). Both the registrar and the director are required to issue a written receipt therefore to the publisher.

Section 7 requires the publisher of every newspaper printed in Kenya to provide two copies of the newspaper and two copies of every supplement carried with it to the

registrar on every day that the newspaper is published. A form detailing all such deliveries must be submitted to the registrar each year (section 8). Any publisher who fails to comply with sections 6, 7 and 8 is guilty of an offence and may be fined, imprisoned or both – section 9. Importantly, section 9(4) makes any person who sells or distributes any book or newspaper where the publisher has not complied with sections 6, 7 or 8 also guilty of an offence and liable to a fine, imprisonment or both.

The Books and Newspapers Act contains so-called subsidiary legislation after section 22 which details:

- Classes of books and newspapers excluded under section 5(2), which permits the minister to exclude any book, newspaper or class thereof from the deposit and registration requirements in Part II of the act
- Classes of persons excluded under section 10(2), which permits the minister to exclude any person or class of person from the bond requirements in Part III of the act
- The Books and Newspapers Rules, which summarise the requirements and procedures in terms of registration, deposits, returns, bonds and the forms required therefore
- Fees payable to the registrar for inspecting entries to the register, individual books or newspapers, and the charges for filing of returns of newspapers, books, changes of particulars and filing of a bond.

#### ❖ The Media Council Act, Act 46 of 2013

The Media Council Act applies to media enterprises, journalists, foreign journalists accredited under this act, media practitioners, and consumers of media services – section 4.

Section 5(1) establishes the Media Council of Kenya, a body which is stated to be independent of control by government, political and commercial interests – section 11. The appointments process for members of the Media Council is dealt with elsewhere in this chapter. Section 6 describes its functions, including:

- Promoting and protecting the freedom and independence of the media
- Prescribing standards of journalists, media practitioners and media enterprises, and promoting ethical and professional standards, as well as regulating and monitoring compliance therewith

- Ensuring the protection of the rights and privileges of journalists in the performance of their duties
- Advising the government and setting standards for the training of journalists
- Accrediting Kenyan and foreign journalists by certifying their competence, authority or credibility against official standards based on the quality and training of Kenyan journalists. Accreditation is valid for a renewable period of 12 months, according to section 46(2)
- Subject to any other written law, considering and approving applications for accreditation by educational institutions that seek to offer courses in journalism. Only accredited institutions may offer or teach journalism courses. An unaccredited institution that teaches journalism courses commits an offence and its proprietor, director or manager is liable to a fine, imprisonment or both (section 47)
- Compiling and maintaining a register of accredited journalists, media enterprises and such other related registers as it may deem fit, and issuing accreditation documents
- Facilitating resolutions of disputes between the media and government, the media and the public, and intra-media disputes.

Section 6(2) requires the Media Council to ensure that the freedom and independence of the media is exercised in a manner that respects the rights and reputations of others, and does not compromise national security, public order, public health and public morals. The Cabinet secretary, in consultation with the Media Council, is authorised by section 6(3) to make regulations to give further effect to section 6(2).

According to section 22, an action may not lie against the Media Council or any of its officers or appointed persons in respect of anything done or omitted by them in good faith in the performance of their duties.

Section 27 of the Media Council Act establishes a Complaints Commission, a separate body whose members are appointed in the same manner as applies to the members of the Media Council. It is independent in its operations, functions and powers, according to section 30, and must be guided by article 159 of the Constitution. Any person aggrieved by a publication or the conduct of a journalist may complain to the Complaints Commission, according to section 34(1)(a), as may any person aggrieved

by anything done against a journalist that limits or interferes with the constitutional freedom of expression of the journalist – section 34(1)(b). Part of its mandate is almost identical to that of the Communications and Multimedia Appeals Tribunal, under section 102A of the KIC Act, and these two bodies cross-refer complaints. It is unclear from the legislation what factors would determine which body hears which complaint. However, the Tribunal hears appeals from decisions of the Media Council and the CA, while the Complaints Commission does not.

The functions of the Complaints Commission are to:

- Mediate or adjudicate in disputes between the media and the government, the media and the public, and intra-media disputes on ethical issues
- Ensure adherence to the standards of journalism provided for in the Code of Conduct for the Practice of Journalism in Kenya
- Achieve impartial, speedy and cost-effective settlement of complaints against journalists and media enterprises – section 31.

The Complaints Commission has the power to:

- Establish and maintain an internal mechanism for the resolution of disputes
- Prescribe procedures for determination of media-related disputes
- Receive, investigate and deal with complaints made against journalists and media enterprises
- Summon and receive information and evidence.

Any person aggrieved by a publication or the conduct of a journalist or media enterprise may complain to the Complaints Commission, as may any person aggrieved by anything done against a journalist or media enterprise that limits or interferes with the constitutional freedom of expression of such a journalist or media enterprise – section 34(1)(a) and (b). The complaint under section 34(1) must be in writing and must include the grounds for the complaint, the nature of the injury or damage suffered, and the remedy sought. Although section 32(4) states that a complainant's name, address and identity must be revealed to the Complaints Commission, the Commission may, under section 34(5), keep that information confidential or accept an anonymous complaint concerning an issue of public interest, or where no clearly identifiable person or group is affected.

Under section 34(8), the Complaints Commission may also take up a complaint on its own initiative, or refer a complaint to the Communications and Multimedia Appeals Tribunal, where the matter falls under the mandate of the Tribunal. Sections 35–38 of the Media Council Act detail the complaints, hearings and resolution procedures. A person aggrieved by a decision of the Complaints Commission may apply to the High Court, according to section 42(1), but the timeframe for this application is unclear. Section 42(2) specifies that the aggrieved person may, ‘after 30 days after the Commission has made its decision’, apply to the High Court, but section 43 specifies that the challenge has to take place within 30 days of the Commission’s decision.

Except as expressly provided in the Media Council Act or any other regulations made thereunder, the Complaints Commission has the power to regulate its own procedure – sections 33(3) and 44.

According to section 45(1), journalists and media enterprises shall at all times comply with the code of conduct set out in the Second Schedule of the Media Council Act (Journalism Code). The Journalism Code, which applies to Kenyan journalists, foreign journalists, media practitioners, and media enterprises, according to section 1 thereof, contains 26 sections detailing the required conduct of the media. They are dealt with above in this chapter in the section headed ‘Legislation governing journalists’, and are not repeated here.

Section 45(2) provides that the Journalism Code may be amended by the Cabinet secretary on the recommendation of the Media Council.

Section 7 of the Penal Code, CAP 63 of 1930, restates the principle that ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence, so print media houses would do well to keep up to date with all law affecting their businesses.

#### ❖ **The Kenya Information and Communications Act, CAP 411A of 1998**

A key law for the print media is the Kenya Information and Communications Act, CAP 411A of 1998 (KIC Act). The act was significantly amended by the Kenya Information and Communications (Amendment) Act, 2013.

Under section 102 of the KIC Act, the Communications and Multimedia Appeals Tribunal was established. The Tribunal is empowered to receive complaints from any person aggrieved by any publication or conduct of a journalist or media enterprise, anything done against a journalist or media enterprise that limits or interferes with the constitutional freedom of expression of such a journalist or media enterprise, or any action taken, omission made or decision made by any person under the KIC Act

– section 102A. Part of its mandate is almost identical to that of the Complaints Commission under section 34 of the Media Council Act, and these two bodies cross-refer complaints. It is unclear from the legislation what factors would determine which body hears which complaint. However, the Communications and Multimedia Appeals Tribunal hears appeals from decisions of the Media Council and the CA, while the Complaints Commission does not.

It should be noted that the definition of ‘media’ in the KIC Act specifically excludes print and book publishing, but the Tribunal’s authority extends to cover the print media. This is extremely confusing, and we include relevant provisions in this section given the Tribunal’s jurisdiction over the print media.

According to section 8 of the Second Schedule of the KIC Act, the Communications and Multimedia Appeals Tribunal has the powers of the High Court with regard to:

- Administering oaths to the parties and witnesses to the proceedings
- Summoning witnesses and requiring the production of documents
- Ordering the payment of costs
- The provisions of the law relating to commissions of enquiry with respect to:
  - The protection of the members of the Tribunal from suit
  - The form of summonses to witnesses
  - The giving or fabricating of false evidence
  - The duty and indemnity of witnesses, and the penalty for contumacy, insult or interruption of proceedings
  - The appearance of advocates.

After hearing the parties to a complaint, section 102E(1) gives the Tribunal the authority to, among other things:

- Order the offending party to publish an apology or correction in such a manner as the Tribunal may specify
- Make any directive and declaration on freedom of expression
- Issue a public reprimand of the journalist or media enterprise involved
- Order the offending editor of the print material to publish the Tribunal’s decision in such a manner as the Tribunal may specify

- Impose a fine on the media enterprise and journalist adjudged to have violated the KIC Act
- Recommend the suspension or removal from the register of the journalist involved.

Any person aggrieved by a decision or order of the Tribunal may, within 30 days of such a decision or order, appeal to the High Court. No decision or order of the Tribunal may be enforced until the time for lodging the appeal has expired, or until any appeal lodged has been determined – section 102G of the KIC Act.

Section 58 of the KIC Act forbids the sending by post of indecent or obscene printing, photographs, lithographs, engravings, books, cards or other obscene articles. This should be noted by publishers which distribute by mail.

### **3.4 Legislation governing the making, exhibition and broadcasting of films**

The making and exhibition of films is governed by the Films and Stage Plays Act, CAP 222 of 1962 (Films Act). There are a number of constraints on the making and exhibition of films in Kenya.

The Films Act includes a number of regulations for makers and exhibitors of films which are covered in the relevant section of this chapter. These include the Forms and Fees Regulations and the Film Censorship Regulations.

Any person aggrieved by a decision of a licensing officer, licensing authority or the Kenya Film Classification Board may appeal to the minister responsible for the administration of the Films Act. The minister may confirm or modify the decision, and any decision the minister makes is final – section 29.

Further, the minister may revoke any licence or certificate of approval in writing served on the person to whom it was originally issued – section 30.

The Second Schedule to the Films Act lists the licence fees payable for:

- A film, recorded video, poster or trailers of a film
- Lodging of an appeal
- Annual licence for cinemas
- Annual licence for video show theatres and video vendors
- Annual licence for video libraries
- Commercials.

Nothing contained in the Films Act applies to the exhibition or making of any film by the government – section 36.

### **3.4.1 Licensing requirements to make a film in Kenya**

In terms of section 4(1) of the Films Act, all films made in Kenya, whether for exhibition or sale within the country or outside it, have to be made in accordance with the terms and conditions of a filming licence issued by the licensing officer, who is appointed by the minister in terms of section 3. However, section 10 gives the licensing officer complete discretion to exempt from the provisions in Part II of the Films Act, any film or class of films, generally or by reference to the person or class of persons making the film or films. This can be done in writing or by notice in the Gazette.

Where any film is made in contravention of the conditions in section 4(1), every person involved in the making of the film is guilty of an offence punishable by a fine, imprisonment or both – section 4(2). In addition, or in lieu of any other penalty, the court may order the confiscation and destruction of the film – section 32. If any offence under this act, or transgression of the regulations made thereunder, is committed by a company or other body corporate, every person involved in the management of the company is guilty of an offence, and the onus is on the individual to prove innocence and/or non-involvement – section 33.

An application for a filming licence must be made to the licensing officer in writing, and must be accompanied by a full description of the scenes in, and the full spoken text of, the entire film, including those parts made outside Kenya – section 5(1). However, the licensing officer may, at his discretion, accept the application without the complete description and text. The licensing officer may require any non-English text to be translated into English, with the translation certified to his satisfaction – section 5(2). Where a licence has been granted, the film must be made in accordance with the furnished particulars and the conditions of the licence – section 8. Non-compliance makes all involved in the film guilty of an offence.

Prior to issuing the licence, the licensing officer may require the applicant to enter into a bond, with or without sureties, to ensure the film is made in accordance with the conditions of the licence, and that the description, text and other information supplied accords with the information provided to the licensing officer – section 6(2). Alterations and additions may be made to the film, but the licence will then need to be endorsed to include the amendments, in accordance with the same process as for the original licence – section 7. No films may be made that do not comply with the requirements of sections 6 and 7, and all involved in making a non-compliant film are

guilty of an offence. Further, section 18 prohibits the adding of any matter to a film after it has been approved for exhibition. Doing so voids the certificate of approval issued in terms of section 16 of the Films Act.

The issuing of licences is at the discretion of the licensing officer, and he or she may issue it subject to conditions, such as a person appointed by the licensing officer being present at the making of the film – section 6(1). The appointed person may intervene, if need be by force, to stop the making of any scene which in his opinion is in contravention of the licence or the specifications of section 9(1) of the Films Act. The licensing officer then determines whether to permit the resumption of the making of the film – section 9(2). Any person who hinders or obstructs the police officer or appointed person in the exercising of his duties is guilty of an offence – section 9(3), as are all involved in the making of the film should filming be resumed without the permission of the licensing officer or in contravention of the conditions he or she stipulates – section 9(4).

### **3.4.2 Requirements to exhibit a film in Kenya**

There are a number of restrictions on the exhibition of films in Kenya, detailed in Part III of the Films Act. Section 11 of the Films Act establishes the Kenya Film Classification Board (Film Board).

Section 15 details the Film Board's functions, among which are:

- Regulating the creation, broadcasting, possession, distribution and exhibition of films by:
  - Examining every film and every poster submitted under the act for purposes of classification
  - Imposing an age restriction on viewership
  - Giving consumer advice, with due regard for the protection of women and children against sexual exploitation or degradation in cinematograph films and on the internet.
- Licensing and issuing certificates to distributors and exhibitors of films.

The Film Board is also empowered to make excisions from films – section 15(3). Its authority extends similarly to approving and excising posters for public display which advertise films. Any person who exhibits a film without the required excisions is guilty of an offence – section 15(6).

No person may exhibit or distribute any film unless he is registered as an exhibitor

or distributor by the Film Board and issued with a certificate – section 12(1). No film may be distributed, exhibited or broadcast, either publicly or privately, unless the Film Board has examined it and issued a certificate of approval for it – section 12(2). However, this condition does not apply to educational documentaries approved by the Kenya Institute of Education or to films restricted for use in the medical profession – sections 12(2)(a) and (b). Any person who exhibits a film in contravention of these restrictions is guilty of an offence – section 16(6).

Exhibition of a film or poster in contravention of the act is punishable by a fine, imprisonment or both. In addition, or in lieu of any other penalty, the court may order the confiscation and destruction of the film as well as the revocation of the certificate of approval or permission previously granted – section 32. If any offence under this act, or transgression of the regulations made thereunder, is committed by a company or other body corporate, every person involved in the management of the company is guilty of an offence, and the onus is on the individual to prove innocence and/or non-involvement – section 33.

Every application for a certificate of approval for a film has to be made to the Film Board, and the application must be accompanied by the entire film to which the film relates as well as every poster connected with it which is intended for public display. The Film Board may require any non-English text to be translated into English, with the translation certified to the Film Board's satisfaction – section 14.

### **3.4.3 Requirements to broadcast a film in Kenya**

The Kenya Information and Communications Act, CAP 411A of 1998 (KIC Act), details in section 46I(2) requirements relating to the broadcasting of films. It specifies that where any cinematograph film has been submitted under any law for classification or censorship and approved for exhibition, and where approval of the film for exhibition has been denied or has been given subject to excisions, no broadcaster shall:

- In the case of any film in respect of which approval has been denied, broadcast the film or any part thereof
- In the case of any film that has been approved for exhibition subject to excisions therefrom, broadcast that film or any part thereof that includes any part required to be excised,

except with the consent of and subject to any conditions given by the Kenya Film Censorship Board established under the Films Act.

### **3.5 Legislation governing the internet**

The Media Council Act, No. 46 of 2013, includes ‘materials disseminated through the internet’ in its definition of ‘publication’, and ‘collecting, writing, editing and presenting news or news articles … [via] the internet’ in its definition of ‘journalism’.

Although no further mention of ‘the internet’ is made in the act, content producers for the internet would do well to know the contents of the act, especially the Code of Conduct for the Practice of Journalism in the Second Schedule, and which is dealt with under the heading ‘Legislation governing journalists’ above in this chapter.

Article 15(1)(a)(iii) of the Films and Stage Plays Act, CAP 222 of 1962, provides that the Kenya Film Classification Board (Film Board) includes among its functions ‘giving consumer advice, having due regard to the protection of women and children against sexual exploitation or degradation … on the internet’.

A key law for the internet is the Kenya Information and Communications Act, CAP 411A of 1998 (KIC Act). The KIC Act was significantly amended by the Kenya Information and Communications (Amendment) Act, 2013.

In section 84D it provides that any person who publishes or transmits or causes to be published in electronic form, any material which is lascivious or appeals to the prurient interest, and its effect is likely to deprave and corrupt persons who read, see or hear the matter, is liable to a fine, imprisonment or both.

The provisions of the KIC Act relating to the powers and functions of the Communications and Multimedia Appeals Tribunal are applicable to internet content. These are dealt with under the heading ‘Legislation governing journalists’ above in this chapter.

### **3.6 Legislation governing the broadcast media generally**

#### **3.6.1 Legislation that regulates broadcasting generally**

Broadcasting in Kenya is regulated by:

- The Kenya Information and Communications Act – CAP 411A of 1998 (KIC Act)
- The Media Council Act – Act 46 of 2013 (Media Council Act)
- The Kenya Broadcasting Corporation Act, CAP 221 of 1988 (KBC Act).

### **3.6.2 Establishment of the CA, the Media Council, the Complaints Commission and the Tribunal**

Kenya has more than one authority involved in the regulation of broadcasting, namely:

- The Communications Authority of Kenya (CA), which is established under section 2 of the KIC Act.
- The Media Council of Kenya, which is established in terms of section 5(1) of the Media Council Act.
- The Complaints Commission, which is established under section 27 of the Media Council Act.
- The Communications and Multimedia Appeals Tribunal, which is established under section 102 of the KIC Act.

### **3.6.3 Main functions of the CA, the Media Council, the Complaints Commission and the Tribunal**

#### **THE COMMUNICATIONS AUTHORITY OF KENYA**

According to section 5(1) of the KIC Act, the CA was established ‘to licence and regulate postal, information and communication services’.

Section 5B provides that, in undertaking its functions, the CA must comply with the provisions of article 34(1)–(2) of the Constitution, and subject to constitutional article 24, the rights to freedom of the media and freedom of expression may be limited for the purposes and in the manner and to the extent set out in the KIC Act and any other written law. Such a limitation may only be to the extent that a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom – section 5B(3).

According to section 5C, the Cabinet secretary may issue to the CA policy guidelines of a general nature relating to the provisions of the KIC Act. Those guidelines have to be published in the Gazette.

The CA is responsible for issuing licences for:

- Signal distribution – sections 46O and 46N

- Broadcast radio stations and broadcast equipment – section 36
- Public, private and community broadcasting – section 46B
- Radio, television and any other class of licence as may be determined in accordance with the regulations – section 46B(2)(f).

Among other things, section 46A specifically requires the CA to:

- Promote and facilitate the development, in keeping with the public interest, of a diverse range of broadcasting services in Kenya
- Facilitate and encourage the development of Kenyan programmes
- Promote the observance of public interest obligations in all broadcasting categories
- Promote diversity and plurality of views
- Ensure the provision by broadcasters of appropriate internal mechanisms for dealing with complaints
- Protect the right to privacy of all persons
- Administer the broadcasting content aspect of the act
- Develop media standards
- Regulate and monitor compliance with those standards.

It may also revoke licences in accordance with the provisions of sections 46J and 46P. Any person who provides a broadcasting service without a broadcasting licence commits an offence, and is liable for imprisonment, a fine or both – section 46Q.

The CA may set standards for the time and manner of programmes to be broadcast by licensees under the KIC Act – section 46H(1).

Importantly, section 46H(2) empowers the CA to prescribe and review a programming code and a watershed period. The programming code has been prescribed by the CA and is dealt with in the section on regulations below in this chapter. However, broadcasters who are members of a body which has its own programming code enforced by that body, and accepted by the CA, may comply with the applicable self-regulatory programming code and not the programming code prescribed by the CA.

As part of its function, the CA is required, under section 84R(2), to promote, develop and enforce fair competition and equality of treatment among licensees. It may, on its own initiative or on request, investigate any licensee suspected of having committed any act, any omission, or engaged in a practice in breach of fair competition or equal access – sections 84S(1) and 84T.

Where a licensee is found to be competing unfairly, the CA may, among other things: require the licensee to pay a fine not exceeding the equivalent of 10% of the annual gross turnover of the preceding year for each financial year that the breach persists; and declare any anti-competitive agreement or contracts null and void immediately.

Section 104 to the KIC Act gives the CA the power to undertake the prosecution of any offence under the act, and an officer duly authorised in writing by the CA may conduct such a prosecution.

## THE MEDIA COUNCIL OF KENYA

The Media Council was established in terms of the Media Council Act to have authority over a number of broadcasting-related issues including – section 6:

- Promoting and protecting the freedom and independence of the media, along with setting ethical and professional standards for media practitioners, media enterprises and media training, plus regulating and monitoring compliance therewith
- Advising the government or relevant regulatory authority on those issues
- Facilitating resolutions of disputes between the media and government, the media and the public, and intra-media disputes
- Conducting annual reviews of the performance and public opinion of the media, and publishing the results in at least two national circulation daily newspapers
- Tabling reports on its functions before Parliament, through the Cabinet secretary.

The work of the Media Council has a significant impact on journalists working for broadcasters. We have set out the legislative provisions dealing with the Media Council under the heading ‘Legislation governing journalists’ above in this chapter.

## THE COMPLAINTS COMMISSION

The work of the Complaints Commission, established in terms of the Media Council

Act, applies to media enterprises generally, and as such affects the broadcasting sector. It is dealt with under the heading ‘Legislation governing the print media’ above in this chapter. Part of its mandate is almost identical to that of the Communications and Multimedia Appeals Tribunal under section 102A of the KIC Act, and these two bodies cross-refer complaints. It is unclear from the legislation what factors would determine which body hears which complaint. However, the Tribunal hears appeals from decisions of the Media Council and the CA, while the Complaints Commission does not.

### THE COMMUNICATIONS AND MULTIMEDIA APPEALS TRIBUNAL

The Tribunal, established in terms of the KIC Act, is empowered to receive complaints from any person aggrieved by any publication or conduct of a journalist or media enterprise, by anything done against a journalist or media enterprise that limits or interferes with the constitutional freedom of expression of such a journalist or media enterprise, or any action taken, omission made or decision made by any person under the KIC Act – section 102A. Part of its mandate is almost identical to that of the Complaints Commission under section 34 of the Media Council Act, and these two bodies cross-refer complaints. It is unclear from the legislation what factors would determine which body hears which complaint. However, the Tribunal hears appeals from decisions of the Media Council and the CA, while the Complaints Commission does not.

Many of the functions of the Tribunal are dealt with under the heading ‘Legislation governing the print media’ above in this chapter, but there are some functions that relate specifically to broadcasting. The CA is the body that issues licences to broadcasting and signal distribution organisations. Part of the Tribunal’s role is to hear the appeal of any person who is aggrieved by a decision of the Complaints Commission relating to:

- A broadcast complaint – section 46L(5)
- A refusal by the CA to grant a licence – section 79
- A refusal by the CA to renew a licence – section 81
- A modification the CA has made to a licence – section 82(5)
- A revocation of a licence by CA – section 83A(2)
- A decision by the CA regarding unfair competition – section 84T(8)

- Any dispute arising between a radio operator and the owner or occupier of any land – section 85(5).

### **3.6.4 Appointment of members**

#### **THE COMMUNICATIONS AUTHORITY OF KENYA**

According to section 6 of the KIC Act, the CA is managed by a board. The board comprises:

- A chairman, who is appointed by the president in accordance with the process laid out in section 6B
- The principal secretary for the time being responsible for matters relating to broadcast, electronic, print and all other types of media
- The principal secretary for the time being responsible for matters relating to finance
- The principal secretary for the time being responsible for matters relating to internal security
- Seven other persons appointed by the Cabinet secretary in accordance with the process laid out in section 6B.

In terms of section 6A(1) of the KIC Act, to be qualified for appointment to the board, a person has to:

- Be a citizen of Kenya
- Hold a degree from a university recognised in Kenya in any of the following fields: law; telecommunications, information and communications technology (ICT); broadcasting; postal regulation; humanities and social sciences; any other relevant field; or have a distinguished career spanning at least 20 years in the ICT sector
- Have experience in the relevant sector – 10 years for the chairman, five years for any other board member
- Satisfy the leadership and integrity requirements of Chapter Six of the Constitution.

Under section 6A(3), a person would be disqualified from board membership for reasons that include: having any direct or indirect commercial interest in the sector within the previous six months; being an office bearer or employee of a political party; being a public officer; being an undischarged bankrupt; having been convicted of a felony and sentenced to imprisonment; having been convicted of an offence under the KIC Act; having been removed from office for abuse thereof.

The board members are selected after a public nominations process detailed in section 6B. According to this section, vacancies on the CA Board have to be posted in the Gazette and on the official website of the ministry, and applications invited from qualified persons. The president or Cabinet secretary, as the case may be, has to convene a selection panel to evaluate and select appropriate candidates, which selection panel must comprise persons drawn from the:

- Media Council of Kenya
- Kenya Private Sector Alliance
- Law Society of Kenya
- Institute of Engineers of Kenya
- Public Relations Society of Kenya
- Kenya National Union of Teachers
- Consumers' Federation of Kenya
- Ministry responsible for matters relating to the media.

It is unclear whether or not these institutions are able to nominate representatives to the selection panel or whether the president or Cabinet secretary has the discretion to make the appointments from those organisations directly. The independence of the selection panel is largely determined by this critical issue and therefore it is unfortunate that the KIC Act is so vague in this regard.

Applications have to be forwarded to the selection committee within seven days of the publication of the notice, and the committee is required to prepare a shortlist and publish the names and qualifications of the shortlisted applicants in the Gazette and on the ministry's official website within the following seven days. Within the 14 days thereafter, the selection committee interviews the shortlisted applicants and then forwards to the president a list of three persons qualified to be chairperson, or to the Cabinet secretary two persons qualified to be board members in relation to each vacancy. The president or Cabinet secretary, as the case may be, has to make the appointment/s within 14 days of receipt of those names. All appointments are published in the Gazette. In selecting the CA board members, the president and Cabinet secretary must ensure that the board is representative of the interests of all sections of society, that equal opportunity was given for persons with disabilities and

other marginalised groups, and that not more than two-thirds of the members are of the same gender.

The chairperson and members of the board hold office for three years, renewable once – section 6C. A board member may be removed from office if he/she is found to be guilty of gross misconduct or is absent from three consecutive meetings without permission of the board, except for good cause shown – section 6D. The procedure for removal of a member of the CA Board under section D has to be carried out in accordance with administrative justice requirements in article 47 of the Constitution.

Section 7(f) gives the CA the authority to establish a broadcasting standards committee and such other committees as may be necessary to carry out its functions, and section 7(g) gives it the authority to co-opt persons whose skills and expertise may be necessary for the functioning of the CA. Any co-opted person may attend board meetings, but may not vote.

The director general (DG) is chief executive of the CA and is responsible for the day-to-day management thereof – section 11(1). The DG is an *ex officio* member of the board, but does not have a board vote – section 11(2). Sections 11(3), (4) and (6) specify that the DG is to be recruited and appointed by the board through a competitive process, that the terms and conditions of the DG's service are determined by the CA, in consultation with the Public Service Commission, and that the DG is appointed for a term of four years, renewable once.

## THE MEDIA COUNCIL OF KENYA

Under section 7(1) of the Media Council Act, the Media Council consists of:

- A chairperson and seven other members appointed by the Cabinet secretary on the recommendation of a selection panel convened by him, and
- One person nominated by the Cabinet secretary.

The 13-member selection panel comprises individuals nominated by the following organisations – section 7(3):

- Kenya Union of Journalists
- Media Owners Association
- Kenya Editors' Guild
- Law Society of Kenya
- Kenya Correspondents Association
- Public Relations Society of Kenya

- National Gender and Equality Commission
- Association of Professional Societies in East Africa
- Consumers Federation of Kenya
- The ministry responsible for matters relating to the media
- Kenya News Agency
- Two persons nominated by the journalism schools of recognised universities, one public and one private.

The Cabinet secretary is required by section 7(2)(a) to place a notice in the Gazette and at least two national circulation newspapers declaring any vacancies in the Media Council. Applications from qualified individuals received within the following seven days are forwarded to the selection panel – section 7(5). Only citizens of Kenya qualify to be members of the Media Council, according to section 8. The selection panel draws up a shortlist, and publishes the names and qualifications of all shortlisted applicants in the Gazette and two national circulation newspapers – section 7(7). After interviewing the shortlisted applicants – section 7(8) – the selection panel chooses one person as chairman and seven members, and forwards the names to the Cabinet secretary – section 7(9). Under section 7(11), the Cabinet secretary may reject any nominations solely on the grounds specified in section 8(2), which deals with circumstances which would disqualify a person from Media Council membership, after which the selection panel puts forward another person from the shortlist – section 7(12).

The selection panel and the Cabinet secretary are required by section 7(14) to ensure that:

- The nominees to the Media Council reflect the interests of all sections of society
- Equal opportunities are provided for persons with disabilities or other marginalised groups
- Not more than two-thirds of the Media Council members are of the same gender.

After the appointment of the Media Council chairperson and members, the selection panel is dissolved – section 7(15).

Under section 12(1), the chairperson and members of the Media Council serve a three-year term, renewable once, and serve on a part-time basis – section 12(2). The chairperson or a member of the Media Council may be removed from office for, among other things, violation of the Constitution, gross misconduct, physical or mental incapacity, incompetence or neglect of duty, or acceptance of any position or shares that would result in a conflict of interest with his/her official duties to the Media Council – section 14(1). Anyone wishing to remove a Media Council member

has to present a written petition to the National Assembly, according to section 14(2), and the National Assembly forwards any satisfactory complaint along with its recommendation to the Cabinet secretary – section 14(3). The Cabinet secretary is required to appoint a three-person tribunal to consider the petition, according to section 14(4), and if the tribunal determines the grounds are sufficient for removal, shall recommend the Cabinet secretary remove the member from office – section 14(5). The Cabinet secretary is bound by the recommendation of the tribunal – section 14(7).

Section 17 provides for the appointment by the Media Council, after a competitive recruitment process, of a secretary to the Council who is the chief executive officer of the Media Council and is responsible for overall management of the Council. The secretary is an *ex-officio* member of the Media Council Board. The Council has the power to remove the secretary from office, according to section 18, without reference to the Cabinet secretary.

The Media Council may establish such committees as may be necessary for the better carrying out of its functions under section 9(1), and may co-opt persons with special knowledge and expertise as required – section 9(2).

According to section 22, an action may not lie against the Media Council or any of its officers or appointed persons in respect of anything done or omitted by them in good faith in the performance of their duties.

## THE COMPLAINTS COMMISSION

Section 28 of the Media Council Act specifies that the chairperson of the Complaints Commission is required to be a person who holds or has held a judicial office in Kenya, or who is an advocate of the High Court of Kenya with at least 10 years' experience. The six other members of the Complaints Commission must have knowledge or experience in one of the following areas: journalism; media policy and law; media regulation; business practice and finance; the performing arts or entertainment; advertising practice; or related social sciences.

Section 27(2) specifies that the provisions related to the process of selecting members of the Media Council noted in sections 7(2)–(8) apply to the selection of members of the Complaints Commission as well. These are dealt with immediately above.

The chairperson and vice chairperson of the Complaints Commission are elected by the members themselves at their first meeting – section 28(2). The chairperson or a member of the Complaints Commission may be removed from office for, among

other things, violation of the Constitution, gross misconduct, physical or mental incapacity, incompetence or neglect of duty, or acceptance of any position or shares that would result in a conflict of interest with his/her official duties to the Complaints Commission – section 13(1) read with section 14(1).

In performing its functions, the Complaints Commission is required to be independent in operations and guided by the provisions of article 159 in the Constitution, which relate to judicial authority and principles – section 30.

## THE COMMUNICATIONS AND MULTIMEDIA APPEALS TRIBUNAL

Under section 102(1) of the KIC Act, the Communications and Multimedia Appeals Tribunal comprises:

- A chairman, nominated by the JSC, who must be qualified to hold office as a judge in the High Court of Kenya, and possess experience in communication policy and law
- At least four persons with knowledge and experience in media, telecommunication, postal, courier systems, radio communications, information technology or business practice and finance, and who are not in the employ of the government, the Media Council or the CA.

Vacancies on the Tribunal have to be posted in the Gazette and in at least two national circulation newspapers within 14 days of its occurrence, and applications must be invited from qualified persons – section 102(2)(a). Within that time period, the Cabinet secretary has to convene a selection panel to evaluate and select appropriate candidates, which section 102(3) specifies must comprise persons drawn from the following organisations:

- Media Council of Kenya
- Kenya Private Sector Alliance
- Law Society of Kenya
- Institute of Engineers of Kenya
- Public Relations Society of Kenya
- Kenya National Union of Teachers
- Consumers Federation of Kenya
- The ministry responsible for matters relating to the media.

It is extremely unclear whether or not these institutions are able to nominate representatives to the selection panel or whether the Cabinet secretary has the discretion

to make the appointments from those organisations directly. The independence of the selection panel is largely determined by this critical issue and it is therefore unfortunate that the KIC Act is so vague in this regard.

Applications have to be forwarded to the selection committee within seven days of the publication of the notice, according to section 102(5), and the committee is required to prepare a shortlist and publish the names and qualifications of the shortlisted applicants in the Gazette and in at least two national circulation newspapers within the following seven days – section 102(7). Within the 14 days thereafter, section 102(8) requires the selection committee to interview the shortlisted applicants and then forward to the Cabinet secretary a list of three persons per vacant position – section 102(9). The Cabinet secretary has the discretion to reject nominations, in which instance the selection committee must submit fresh nominees – section 102(11). The Cabinet secretary must make the appointment/s within seven days of receipt of the list of nominees by notice in the Gazette, according to section 102(10), but may extend the period specified in respect of any matter under this section by up to 14 days – section 102(12). In selecting the Communications and Multimedia Appeals Tribunal members, the Cabinet secretary must ensure that the Tribunal is representative of the interests of all sections of society, that equal opportunity was given for persons with disabilities and other marginalised groups, and that not more than two-thirds of the members are of the same gender – section 102(13).

Once the Tribunal members are appointed, the selection committee is dissolved – section 102(14). All members of the Tribunal are appointed for a three-year term, renewable once, according to section 102(15).

A position will become vacant if a Tribunal member accepts any office which would have made him/her ineligible for appointment to the Tribunal – section 102(16)(b). The Cabinet secretary may remove a member from office on the recommendation of a tribunal set up for the purpose under section 102(17). This tribunal's recommendation must be acted upon by the Cabinet secretary within 30 days – section 102(20).

### **3.6.5 Funding for the CA, the Media Council, the Complaints Commission and the Tribunal THE COMMUNICATIONS AUTHORITY OF KENYA**

Under section 17 of the KIC Act, the funds of the CA consist of:

- Such moneys or assets as may accrue to or vest in the CA in the course of the exercise of its powers or performance of its functions under the KIC Act

- Sums payable to it pursuant to the KIC Act, any other written law, any gift or trust
- Moneys provided by Parliament
- Moneys from other sources provided for, donated or lent to the CA.

## THE MEDIA COUNCIL OF KENYA

Section 23 of the Media Council Act specifies that the funds of the Media Council consist of:

- Monies allocated by the National Assembly
- Fees charged to journalists by the Media Council for documents of accreditation or registration
- Monies or assets as may accrue to the Media Council in the performance of its functions
- Monies from any other source provided, donated or lent to the Media Council.

## THE COMPLAINTS COMMISSION

The Media Council Act does not deal with the sources of funding for the Complaints Commission.

## THE COMMUNICATIONS AND MULTIMEDIA APPEALS TRIBUNAL

The KIC Act does not deal with the sources of funding for the Tribunal.

### 3.6.6 Making broadcasting regulations

#### ❖ The Kenya Information and Communications Act, CAP 411A of 1998

The KIC Act authorises the Cabinet secretary, in consultation with the CA, to make regulations affecting many aspects of broadcasting in Kenya, including:

- Radio communications – section 38(1)
- All broadcasting services – section 46K – including:
  - The facilitation, promotion and maintenance of diversity and plurality of views
  - Financing and broadcast of local content
  - Mandating the carriage of content in keeping with interest obligations
  - Prescribing anything that may be prescribed under this part of the KIC Act

- Fair competition in the sector – section 84R(3) and 84W(1).

The words ‘in consultation with’ mean that the CA essentially has a veto over regulations made by the Cabinet secretary.

Section 5B(5) of the KIC Act gives the CA authority to make regulations for the better carrying out of the provisions of section 5B, which requires the CA to comply with various constitutional provisions in undertaking its functions under the KIC Act.

#### ❖ **The Media Council Act, No. 46 of 2013**

The Media Council Act authorises the Cabinet secretary, in consultation with the Media Council, to make regulations for the better carrying out of the provisions of the Media Council Act – section 50(1) – though the Media Council may make rules to govern its own procedures, according to section 50(2). The words ‘in consultation with’ mean that the Media Council essentially has a veto over regulations made by the Cabinet secretary.

### **3.6.7 Licensing regime for broadcasters in Kenya**

#### **BROADCASTING LICENCE REQUIREMENT**

Any person who provides a broadcasting service without a broadcasting licence commits an offence and is liable for imprisonment, a fine or both – section 46Q of the KIC Act. The CA is the body empowered by the KIC Act to issue broadcasting licences – section 46. It may also revoke licences in accordance with the provisions of sections 46J and 46P.

#### **CATEGORIES OF BROADCASTING LICENCES**

Broadcasting services in Kenya are classified as public, private and community broadcasting – section 46B(1) of the KIC Act.

The KIC Act categorises licences into the following classes – section 46B(2):

- Free-to-air radio
- Free-to-air television
- Subscription radio
- Subscription television
- Subscription management
- Any other class of licence as may be determined in accordance with the regulations, which are included as subsidiary legislation in the KIC Act.

That said, application forms and guidelines for the various licence categories may be downloaded from the CA website,<sup>19</sup> and the CA's categories of broadcasting services therein are different to those provided for in the act, according to its Broadcasting Market Structure<sup>20</sup> document, namely:

- Terrestrial subscription (pay) broadcasting (licence duration: television – 5 years)
- Free-to-air community broadcasting (licence duration: television – 4 years; radio – 3 years)
- Commercial free-to-air broadcasting (licence duration: television – 7 years; radio – 5 years)
- Digital mobile broadcasting (licence duration: television – 7 years)
- Terrestrial subscription broadcasting (licence duration: television – 7 years; radio – 5 years)
- Subscription management (licence duration: 5 years)
- Community free-to-air broadcasting (licence duration: television – 7 years; radio – 5 years)
- Satellite broadcasting (licence duration: television – 7 years)
- Cable broadcasting (licence duration: television – 7 years; radio – 5 years)
- IPTV broadcasting (licence duration: 5 years).

## BROADCASTING LICENSING PROCESS

The procedures for applying for a licence and its renewal are covered in Part VI, 'Licensing and Enforcement of the KIC Act'. Every application for a licence under the KIC Act must be in the prescribed form and must be accompanied by the prescribed fees. Additional information may be required by the CA in considering the application – section 77.

Those ineligible for a broadcasting licence include: a political party; a person adjudged bankrupt or who has entered into an arrangement with his creditors; someone of unsound mind; a public or state officer – section 46D(1).

The CA must publish the name and other particulars of the licence applicant as well as its reasons for the proposed granting of the broadcasting licences in the Gazette at least 30 days before granting a licence. Public comment is invited, and written objections with respect to the proposed licence may be made by the public for at least 30 days after the gazetting – section 78. In making its decision, the CA must take the written representations into account.

The CA may licence the applicant on the expiry of the period of written representation, subject to such conditions as may be prescribed, including the payment of licence fees – section 79. Should the CA not grant the licence, it is required to notify the applicant in writing of the reasons for refusal within 30 days, and the applicant may, if aggrieved, appeal to the Communications and Multimedia Appeals Tribunal. The Tribunal must publish in the Gazette its decision and the reasons therefore within 15 days of every decision on an appeal – section 82(6).

According to the KIC Act, a successful applicant must commence using the assigned frequencies within such period as the CA stipulates in the licence. Failure to do so may result in revocation of the licence – section 46J(c). Regulations have been promulgated that also deal with this issue and these are dealt with below in this chapter.

A licence granted under the KIC Act continues in force for such a period as may be specified in the licence, unless earlier revoked – section 80. On application, a licence may be renewed for such a further period as the CA may specify subject to the payment of the prescribed fee. Where the CA does not renew the licence, it is required to notify the licensee in writing of the reasons for refusal within 30 days, and the licensee may, if aggrieved, appeal to the Communications and Multimedia Appeals Tribunal – section 81. The Tribunal must publish in the Gazette its decision and the reasons therefore within 15 days of every decision of an appeal – section 82(6).

The CA may make modifications to the conditions attached to any licence issued under the KIC Act, but is required to publish in the Gazette the intended changes, the reason for the modification, and specifying a period of no less than 30 days during which written objections may be made – section 82. A licensee aggrieved by the decision of the CA may appeal to the Communications and Multimedia Appeals Tribunal within 15 days of receipt of notification of modification, and the Tribunal may stay the modification pending its decision on the appeal. The Tribunal must publish in the Gazette its decision and the reasons therefore within 15 days of every decision of an appeal – section 82(6).

The CA is required to maintain separate registers of the various licences it issues

under the KIC Act, containing such particulars for every licence as may be prescribed – section 83. Any person may inspect the register of licences for a prescribed fee, though the fee is waived for a member of the police force, a public officer acting in the course of duty, or a person authorised by the board of the CA.

The forms for applying for broadcasting licences are included in the First Schedule of the KIC Act, and the forms and guidelines are also available for download on the CA website.<sup>21</sup>

## FREQUENCY SPECTRUM LICENSING

This is an important aspect of broadcasting because all terrestrial and satellite broadcasting signals are distributed through radio waves, and consequently make use of the radio frequency spectrum.

The CA is the body that licenses spectrum, according to section 36(1) of the KIC Act. Section 35 specifies that no person may establish or use any radio communication station or apparatus except in accordance with the terms of a licence granted under section 36.

Any licence granted under section 36 may be subject to terms and conditions as the CA may specify, including limitations as to position, apparatus and such like – section 36(2). The CA may renew or revoke the licence, or vary or modify any conditions attached thereto – section 36(4). The licence is valid for as long as specified in the individual licence – section 36(3).

Regulations for managing and allocating the spectrum are included in the KIC Act in subsidiary legislation, and are dealt with in the regulations section of this chapter.

## RESPONSIBILITIES OF BROADCASTERS

❖ **The Kenya Information and Communications Act, CAP 411A of 1998**  
Section 46F–I of the KIC Act details the particular conditions that the CA may require broadcasters of different categories to meet. In brief, these are:

- 46F – Community broadcasting licence conditions regarding community involvement and participation in programming and management of community broadcasting licensees.
- 46G – Private broadcasting licence conditions regarding coverage areas and local television content requirements.

- 46H – Programming standards applicable to all broadcasters including the applicable programming code, and the watershed period when large numbers of children are likely to be watching.
- 46I – Requirements applicable to all licensed broadcasters include:
  - Providing responsible and responsive programming that caters to the varied needs and susceptibilities of different sections of the Kenya community
  - Ensuring Kenyan identity is developed and maintained in programmes
  - Broadcasting such a percentage of Kenyan programmes as is prescribed by the CA
  - Observing standards of good taste and decency
  - Gathering and presenting news and information accurately and impartially
  - When controversial or contentious issues of public interest are discussed, making reasonable efforts to present alternative points of view, either in the same programme or in other programmes within the period of current interest
  - Respecting the right to privacy of individuals
  - Respecting copyright and neighbouring rights in respect of any work or material
  - Keeping a programme log or machine readable record of its programming for a period of one year after the date of broadcasting
  - Ensuring that advertisements, either in terms of content, tone or treatment, are not deceptive or are not repugnant to good taste
  - Ensuring that derogatory remarks based on ethnicity, race, creed, colour and sex are not broadcast
  - Not broadcasting any film that has been denied approval for exhibition, nor broadcasting an approved film that has not had any required excisions removed
  - Broadcasting on radio or television such percentage of Kenyan programmes as is prescribed by the CA.

According to section 46Q, an offence is committed by any person who:

- Provides a broadcasting service in an area for which he/she/it is not licensed to broadcast
- Broadcasts in contravention of the act or the licence conditions.

Contravention of section 46Q makes the licensee liable to a fine, imprisonment or both.

Where the CA has determined that a licensee is contravening the KIC Act, or any other written law or any of the conditions of that licence, and has taken action on the issue, any licensee aggrieved by the decision may appeal it with the Communications and Multimedia Appeals Tribunal within 15 days of the notice thereof – section 83A.

❖ **The Media Council Act, No 46 of 1998**

Within the Media Council Act, the Second Schedule contains the Code of Conduct for the Practice of Journalism (Journalism Code), and section 1 specifies that journalists, media practitioners, foreign journalists and media enterprises (all of which are relevant to broadcasters) are all subject to the Media Council Act and thus also to the Journalism Code. The Journalism Code, which comprises 26 sections, is dealt with previously in this chapter in the section headed 'Legislation governing journalists', and is not repeated here.

### **3.6.8 Are the CA, the Media Council, the Complaints Commission and the Tribunal independent regulators?**

#### **THE COMMUNICATIONS AUTHORITY OF KENYA**

Section 5A of the KIC Act specifies that the CA is independent and free of control by government, political or commercial interests in the exercise of its powers and performance of its functions and, further, should be guided by the national values in article 10 and those for public servants in article 232(1) of the Constitution.

While this statement is a strong indication of independence, it is unfortunate that the provisions of the KIC Act are unclear as to how the members of the selection panel which recommends board appointments are appointed. In this regard, it is extremely unclear whether or not the organisations whose representatives make up the selection panel are able to nominate their representatives to the selection panel or whether the president or Cabinet secretary has the discretion to make the appointments from those organisations directly. The independence of the selection panel is largely determined by this critical issue and it is therefore unfortunate that the KIC Act is so vague in this regard.

The KIC Act authorises the Cabinet secretary, in consultation with the CA, to make regulations affecting many aspects of broadcasting in Kenya. The words 'in consultation with' mean that the CA essentially has a veto over regulations made by the Cabinet secretary.

Section 5B(5) of the KIC Act gives the CA authority to make regulations for the better carrying out of the provisions of section 5B, which requires the CA to comply with

various constitutional provisions in undertaking its functions under the KIC Act. Consequently, it appears that the CA may make regulations on its own and also has veto powers in respect of regulations made by the Cabinet secretary.

## THE MEDIA COUNCIL OF KENYA

Section 11 of the Media Council Act specifies that the Media Council is independent of control by government, political or commercial interests. This statement is a strong indication of independence, and section 7(3) of the Media Council Act supports this view as the members of the selection panel, which recommends board appointments, are nominated by their individual organisations without government intervention.

The Media Council Act authorises the Cabinet secretary, in consultation with the Media Council, to make regulations for the better carrying out of the provisions of the act. The words 'in consultation with' mean that the Media Council essentially has a veto over regulations made by the Cabinet secretary.

## THE COMPLAINTS COMMISSION

Section 30 of the Media Council Act specifies that the Complaints Commission is independent in its operations and shall be guided by the provisions of article 159 of the Constitution. This statement is a strong indication of independence, and section 7(3) of the Media Council Act supports this view as the members of the selection panel, which recommends appointments to the Complaints Commission, are nominated by their individual organisations without government intervention.

## THE COMMUNICATIONS AND MULTIMEDIA APPEALS TRIBUNAL

It is unfortunate that the provisions of the KIC Act are unclear as to how the members of the selection panel, which recommends Tribunal appointments, are appointed. In this regard, it is extremely unclear whether or not the organisations whose representatives make up the selection panel are able to nominate their representatives to the selection panel or whether the Cabinet secretary has the discretion to make the appointments from those organisations directly. The independence of the selection panel is largely determined by this critical issue and it is therefore unfortunate that the KIC Act is so vague in this regard.

### **3.6.9 Amending the legislation to strengthen the broadcast media generally**

The legislation in place in Kenya is remarkably restrictive, particularly considering the media freedoms and protections within the Kenyan Constitution.

- The Media Council and the CA ought to be empowered to make their own regulations without executive intervention.
- The Media Council Act ought to be amended to allow for self-regulation in respect of content published in the print media. Given that the importance of self-regulation of content matters has been recognised in the KIC Act, it is surprising that similar recognition has not been afforded to the print media.

### **3.7 Legislation that regulates the state broadcaster**

State broadcasting in Kenya is regulated in terms of:

- The Kenya Broadcasting Corporation Act, CAP 221 of 1988 (KBC Act)
- The Kenya Information and Communications Act, CAP 411A of 1998 (KIC Act).

#### **3.7.1 Establishment of the Kenya Broadcasting Corporation**

The Kenya Broadcasting Corporation (KBC) is established in terms of section 3 of the Kenya Broadcasting Corporation Act, CAP 221 of 1988 (KBC Act) as a corporation which is a body corporate with perpetual succession and which has the power to sue and be sued in its corporate name, and to hold property.

A reference to the minister in the KBC Act should be construed as a reference to the relevant Cabinet secretary.

#### **3.7.2 The KBC's mandate**

The KBC is designated as the ‘public broadcaster’ and is required to provide ‘public broadcasting services’, in terms of section 46E of the KIC Act. According to section 8(1) of the KBC Act, the KBC’s duties include:

- Providing independent and impartial broadcasting services of information, education and entertainment in English, Kiswahili and any other languages the KBC may decide upon
- Providing an external broadcasting service for reception in countries outside Kenya, should the minister responsible for the administration of the KBC Act (the minister) require it
- Advising the government on all matters relating to the broadcasting services and the KBC generally

- Appointing and entering into agreements with such contractors and artistes as may be necessary for the purposes of the KBC Act
- Conducting broadcasting services with impartial attention to the interests and susceptibilities of the different communities in Kenya
- Providing facilities for commercial advertising and for the production of commercial programmes at a fee and time the KBC may determine
- Including in its sound and television programmes a daily service of news broadcast in English, Kiswahili and any other languages the KBC may decide upon
- Keeping a fair balance in all respects in the allocation of broadcasting hours between different political viewpoints
- In consultation with the Electoral Commission, during the campaign period preceding any presidential, parliamentary or local government election, allocating free air time to registered political parties participating in the election to expound their policies.

Section 8(2) empowers the KBC, among other things, to:

- Produce, manufacture, purchase or otherwise acquire and sell or otherwise dispose of all materials and apparatus for use in connection with broadcasting services
- Collect news and information in or from any part of the world and in any manner that may be thought fit and to establish and subscribe to news agencies
- Complete, publish, print and distribute matter conducive to the performance of its duties, or to enter into a contract with any person for that purpose
- Accept for broadcasting, with or without charge, advertisements and announcements which do not conflict with the general policy of the KBC
- Make available to broadcasting organisations the use of its sound and television studios, upon terms it may determine, for the purpose of preparing programmes for broadcasting
- Carry on or operate such services, including wired distribution services, as are conducive to the exercise of its duties

- With the approval of the minister, establish companies whose objects include any of the KBC's powers, functions or duties whose business is capable of being carried on in such a way as to facilitate or advance those powers, functions or duties, and to purchase or otherwise acquire stocks, shares or securities of, and subsidise and assist, the companies.

In terms of section 9(1) of the act, the KBC is the successor in title to the government operating under the now-repealed Kenya Broadcasting Corporation (Nationalization) Act, 1967 (CAP 221).

The managing director of the KBC has the authority to plan, regulate and control the content and balance of all broadcasts by the KBC – section 11(2)(b).

In terms of section 14, the minister may, by written instruction, supply announcements or programmes of national importance by sound or television that the KBC is required to broadcast. Section 14(2) permits the KBC to choose whether or not to announce that the broadcast is at the request of the minister.

### **3.7.3 Appointment of the KBC's Board**

In terms of section 4 of the KBC Act, the board of directors consists of:

- A chairman, appointed by the president
- The managing director, who is appointed by the minister after consultation with the board – section 5(1). Control and executive management of the KBC is vested in him or her – section 11(1)
- The permanent secretary in the ministry responsible for information and broadcasting
- The permanent secretary in the Office of the President
- The permanent secretary in the ministry responsible for finance
- Up to seven members appointed by the minister:
  - They may not be employees of the KBC
  - No more than three may be public officers
  - At least one must have knowledge or experience with radio communication and apparatus
  - At least one must have knowledge or experience of radio or television programme production

- At least one must have knowledge or experience in the print media
- At least one must have knowledge or experience of financial management and administration.

Each board member holds office for three years and is eligible for reappointment – First Schedule, section 1. A board member may be removed from office by the minister for non-attendance of meetings, or if he/she is incapacitated physically or mentally, or is otherwise unable or unfit to discharge the functions of a director – First Schedule, section 2.

The board may establish one or more advisory councils of at least seven members to advise the board on any matter concerning the broadcasting service of the KBC – section 12(1)–(2). According to the provisions relating to advisory councils in the Second Schedule of the KBC Act, members of advisory councils hold office for up to three years (section 1), and may be removed from office for incapacity or if he/she is, in the opinion of the board, unfit or unqualified to continue in office.

### **3.7.4 Funding for the KBC**

Section 37 of the KBC Act states that the government may make grants to the KBC, though section 38(1) requires that the KBC conduct its business according to commercial principles. The KBC may invest moneys in securities – section 38(3) – and section 39 gives the KBC permission to borrow money by the issue of loan stock on such terms as may be approved by the minister responsible for finance. All the funds, assets and other movable and immovable property of the ‘Voice of Kenya’ became vested in the KBC, according to section 54(1).

According to section 43(3), the accounts of the KBC have to be audited and reported upon annually by the auditor general (corporations). It is noteworthy that in April 2016 the auditor general declared the KBC insolvent.<sup>22</sup>

### **3.7.5 The KBC: Public or state broadcaster?**

Despite requirements for ‘impartiality’ and ‘independence’ in section 8(1)(a) and (f), and 10(1) of the KBC Act, the KBC cannot be said to be a public broadcaster. The board is appointed by the president and the minister, and no public nominations process or shortlisting by a multi-party body such as the National Assembly takes place in respect of board appointments.

According to section 16(1), the corporation is required to employ such public officers as may be seconded to it by the government. Under section 16(2), the government

may at any time determine the secondment of any public officer to the KBC. The KBC may also request the secondment of such an officer.

Section 51 of the KBC Act specifies that the Protected Areas Act, CAP 204 of 1949, applies to the grounds, buildings and installations of the KBC, as though an order for their protection had been made under section 3 of that act. The Protected Areas Act permits persons entering such protected areas to be searched, detained, arrested or removed by the police. These kinds of protections are typical of strategically important government sites, and thus lend weight to viewing the KBC as a state broadcaster.

In terms of section 14, the minister may, by written instruction, supply announcements or programmes of national importance by sound or television that the KBC is required to broadcast. Section 14(2) permits the KBC to choose whether or not to announce that the broadcast is at the request of the minister.

Further, the minister, after consultation with the board, makes regulations for the KBC – section 53. The effect of the words ‘after consultation’ is that the board does not have a veto in respect of such regulations.

### **3.8 Legislation governing broadcasting signal distribution**

Signal distribution is the physical process of delivering the signal from a broadcasting studio to the audience. According to section 46N of the KIC Act, no person may provide signal distribution services within Kenya or from Kenya to other countries except in accordance with a licence issued by the CA. Any person who contravenes this requirement is guilty of an offence and is liable to a fine, imprisonment or both.

The CA’s Broadcasting Market Structure<sup>23</sup> document recognises the following categories in this sector, and application forms and guidelines may be downloaded from the CA website:<sup>24</sup>

- National broadcast signal distribution (licence duration: 15 years)
- Self-provisioning broadcast signal distribution (licence duration: 15 years)

Section 46O authorises the CA to set conditions on the granting of a signal distribution licence, and these conditions may include:

- Providing signal distribution services as a common carrier to broadcasting licensees
- Providing services promptly and in an equitable and non-discriminatory manner

- Providing capability for a diversity of broadcast services
- Providing an open network that is interoperable with other signal distribution networks
- Complying with the specific nature and location of transmitters and their transmission characteristics
- Any other conditions the CA may determine.

Non-compliance with any specified condition is an offence, punishable with a fine, imprisonment or both.

### **3.9 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.

Kenya has yet to enact specific whistleblower protection legislation, though significant protection is offered to whistleblowers in the recently passed Access to Information Act, which is discussed elsewhere in this chapter.

#### **❖ The Penal Code, CAP 63 of 1930**

The Penal Code was enacted prior to Kenya's independence but has been amended numerous times since then. The 2012 revision, which followed the 2010 revision of the Constitution, provides that any person who, having been called upon to give evidence in a judicial proceeding, and fails to do so, is guilty of an offence and liable to imprisonment under section 121(1)(b), though section 121(2) also provides for the option of a fine or both penalties in the case of this offence.

#### **❖ The Media Council Act, Act 46 of 2013**

Any person aggrieved by a publication or the conduct of a journalist may complain to the Complaints Commission, according to section 34(1)(a). The Complaints

Commission has the power to summon and receive information and evidence, to require any person to give it assistance in the investigation of a complaint made under the Media Council Act, or summon anyone to appear before it for examination on matters relevant to an investigation of a complaint, according to section 33. Section 49(1) provides that the penalty for a contravention of the Media Council Act is a fine, imprisonment or both, where no specific penalty is otherwise specified.

❖ **The National Cohesion and Integration Act, Act 12 of 2008**

In terms of section 27, the National Cohesion and Integration Commission (NCIC) (established under section 15 of the NCI Act) has the power to summon witnesses, to call for the production of books, plans and other documents, and to examine witnesses and parties on oath. Section 29 specifies that any person summoned to attend and give evidence at a sitting of this commission is bound to obey the summons as if it were served by the High Court. In terms of section 58, the NCIC may apply to a magistrates' court for an order requiring a person to furnish any information required by a compliance notice if the person fails to furnish the information, or if the NCIC has reasonable cause to believe that the person does not intend to furnish the information.

❖ **Commission on Administrative Justice Act, No. 23 of 2011**

Under section 27(c), the Commission on Administrative Justice (CAJ) has the powers of a court to require any person to disclose any information within the person's knowledge that may be relevant to any investigation by the CAJ. Section 27(a) gives the CAJ the power to issue summonses or other orders requiring attendance of any person before the CAJ and the production of any document or record relevant to any investigation by the body.

❖ **The National Intelligence Service Act, No. 28 of 2012**

The 2014 Amendments to the National Intelligence Service Act provides for a new section 42(2) which empowers the director general of the Intelligence Service, subject to guidelines approved by the National Intelligence Service Council and accompanied by a warrant from the High Court, to issue a written authorisation valid for 180 days, to an intelligence officer empowering him or her to, among other things, obtain any information, material, record or document and for that purpose to enter into any place or obtain access to anything, search for, remove, examine or take extracts from or make copies of all records, information, document or thing, or to monitor communications.

❖ **The Prevention of Terrorism Act, No. 30 of 2012**

The 2014 Amendments to the Prevention of Terrorism Act provides for a new section 36A(1) which empowers the National Security Organs (the Kenya Defence Forces, the National Intelligence Service and the National Police Service) to intercept

communication for the purposes of detecting, deterring and disrupting terrorism. This has obvious implications for a journalist's need to protect his or her sources.

In a very serious legislative amendment, section 36A(3) of the Prevention of Terrorism Act purports to limit article 31 of the Constitution (providing for the right to privacy) for the purposes of intercepting communication directly relevant in the detecting, deterring and disrupting of terrorism. The effect of this provision is to undermine the supremacy clause in Kenya's Constitution (article 2(1)). It is for a court to determine that a legislative provision is a justifiable limitation of a right provided for in the Constitution and not the legislature by way of a statutory provision.

It is, however, 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 or the right to freedom of the media will depend on the particular circumstances in each case, particularly on whether or not the information is available from any other source. It is therefore extremely difficult to state that these provisions are, by themselves, a violation of the rights to freedom of expression and to the media under the Constitution.

### **3.10 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, including:

- Prohibition of publications relating to judicial proceedings
- Prohibition of publications that discredit the judiciary and judicial organs
- Prohibition of publications that undermine the authority of a public officer
- Prohibition of publications that constitute treason
- Prohibition of publications that are contrary to the interests of public order
- Prohibition of publications that contain certain election-related information
- Prohibition of publications that constitute hate speech
- Prohibition of publications that are contrary to the interests of public health

- Prohibition of publications relating to sexual offences
- Prohibition of publications that are contrary to the interests of the defence or security of Kenya
- Prohibition of publications that constitute encouragement of terrorism
- Prohibition of publications that contain alarming information
- Prohibition of publications that constitute incitement to violence and disobedience of the law
- Prohibition of publications that are contrary to the interests of public morals
- Prohibition of publications that constitute obscenity and pornography
- Prohibition of publications that constitute incitement to boycott
- Prohibition of publications that contain subversive information
- Prohibition of publications affecting relations with foreign states and external tranquillity
- Prohibition of publications that do not correctly identify the publisher and printer
- Prohibition of publications that constitute criminal defamation.

### **3.10.1 Prohibition of publications relating to judicial proceedings**

#### **❖ Penal Code, CAP 63 of 1930**

##### ***Information directed to be held in private***

Any person who publishes a report of the evidence taken in any judicial proceeding, which has been directed to be held in private, is guilty of an offence punishable by imprisonment – section 121(1)(e). This is deemed, according to section 121(3), to be in addition to and not in derogation from the power of the High Court to punish for contempt of court.

#### **❖ Sexual Offences Act, No. 3 of 2006**

##### ***Information identifying the victim of a sexual offence or the victim's family***

Under section 31(4)(d), a court in criminal proceedings involving the alleged commission of a sexual offence may, on declaring a witness vulnerable according to

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the specifications of section 31, prohibit the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to their identification.

Any person, including a juristic person, who publishes any information in contravention of section 31, contrary to any direction of the court, or in any manner reveals the identity of a witness contrary to any direction of the court, commits an offence punishable by imprisonment, a fine or both. The fine imposed is greater if the person identified or published about is under 18 years of age – section 31(11). Any juristic person convicted of such an offence is liable to a fine – section 31(12).

### **3.10.2 Prohibition of publications that discredit the judiciary and judicial organs**

#### **❖ Penal Code, CAP 63 of 1930**

Insulting a judicial officer is an offence in terms of article 586 of the Penal Code, and the punishment is a period of imprisonment, a fine or both. Further, publicly discrediting a judicial decision using words, writings, images or any acts (article 588) is an offence. The punishment is a period of imprisonment, a fine or both.

### **3.10.3 Prohibition of publications that undermine the authority of a public officer**

#### **❖ Penal Code, CAP 63 of 1930**

Uttering, printing or publishing any words or doing anything calculated to bring into contempt or to excite defiance of the lawful authority of a public officer is an offence punishable by imprisonment – section 132.

### **3.10.4 Prohibition of publications that contain certain election-related information**

#### **❖ Elections Act, Act 41 of 2011**

Section 41 of the Elections Act specifically prohibits exit polls from being published or distributed during the prescribed hours for an election – that is, while voting is actually taking place.

### **3.10.5 Prohibition of publications that constitute treason**

#### **❖ Penal Code, CAP 63 of 1930**

Section 40(1)(b) of the Penal Code states that any person who expresses, utters or declares any compassings, imaginations, inventions, devices or intentions by publishing any printing or writing which intends harm or imprisonment to the president, deposing of the president or overthrow of the government is guilty of the offence of treason. The offence of treason is punishable by death, according to section 40(3).

### **3.10.6 Prohibition of publications that are contrary to the interests of public order**

#### **❖ Penal Code, CAP 63 of 1930**

Section 52(1) of the Penal Code prohibits the importation of any publication that is judged by the minister to be against the interests of public order. Section 52(2) authorises the minister, on reasonable grounds justifiable in a democratic society and in the interest of public order, to declare any publication to be a prohibited publication. Both sections require an order to be published in the Gazette. Being in possession of a prohibited publication is an offence punishable with imprisonment – section 53(1).

New section 66A(1) of the Penal Code makes it an offence to publish, broadcast or distribute through print, digital or electronic means, insulting, threatening or inciting material or images of dead or injured persons which are ‘likely to ... disturb public peace’. The offence is punishable upon conviction by a fine, a period of imprisonment or both.

In a very serious legislative amendment, section 66A(3) of the Penal Code purports to limit articles 33 and 34 of the Constitution (providing for freedom of expression and the media) for material likely to disturb public peace. The effect of this provision is to undermine the supremacy clause in Kenya’s Constitution (article 2(1)). It is for a court to determine that a legislative provision is a justifiable limitation of a right provided for in the Constitution and not the legislature by way of a statutory provision.

### **3.10.7 Prohibition of publications that constitute hate speech**

#### **❖ The Kenya Information and Communications Act, CAP 411A of 1998**

Under section 5B(4), the right to freedom of expression does not extend to the spread of hate speech or the advocacy of hatred that constitutes ethnic incitement, vilification of other persons or communities, or any ground of discrimination specified or contemplated in article 27(4) of the Constitution.

#### **❖ The National Cohesion and Integration Act, Act 12 of 2008**

A person who:

- Publishes or distributes written material
- Distributes, shows or plays a recording of visual images
- Provides, produces or directs a programme which is threatening, abusive or insulting,

commits an offence if the intention is to stir up ethnic hatred or, having regard to all

the circumstances, ethnic hatred is likely to be stirred up – section 13. In this section, ‘ethnic hatred’ includes hatred against persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins. The offence is punishable by a fine, imprisonment or both.

In terms of section 62, a newspaper, radio station or media enterprise that publishes utterances intended to incite feelings of contempt, hatred, hostility, violence or discrimination against any person, group or community on the basis of ethnicity or race, commits an offence and is liable to a fine.

### **3.10.8 Prohibition of publications that are contrary to the interests of public health**

#### **❖ Penal Code, CAP 63 of 1930**

Section 52(1) of the Penal Code prohibits the importation of any publication that is judged by the minister to be against the interests of public health. Section 52(2) authorises the minister, on reasonable grounds justifiable in a democratic society and in the interest of public health, to declare any publication to be a prohibited publication. Both sections require an order to be published in the Gazette. Being in possession of a prohibited publication is an offence punishable with imprisonment – section 53(1).

### **3.10.9 Prohibition of publications relating to sexual offences**

#### **❖ Sexual Offences Act, No. 3 of 2006**

Section 14(b) states that any person, including a juristic person, who prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that would constitute a sexual offence against a child is guilty of an offence which is punishable by imprisonment, and where the accused is a juristic person, to a fine. The same penalty is specified under section 19(3)(b) for such conduct relating to a person with disabilities, though the accused individual does have the option of a fine.

### **3.10.10 Prohibition of publications that are contrary to the interests of the defence or security of Kenya**

#### **❖ Penal Code, CAP 63 of 1930**

Section 52(1) of the Penal Code prohibits the importation of any publication that is judged by the minister to be against the interests of the security of Kenya. Section 52(2) authorises the minister, on reasonable grounds justifiable in a democratic society and in the interest of the defence of Kenya, to declare any publication to be a prohibited publication. Both sections require an order to be published in the Gazette.

Being in possession of a prohibited publication is an offence punishable with imprisonment – section 53(1).

New section 66A(2) of the Penal Code makes it an offence to publish or broadcast any information which undermines investigations or security operations by the National Police Service or the Kenya Defence Forces. The offence is punishable upon conviction by a fine, a period of imprisonment or both.

❖ **Preservation of Public Security Act, CAP 57 of 1960**

Section 4(2)(d) of the Public Security Act specifies that regulations for the preservation of public security may make provision for the censorship, control or prohibition of the communication of any information, or of any means of communicating or of recording ideas or information, including any publication or document, and the prevention of the dissemination of false reports.

It should be noted that under section 7(2), regulations made under this act may make provision for the apprehension and punishment of anyone offending against the regulations. The section further states that these penalties may exceed those otherwise permitted by law to be imposed by regulations, and may include the death penalty and the forfeiture of any property connected in any way with the offence.

❖ **The Prevention of Terrorism Act, No. 30 of 2012**

The 2014 amendments to the Prevention of Terrorism Act provides for a new section 30F(1), which makes it an offence to broadcast any information which undermines investigations or security operations relating to terrorism, without authorisation from the National Police Service. The offence is punishable upon conviction by a fine, a period of imprisonment or both.

In terms of section 30F(2), any person who publishes or broadcasts photographs of victims of a terrorist attack without the consent of the National Police Service and of the victim commits an offence. The offence is punishable upon conviction by a fine, a period of imprisonment or both.

❖ **Official Secrets Act, CAP 187 of 1968**

Section 3(1)(c) states that any person who, for any purpose prejudicial to the safety or interests of Kenya ‘obtains, collects, records, publishes or communicates in whatever manner to any other person any code word, plan, article, document or information which is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power or disaffected person, is guilty of an offence’.

Section 3(2) makes it an offence to take a photograph of or in a prohibited place

without having obtained the authority of the officer in charge of that place. These offences are both punishable by imprisonment. A warrant is not required for the arrest of any person suspected of having, or being about to commit, an offence under the Official Secrets Act – section 17(1).

### **3.10.11 Prohibition of publications that constitute encouragement of terrorism**

#### **❖ The Prevention of Terrorism Act, No. 30 of 2012**

The 2014 Amendments to the Prevention of Terrorism Act provide for a new section 30A which makes it an offence to publish a statement that is likely to be understood as directly or indirectly encouraging, or inducing another person to commit or prepare to commit, an act of terrorism. The offence is punishable upon conviction by a period of imprisonment.

### **3.10.12 Prohibition of publications that contain alarming information**

#### **❖ Penal Code, CAP 63 of 1930**

Any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace is guilty of a misdemeanour. However, proving that measures were taken prior to publication to verify the accuracy of the published item which led to the belief that the information was true is regarded as a defence – section 66.

New section 66A(1) of the Penal Code makes it an offence to publish, broadcast or distribute through print, digital or electronic means, insulting, threatening or inciting material or images of dead or injured persons which are likely to cause fear and alarm to the general public. The offence is punishable upon conviction by a fine, a period of imprisonment or both.

In a very serious legislative amendment, section 66A(3) of the Penal Code purports to limit articles 33 and 34 of the Constitution (providing for freedom of expression and the media) for material likely to cause public alarm. The effect of this provision is to undermine the supremacy clause in Kenya's Constitution (article 2(1)). It is for a court to determine that a legislative provision is a justifiable limitation of a right provided for in the Constitution and not the legislature by way of a statutory provision.

### **3.10.13 Prohibition of publications that constitute incitement to violence and disobedience of the law**

#### **❖ Penal Code, CAP 63 of 1930**

An offence is committed by any person who prints, publishes, utters any words or

does any act indicating or implying that it might be desirable to do, or omit to do (the omission of which would bring harm) anything that is calculated to:

- Bring death or physical injury to any person or group of persons
- Lead to damage or destruction of property
- Prevent the enforcement or execution of any written law, or lead to defiance or disobedience of lawful authority.

The offence is punishable by imprisonment – section 96.

### **3.10.14 Prohibition of publications that are contrary to the interests of public morals**

#### **❖ Penal Code, CAP 63 of 1930**

Section 52(1) of the Penal Code prohibits the importation of any publication that is judged by the minister to be against the interests of public morals. Section 52(2) authorises the minister, on reasonable grounds justifiable in a democratic society and in the interest of public morals, to declare any publication to be a prohibited publication. Both sections require an order to be published in the Gazette. Being in possession of a prohibited publication is an offence punishable with imprisonment – section 53(1).

### **3.10.15 Prohibition of publications that constitute obscenity and pornography**

#### **❖ Penal Code, CAP 63 of 1930**

Under section 181, any person who makes, produces or has in his possession obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene object or objects tending to corrupt morals, or publicly exhibits any indecent show or performance, is guilty of a misdemeanour and is liable to imprisonment or a fine.

#### **❖ Sexual Offences Act, Act 3 of 2006**

Section 16(1) states that any person, including a juristic person, who ‘... publicly exhibits or puts into circulation ... makes, produces or has in his or her possession any obscene book, pamphlet, paper, drawing, painting, art, representation or figure or any other obscene object whatsoever which depicts the image of any child’ is guilty of an offence which is punishable by imprisonment, a fine or both. A subsequent conviction is punishable by longer imprisonment without the option of a fine. Under section 16(3), the item shall be deemed obscene if it appeals to the ‘prurient interest’, or if it ‘tends to deprave and corrupt persons’.

Section 4(1) of the Sexual Offences Regulations, 2008, which are published as

subsidiary legislation to the Sexual Offences Act, specifies that the articles referred to in section 16 of the Sexual Offences Act include those articles prohibited under section 52(1)–(2) of the Penal Code. Further, according to section 4(3) of the Regulations, the minister of matters relating to legal affairs and prosecutions may, in consultation with the Prohibited Publications Review Board, and by an order in the Gazette, prohibit other publications for purposes of section 16 of the Sexual Offences Act.

❖ **The Kenya Information and Communications Act, CAP 411A of 1998**

In terms of section 84D of the KIC Act, any person who publishes or transmits or causes to be published in electronic form, any material which is lascivious or appeals to the prurient interest, and its effect is likely to deprave and corrupt persons who read, see or hear the matter, is liable to a fine, imprisonment or both.

### **3.10.16 Prohibition of publications that constitute incitement to boycott**

❖ **Penal Code, CAP 63 of 1930**

An offence is committed by any person who, by word of mouth, publicly, or by making a publication – as defined in section 98(7) – advises, induces or persuades people to take an action furthering a boycott, or attempts to do so. Unless the contrary is proved, any publication is deemed to be made with the intention of furthering the designated boycott – section 98(3). The offence is punishable by imprisonment, according to section 98(2).

### **3.10.17 Prohibition of publications that contain subversive information**

❖ **Penal Code, CAP 63 of 1930**

Under section 77(1), any person who utters any words with a subversive intention is guilty of an offence and liable to imprisonment. Subversive activities under section 77(3) include:

- Supporting, propagating or advocating any act or thing prejudicial to the public order, the security of Kenya or administrative justice
- Inciting violence or counselling defiance of or disobedience to the law or lawful authority
- Indicating, expressly or by implication, any connection, association or affiliation with, or support of, any unlawful society
- Anything intended to promote feelings of hatred or enmity between the different races and communities in Kenya. This provision does not extend to comments or

criticisms made in good faith with a view to removal of any causes of hatred or enmity between races or communities

- Anything intended to bring into hatred or contempt or to excite disaffection against any public officer or class of public officers in the execution of his duty. This provision does not extend to comments or criticisms made in good faith with a view to the remedying or correction of errors, defects or misconduct on the part of the public officer or officers.

### **3.10.18 Prohibition of publications affecting relations with foreign states and external tranquillity**

❖ **Penal Code, CAP 63 of 1930**

Publication of anything intended to be read, or any sign or visible representation tending to degrade, revile or expose to hatred or contempt any foreign prince, potentate, ambassador or other foreign dignitary with the intent to disturb peace and friendship between Kenya and the country of the prince or dignitary, is a misdemeanour, according to section 67.

### **3.10.19 Prohibition of publications that do not correctly identify the publisher and printer**

❖ **Books and Newspapers Act, CAP 111 of 1960**

Every book and every newspaper printed within Kenya has to have printed legibly in English on its first or last printed page the:

- Name address of its printer
- Name and address of its publisher
- Name of the place in which it is printed
- Name of the place in which it is published – section 17(1).

Any person who prints, publishes, sells, distributes or assists in selling or distributing any book or newspaper which does not comply with this requirement is guilty of an offence punishable by a fine, imprisonment or both – section 17(2).

Further, the court may order all copies of the book or newspaper in the custody of the court or in the possession of the offender to be forfeited or destroyed.

### **3.10.20 Prohibition of publications that constitute criminal defamation**

Chapter XVIII of the Penal Code, CAP 63 of 1930 deals with defamation and libel in detail.

## WHAT IS CRIMINAL DEFAMATION?

Section 194 of the Penal Code provides for the misdemeanour offence of libel, which is, in the part that is relevant for the media, the unlawful publication by print, writing or effigy, or by any means otherwise than solely by gestures, spoken words or other sounds, of any defamatory matter concerning another person with the intent to defame that other person.

Defamatory matter itself is defined in section 195 as matter likely to injure the reputation of any person in his profession or trade by an injury to his reputation. It is immaterial whether the defamed person is living or dead at the time of the publication.

Publication of libel is regarded as 'causing the print, writing, painting, effigy or other means by which the defamatory matter is conveyed ... either by exhibition, reading, recitation, description, delivery or otherwise, that the defamatory meaning becomes known, or is likely to become known' to the defamed person or any other person. It is not necessary that the defamatory meaning be directly or completely expressed. It suffices if the meaning and person alleged to be defamed can be collected either from the alleged libel itself or from any intrinsic circumstances, or a combination of the two – section 196.

## WHEN WILL THE PUBLICATION OF DEFAMATORY MATTER BE LAWFUL?

Under section 197, the publication of defamatory matter is unlawful unless:

- The matter is true and it is in the public interest that it be published
- It is privileged.

## ABSOLUTE PRIVILEGE

The publication of defamatory matter is absolutely privileged, according to section 198, therefore, no person is liable to punishment if the matter is published:

- By the president, the Cabinet of ministers, in Parliament or in an official document of proceedings therefrom
- In the Cabinet of ministers, in Parliament, in any case by the president, a minister or an MP
- By order of the president or the Cabinet of ministers

- Concerning a person subject to military or naval discipline and relates to his conduct as a person subject to such discipline and is published by someone in authority over him
- In the course of any judicial proceedings, by a person taking part therein as a judge, magistrate, commissioner, advocate, assessor, witness or party thereto
- Is in fact a fair report of anything said, done or published in the Cabinet of ministers or in Parliament
- By a person legally bound to publish it.

Where a publication is absolutely privileged, it is immaterial whether the matter be true, false, known or not known or believed to be false, and whether or not it is published in good faith.

### CONDITIONAL PRIVILEGE

According to section 199, publication of defamatory matter is privileged provided:

- It was published in good faith
- The party who published it is under legal, moral or social duty to publish it to the person to whom the publication is made
- The publisher has a legitimate personal interest in so publishing, on condition that the publication does not exceed either in extent or matter what is reasonably sufficient for the occasion
- One of the following cases applies:
  - It is a fair report of any court proceedings not held in camera. It should be noted that this specifically excludes anything on which the court prohibits publication on the grounds that it is seditious, immoral or blasphemous
  - The matter published is a copy, reproduction or fair abstracts of any matter which has been previously published which was absolutely privileged, as per section 198
  - It is an expression of opinion in good faith as to the conduct of a person in a judicial, official or other public capacity, or as to his or her personal character so far as it appears in such conduct

- It is an expression of opinion in good faith as to the conduct of a person in relation to any public question or matter, or as to his personal character as it appears in such conduct
- It is an expression of opinion in good faith as to the conduct of any person as disclosed by evidence given in a public legal proceeding, or as to the character of any person so far as it appears in any such conduct
- It is an expression of opinion in good faith as to the merits of any book, writing, painting, speech or other work, performance or act published or publicly done or made or submitted by a person to the judgment of the public, or as to the character of the person so far as it appears therein
- It is a censure passed by a person in good faith on the conduct of another person in any matter in respect of which he or she has authority over the other person, or on the character of the other person so far as it appears in such conduct
- It is a complaint or accusation made by a person in good faith against another person in respect of his or her conduct in any matter, or in respect of his or her character so far as it appears in such conduct, to any person having authority over that other person in respect of such conduct or matter, or having authority by law to inquire into or receive complaints respecting such conduct or matter
- It is published in good faith for the protection of the rights or interests of: the person who publishes it; the person to whom it is published; or of some person in whom the person to whom it is published is interested.

## DEFINITION OF GOOD FAITH

In terms of section 200 of the Penal Code, a publication of defamatory matter shall be deemed not to have been made in good faith if:

- The matter is untrue, and the person publishing it did not believe it to be true
- The matter is untrue, and it was published without reasonable care being taken to ascertain whether it was true or false
- In publishing the matter, the person who published it intended to injure the person defamed in a substantially greater degree or substantially more than was reasonably necessary for the public interest or for the protection of the private right or interest in respect of which he claims to be privileged.

### **3.11 Legislation relating to the interception of communication**

The growth of wireless and cellular communications, along with advances in ITCs raises the possibility of the monitoring, recording and intercepting of communications by the media and others, including government.

#### **❖ The Kenya Information and Communications Act, CAP 411A of 1998**

The Kenya Information and Communications Act, CAP 411A of 1998, provides in section 83W(1)(b) that any person who by any means knowingly intercepts or causes to be intercepted, directly or indirectly, any function of, or data within a computer system, commits an offence, and is liable to a fine, imprisonment or both – section 83W(2). However, according to section 83W(5)(b), a person is not liable to punishment if he or she is acting in reliance of any statutory power to do so.

Any person who discloses access codes or any other means of gaining access to any information in a computer, knowing that the disclosure is likely to cause prejudice to any person, commits an offence and is liable to a fine, imprisonment or both – section 83Z.

#### **❖ The Prevention of Terrorism Act, No. 30 of 2012**

The 2014 Amendments to the Prevention of Terrorism Act provide for a new section 36A(1) which empowers the National Security Organs (the Kenya Defence Forces, the National Intelligence Service and the National Police Service) to intercept communication for the purposes of detecting, deterring and disrupting terrorism.

In a very serious legislative amendment, section 36A(3) of the Prevention of Terrorism Act purports to limit article 31 of the Constitution (providing for the right to privacy) for the purposes of intercepting communication directly relevant in the detecting, deterring and disrupting of terrorism. The effect of this provision is to undermine the supremacy clause in Kenya's Constitution (article 2(1)). It is for a court to determine that a legislative provision is a justifiable limitation of a right provided for in the Constitution and not the legislature by way of a statutory provision.

### **3.12 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.

Kenya has yet to enact specific whistleblower protection legislation, though significant protection is offered in the recently passed Access to Information Act, 2016.

❖ **Access to Information Act, 2016 (AI Act)**

On 31 August 2016, the president of Kenya signed into law the Access to Information Act, 2016.<sup>25</sup>

*Objectives of the legislation*

Access to information is guaranteed in the Kenyan Constitution, and the object of the AI Act, in terms of section 3(a), is to give effect to the right of access to information by citizens as provided under article 35 of the Constitution.

In line with constitutional requirements, it is further intended to – section 3(b)-(f):

- Provide a framework for public and private entities to proactively disclose information
- Provide a framework to facilitate access to information
- Promote routine and systematic disclosure of information, transparency and accountability
- Provide for the protection of persons who disclose information of public interest in good faith
- Provide a framework to facilitate public education on the right to access information under the AI Act.

The AI Act gives every citizen of Kenya the right to access of information. A 2012 High Court decision held that the word ‘citizen’ in article 35 of the Constitution applied to natural persons only, and thus juristic persons such as companies were excluded from the right. However, the AI Act of 2016 specifically includes ‘any private entity that is controlled by one or more Kenyan citizens’ in its definition of ‘citizen’, so companies, NGOs, etc. also have the right of access to information.

Section 4(1) gives every citizen the right to information held by:

- The state
- Another person and where that information is required for the exercise or protection of any right or fundamental freedom.

In terms of section 2, a ‘private body’ is defined as any private entity or non-state actor that:

- Receives public resources and benefits, utilises public funds, engages in public functions, provides public services, has exclusive contracts to exploit natural resources (with regard to said funds, functions, services or resources)
- Is in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right.

In terms of section 2, a ‘public entity’ is defined as:

- Any public office, as defined in article 260 of the Constitution
- Any entity performing a function within a commission, office, agency or other body established under the Constitution.

Importantly, in terms of section 4(2), this right of access to information is not affected by:

- Any reason the person gives for seeking access
- The public entity’s belief as to what the person’s reasons are for seeking access.

The legislative provisions applicable to public entities also apply to private bodies, with any ‘necessary modification’ – sections 10(4) and 11(4).

#### *Mandatory grounds for refusing access to information*

Under section 6(1), information must be withheld by a public entity or private body, where it is satisfied that disclosure of the information is likely to:

- Undermine the national security of Kenya – section 6(2)(a)–(l) specifies what falls into this category, including:
  - Military strategy, covert operations, doctrine, capability, capacity or deployment
  - Foreign government information with implications on national security
  - Intelligence activities, sources, capabilities, methods or cryptology
  - Foreign relations

- Scientific, technology or economic matters relating to national security
- Vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security
- Information obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime, enforcement of any law and activities suspected of constituting threats to national security
- Information between the national and county governments deemed to be injurious to the conduct of affairs of the two levels of government
- Cabinet deliberations and records
- Information that should be provided to a state organ, independent office or a constitutional commission when conducting investigations, examinations, audits or reviews in the performance of its functions
- Information that is referred to as classified information in the Kenya Defence Forces Act
- Any other information whose unauthorised disclosure would prejudice national security.

  

- Impede the due process of law or endanger the safety of life of any person
- Involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made
- Prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained. In terms of section 6(3), if the information relates to the results of any product or environmental testing, and the information concerned reveals a serious public safety or environmental risk, this ground for refusing access does not apply.
- Cause substantial harm to the ability of the government to manage the economy of Kenya. In terms of section 6(3), if the information relates to the results of any product or environmental testing, and the information concerned reveals a serious public safety or environmental risk, this ground for refusing access does not apply
- Significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration

- Damage a public entity's position in any actual or contemplated legal proceedings
- Infringe professional confidentiality as recognised in law or by the rules of a registered association of a profession.

***Public interest override to mandatory non-disclosure***

Despite the restrictions dealt with in section 6(1)–(2), a public entity or private body may be required to disclose information where the public interest outweighs the harm to the protected interests as determined by a court – section 6(4). In terms of section 6(6), when considering this public interest, particular regard must be had to the constitutional provisions to:

- Promote accountability
- Ensure effective oversight of expenditure of public funds
- Inform the public on issues of public health, safety or the environment
- Ensure any statutory authority with regulatory responsibilities adequately discharges its functions.

***Age-related override to mandatory non-disclosure***

Unless the contrary is proved by the public entity or private body, information is presumed not to be exempt if it has been held for more than 30 years – section 6(7).

***Public accessibility is a ground for refusing access to information that is otherwise disclosable***

A public entity is not obliged to supply information to a requester if that information is reasonably accessible by other means – section 6(5).

***Information provision that is mandatory***

Twelve months after commencement of the AI Act, section 5(1)(a) comes into effect – section 5(4). Section 5(1)(a) requires a public entity to facilitate access to information and details the information that the entity must make accessible, which includes:

- The particulars of its organisation, functions and duties
- The powers and duties of its officers and employees
- The procedure followed in the decision-making process, including channels of supervision and accountability
- Salary scales of its officers by grade

- The norms set by it for the discharge of its functions
- Any guidance used by it in its dealing with the public or with corporate bodies, including the rules, regulations, instructions, manuals and records held by it or under its control or used by its employees for discharging its functions
- A guide sufficient to enable any person wishing to apply for information under this act to identify the classes of information held by the body, the subjects to which they relate, and the location of any indexes to be consulted by any person.

Every year after section 5(1)(a) comes into effect, statements updating the information contained in the previous year's statements must be published – section 5(1)(b). Section 5(1) also contains critical requirements for information of relevance to the public in relation to policy development and decision-making by public entities. These include that:

- All relevant information must be communicated to the public or affected persons prior to the initiation of a project or formulation of a policy – section 5(1)(c)
- Reasons for any decision taken in relation to a person, must be provided to that person – section 5(1)(d).

Further, every public entity is required, in terms of section 17(2), to keep and maintain records that are accurate and are stored in a manner which facilitates the right of access to information. Section 17(3)(c) specifies that every public entity shall, not later than three years from the date on which the AI Act begins to apply, computerise its records and information management systems in order to facilitate more efficient access to information.

Upon signing any contract, a public entity has to publish on its website, or make available through other suitable means, the following particulars of the contract – section 5(1)(e):

- The public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and terms of reference
- The contract sum
- The name of the provider, contractor or individual to whom the contract has been granted

- The periods within which the contract shall be completed.

#### *Process for requesting information*

An information access officer must be appointed, according to the AI Act. This is the chief executive officer of a public entity, or these duties may be delegated by the chief executive officer to another officer of the public entity – section 7.

An application to access information must be made in writing in English or Kiswahili, and must contain sufficient particulars to make it clear what information is being requested – section 8(1). An applicant who is illiterate or who has a disability may make such a request orally, but then the information access officer is required to reduce the oral request to writing and provide the applicant with a copy of the request – section 8(2)–(3). A public entity may prescribe a form for making an application to access information, but no application may be rejected solely on the ground that the applicant has not used the prescribed form – section 8(4).

The timeframes specified in sections 9 and 10 regarding the decision as to whether the information will be provided are unclear and in some cases contradictory.

Section 9(1) states that, subject to section 10, a public officer must make a decision on an application within 21 days of receipt of the application. An information access officer may, within five days of receipt of the request, transfer the application or any relevant part of it, to another public entity if the information requested is held by that entity – section 10(1). Where an application is transferred, the information access officer must inform the applicant of the transfer within seven days of receipt of the application (presumably of the original) – section 10(2). The public entity to which the application has been transferred is then required to make a decision on the application within 21 days from the date that the application was first made – section 10(3).

As soon as the information officer has decided whether or not to provide access to the requested information, he or she is required to immediately communicate the decision to the requester – section 4. The information officer must indicate:

- Whether the public or private entity holds the requested information
- Whether the request has been approved
- If it has been declined, the reasons for the decision, including the reasons for considering the information exempt.

If the request is declined, the information officer must also issue a statement of how the requester may appeal to the Commission of Administrative Justice (CAJ).

In terms of section 14(1), an applicant may apply in writing to the CAJ requesting a review of the decision of a public or private entity to:

- Refuse to grant access to the information applied for
- Grant access to information in an edited form
- Purport to grant access, but not actually granting the access in accordance with an application
- Defer providing the access to information
- Grant access to only a specified person
- Refuse to correct, update or annotate a record of personal information in accordance with an application made under section 13, which relates to personal information held by a public or private entity.

Where the applicant does not receive a response to an application under section 9(1) within the specified period, the application shall be deemed to have been rejected – section 9(6).

Section 9(2) addresses not the decision-making timeframe, but the information provision timeframe, where the information sought concerns the life or liberty of a person. It specifies that the information must be provided within 48 hours of receipt of the application.

In term of section 9(3), the information officer to whom a request has been made under section 9(2) may extend this to a maximum of 14 days if:

- The application is complex
- The application is for a large volume of information
- The application requires a search through a large amount of information and meeting the stipulated time would unreasonably interfere with the activities of the information holder

- Consultations are necessary in order to comply with the request and they cannot be completed within the stipulated timeframe.

#### *Process for provision of information*

The AI Act requires information to be disseminated by the most effective method of communication in that local area, in the local language, easily accessible and available at no charge or at cost – section 5(2). According to section 5(3), at a minimum the material must be made available:

- For inspection by any person without charge
- By supplying a copy on request for which a reasonable charge to cover reproduction costs may be made
- On the internet, provided that the materials are held by the authority in electronic form.

Where a decision is taken to provide the requested information, the information officer must send the applicant a written response within 15 working days of the receipt of the request, and advise – section 11(1):

- That the application has been granted
- That the information will be contained in an edited copy, where applicable
- The details of any fees, or further fees, to be paid for access, together with the calculations made to arrive at the amount of the fee
- The method of payment of such fees
- The proposed process of accessing the information once the payment is made
- That an appeal may be made to the CAJ in respect of the amount of fees required or the form of access proposed – section 14(1). According to section 14(2), such an application must be made within 30 days from the day on which the decision is notified to the applicant, or within such a further period as the CAJ will allow.

Upon receipt of the required fee, the information must be produced forthwith at the place where it is kept in the form in which it is held. If the applicant requests that it be made available in another form and, if it is practicable to do so, this shall be done at the expense of the applicant – section 11(3). Section 11(2) states that the inform-

ation must be made available for inspection immediately, but in any event, not later than two working days from the date of receipt of the payment.

No fee may be levied for the submission of an application – section 12(1) – but the entity providing the information may charge a prescribed fee (not more than the cost of reproduction and delivery) for the provision of the information – section 12(2). Within those limitations, the Cabinet secretary responsible for matters relating to information makes regulations prescribing the fees payable – section 12(3).

#### *Offences in terms of the AI Act*

Where an application to access information has been made to a public entity under section 8 and the applicant would have been entitled, subject to payment of any fee, to provision of any information in accordance with that section, any employee, officer or individual subject to the direction of the public entity who alters, defaces, blocks, erases, destroys or conceals any record held by the public entity with the intention of preventing the disclosure of that information, commits an offence – section 18(1)–(2). Upon conviction, the person is liable to a fine, imprisonment or both – section 18(3).

In terms of section 16(8), in any proceedings for an offence relating to the disclosure of information, it is a defence to show that:

- The disclosure was in the public interest
- Before making the disclosure, the defendant had reasonable belief in the veracity of the information – section 16(3).

Where any information provided by a public entity or private body to an applicant under section 11 was supplied to the public entity or private body by a third person, the publication to the applicant of any defamatory matter contained in the information shall be privileged unless the publication is shown to have been made with malice – section 19.

Any person who provides false information maliciously, intending to injure another person, commits an offence and is liable, on conviction, to a fine, imprisonment or both – section 16(4).

#### *Enforcement of the AI Act*

Section 20 gives the CAJ powers of oversight and enforcement for the AI Act, and requires it to designate an access to information commissioner with specific responsibility of performing the functions assigned to the CAJ under the AI Act. Section 21(3) makes its decisions binding on the national and county governments.

Public entities and relevant private bodies are required to provide to the CAJ such reports as the Access to Information Act requires – section 23(7). The CAJ, in consultation with the public, must develop guidelines detailing reporting requirements – section 23(8) – and may request any further information from affected bodies to facilitate and enhance monitoring – section 23(9).

If an applicant for information is dissatisfied with the decision of an information access officer, he or she may within 30 days of the decision being communicated to him or her – section 14(2), or such time as the CAJ may allow, appeal to the CAJ in respect of the following decisions – section 14(1):

- Refusal to grant access to requested information
- Granting access in redacted form
- Purporting to grant access, but not actually granting access in accordance with an application
- Deferring providing the access to information
- Imposition of a fee or the amount of the fee
- Remission of application prescribed fee
- Granting of access to information only to a specified person
- Refusal to correct, update or annotate a record of personal information.

The CAJ may, on its own initiative or upon request by any person, review a decision by a public entity refusing to publish information that it is required to publish under the AI Act – section 14(3). The procedure for submitting a request for review by the CAJ is the same as the procedure for lodging complaints with the body, as detailed in section 22 – section 14(4). These may be lodged orally or in writing to the secretary or such other person as may be authorised by the CAJ for the purpose, and must be in a form and contain particulars as prescribed by the CAJ from time to time – section 22.

In terms of section 23(1), the CAJ has the power to:

- Issue summonses or other orders requiring attendance of any person before the CAJ, and the production of any document or record relevant to any investigation by the CAJ

- Question any person on any subject matter under investigation before the CAJ
- Require any person to disclose any information within such person's knowledge relevant to any investigation by the CAJ.

A person who fails to appear before the CAJ in accordance with any summons or order, knowingly gives false or misleading information or causes an obstruction in the course of the CAJ proceedings, commits an offence which is punishable with a fine, imprisonment for up to six months or both – section 28(8).

If the CAJ is satisfied that there has been an infringement of the provisions of the AI Act, it may order – section 23(2):

- The release of the information unlawfully withheld
- A recommendation for the payment of compensation
- Any other lawful remedy or redress.

Any person who is unsatisfied with a CAJ order may, within 21 days from the date the order was made, appeal to the High Court – section 23(3).

#### *Functions of the CAJ in respect of the AI Act*

In terms of section 21(1), the functions of the CAJ in this context include:

- Investigating violations or provisions of the AI Act, on its own initiative or upon receipt of a complaint
- Requesting and receiving reports from public entities with respect to the implementation of the AI Act and as the act relates to data protection, especially as it relates to the protection of personal data
- Developing and facilitating public awareness programmes on the rights of access to information and the right to protection of personal data
- Working with public entities to promote the right to access of information
- Working with regulatory bodies on promotion and compliance with data protection measures in terms of legislation
- Monitoring state compliance with international treaty obligations relating to freedom of and right of access to information and protection of personal data

- Hearing and determining complaints and reviewing decisions arising from violations of the right of access to information
- Promoting protection of data as provided for under the AI Act or the Constitution
- Performing other functions the CAJ may consider necessary for the promotion of access to information and of data protection.

An order of the CAJ may be filed in the High Court by any party thereto, according to regulations to be prescribed by the CAJ in consultation with the chief justice. Such party must give written notice of the filing of the order to all other parties within 30 days of the filing of the order – section 23(4). If no appeal is filed, the party in favour of whom the order is made by the CAJ may apply *ex parte* by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the High Court – section 23(5).

In terms of section 26 of the AI Act, the CAJ must submit an annual report to Parliament, by way of the Cabinet secretary in charge of information, and it must include an overall assessment of the performance of government with regard to access to information during the period under review. The Cabinet secretary must lay the report before Parliament within two months of receipt thereof, along with any necessary comments. The Cabinet secretary is also required to report each year to Parliament the steps which the government has taken in implementing recommendations made in the CAJ report.

On or before 30 June of each year, section 27 requires every public entity to submit a report to the CAJ which includes:

- The number of requests for information received by the entity, and the number of requests processed
- The number of determinations not to comply with requests under section 8, and the main grounds for such determinations
- The average number of days taken to process different types of requests
- The total amount of fees collected by the public entity while processing requests
- The number of full-time staff devoted to processing requests for information, and the total amount expended for processing such requests.

The Cabinet secretary in charge of information is empowered by section 25 to make regulations after consultation with the CAJ for the better carrying into effect of the provisions of the AI Act.

### ***Whistleblower protection***

The Access to Information Act provides a number of protections that would normally form part of whistleblower protection legislation. Section 3(e) provides for the protection of persons who release information for public interest in good faith. Section 16(1) expands on this by specifying:

A person shall not be penalized in relation to any employment, profession, voluntary work, contract, membership of an organization, the holding of an office or in any other way, as a result of having made or proposed to make a disclosure of information which the person obtained in confidence in the course of that activity, if the disclosure is of public interest.

Section 16(2) states that:

For purposes of subsection (1), a disclosure which is made to a law enforcement agency or to an appropriate public entity shall be deemed to be made in the public interest.

The disclosures protected under section 16(1) and (2) include information on – section 16(5):

- Violations of the law, including human rights violations
- Mismanagement of funds
- Conflict of interest
- Corruption
- Abuse of public office
- Dangers to public health, safety and the environment.

Section 16(6) states that a person is ‘penalised’ if he or she is:

- Dismissed
- Discriminated against
- Made the subject of reprisal or other form of adverse treatment
- Denied any appointment, promotion or advantage that otherwise would have been provided or any other personnel action provided under the law relating to whistleblowers.

The imposition of any such penalty in contravention of section 16(6) is actionable as a tort.

No settlement arising from a claim under section 16 may impose an obligation of confidentiality on any party to that settlement in respect of information which is accurate and which was, or which was proposed to be, disclosed – section 16(7).

In terms of section 16(8), in any proceedings for an offence relating to the disclosure of information, it is a defence to show that:

- The disclosure was in the public interest
- Before making the disclosure, the defendant had reasonable belief in the veracity of the information – section 16(3).

Any person who provides false information, maliciously intending to injure another person, commits an offence and is liable, on conviction, to a fine, imprisonment or both – section 16(4).

❖ **Judicial Service Act, Act 1 of 2011**

Under section 5 of the First Schedule of this act, the JSC is required to maintain the confidentiality of sensitive and highly personal information in the applications for judicial positions, as described in sub-paragraph (1). However, any information that is not described under that sub-paragraph shall be set out in a separate part of the application and may be available to the public, according to section 5(2).

These requirements are useful to the media and to the public interest as it means the process of appointing and dismissing judges is transparent and may be commented upon. This is important in keeping the judiciary accountable to the populace and in maintaining the public's confidence in the integrity of the judiciary.

❖ **Independent Electoral and Boundaries Commission Act, Act 9 of 2011**

The IEBC supervises elections and referenda in Kenya at county and national government level. Among other things, it also has responsibility for regular revision of the voters' roll, and the delimitation of constituencies and wards in accordance with the Constitution – section 4. These are important issues in a democracy, and the transparency and accountability of the IEBC is essential to maintain public confidence in the process.

Within three months of the end of each financial year, the IEBC is required to present its annual report to the president and to Parliament. The IEBC is also required to

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publish the annual report in the Gazette and in at least one national circulation newspaper – section 24.

Under section 27, a request in the public interest by a citizen, and thus the media, shall be addressed by the person the IEBC designates to do so. The request may be subject to the payment of a reasonable fee, where the IEBC incurs an expense in providing the information, and may be subject to confidentiality requirements. Subject to article 35 of the Constitution, the IEBC may decline to give information to an applicant if the request is unreasonable in the circumstances, the information requested is at a deliberative stage by the IEBC, failure of payment of a prescribed fee, or the applicant fails to satisfy the IEBC's confidentiality requirements. The right of access to information under article 35 is limited to the nature and extent specified under section 27.

#### ❖ **Ethics and Anti-Corruption Act, Act 22 of 2011**

Under section 29, the Ethics and Anti-Corruption Commission is required to publish and publicise important information within its mandate affecting the nation. A request for information by a citizen, and thus the media, shall be addressed by a person designated by the Commission to do so. It may be subject to a reasonable fee, and be subject to confidentiality requirements. Subject to article 35 of the Constitution, the Ethics and Anti-Corruption Commission may decline to give information to an applicant if the request is unreasonable in the circumstances, the information requested is at a deliberative stage by the Commission, failure of payment of a prescribed fee, or the applicant fails to satisfy the Commission's confidentiality requirements. The right of access to information under article 35 is limited to the nature and extent specified under section 29 – that is, when the:

- Request is unreasonable
- Information requested is at a deliberative stage by the Commission
- Prescribed fee has not been paid
- Applicant has failed to satisfy the confidentiality requirements of the Commission.

#### ❖ **County Government Act, Act 17 of 2012**

Under section 41, the deliberations of all meetings of the county executive committee are to be recorded in writing and its resolutions must be accessible to the public.

Under section 93, the county media is to have access to information in accordance with article 35 of the Constitution, and section 94 requires the county government to use the media to promote the freedom of the media.

A county government is required to establish mechanisms to facilitate public com-

munication and access to information in the form of the media with the widest public outreach in the county, which may include television stations, websites, community radio stations and other mass media – section 95.

According to section 96, every Kenyan citizen shall, on request, have access to information held by any county government or any unit or department thereof, or any other state organ. Subject to national legislation governing access to information, a county government shall enact legislation to ensure access to information, though it may impose reasonable fees for accessing information held by the county government, its departments or agencies.

## **4 REGULATIONS AFFECTING THE MEDIA**

In this section you will learn:

- What regulations or rules are**
- Key regulations that affect 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 legislation thereon.

### **4.2 Key regulations governing the media**

#### **4.2.1 Regulations contained in the Kenya Information and Communications Act, CAP 411A of 1998**

There are a number of regulations contained in the subsidiary legislation of the KIC Act, and those that apply to the media are:

- Broadcasting – CAP 411A – 187/2009
- Dispute resolution – CAP 411A – 26/2010
- Tariffs – CAP 411A – 27/2010 and 149/2010
- Compliance monitoring, inspections and enforcement – CAP 411A – 28/2010
- Fair competition and equality of treatment – CAP 411A – 29/2010
- Consumer protection – CAP 411A – 54/2010
- Radio communications and frequency spectrum – CAP 411A – 58/2010
- Universal access and service – CAP 411A – 70/2010
- Licensing and quality of service – CAP 411A – 71/2010.

❖ **The Kenya Information and Communications (Broadcasting) Regulations, CAP 411A – 187/2009 (Broadcasting Regulations)**

**Licensing process**

Regulation 3(1), in Part II ‘Licensing’ of the Broadcasting Regulations, specifies that everyone wishing to provide broadcasting services in Kenya must apply to the CA for a licence through the prescribed procedure. A licence application has to be submitted for every broadcasting station an applicant wishes to operate – regulation 3(3). However, it should be noted that no persons other than the public broadcaster is directly or indirectly entitled to more than one broadcast frequency or channel for radio or television broadcasting in the same coverage area – regulation 10. The CA publishes applications received for broadcasting licences in the Gazette and is required by regulation 3(5) to invite public comment prior to issuing the licence, which it will consider when making the final decision whether or not to grant the licence.

The amended section 46J(c) of the KIC Act provides that the period within which a successful licence applicant must use the assigned broadcasting frequencies is ‘such period as the Authority shall stipulate in the licence’. However, the Broadcasting Regulations have not been updated and they still state that a successful applicant must establish the necessary infrastructure and commence broadcasting within 12 months of receiving his/her licence – regulation 3(6). Failure to do so results in revocation of the licence – regulation 3(7). A broadcaster may not lease or transfer broadcast frequencies or channels assigned to it to any other person without the written authority of the CA – regulation (10(6).

Not less than 14 days before commencing broadcasting, regulation 8 requires licensees to publish in a wide circulation newspaper in the licensee’s coverage area:

- A statement on the licensee’s intention to transmit a broadcasting service in the coverage area
- The commencement date and time of transmissions
- The assigned frequency or channel
- The station programming format
- A statement inviting members of the public to contact the licensee in case the licensee’s transmission interferes with services provided by other licensees
- The address and telephone number of the licensee.

Regulation 7 authorises the CA to prescribe fees payable for the broadcasting services licence application, and the fees applicable on granting of the licence, renewal, transfer, annual licence fees, as well as any other fees related to the services. It is authorised to exempt the public broadcasting services and any other licence category from payment of those fees.

All renewal applications may be submitted to the CA within six months before the expiry of the current licence. All required fees have to be paid before the issuance of the renewed licence – regulation 9.

Foreign commercial broadcasters may be licensed by the CA in consultation with the minister in charge of information, subject to availability of frequencies or channels – regulation 12(2).

#### ***Regulations relating to applicant's ownership***

At the time of writing, the CA's website appeared well-maintained and current, and broadcast licence application forms for a number of licence categories were available for download.<sup>26</sup> There are several forms also included as subsidiary legislation in the KIC Act.

Form No. 1 in the KIC Act subsidiary legislation, entitled 'Application for Licences', specifies the required information relating to the company and individuals applying for a licence, including:

- Full name, address and contact information for the company or individual making the application, as well as the income tax personal identification number (PIN)
- Name, nationality, address and passport or identity numbers of individuals, shareholders and directors
- Shareholding information, including local versus foreign shareholding, stock exchange listing data
- The company's registration certificate number and a certified copy of the proof of registration or incorporation in Kenya
- The name and address of the bank or financial institution where its business account is held
- The services proposed and the market to be served
- Several mandatory items, specifically:

- A certified copy of proof of shareholding from the Registrar of Companies
- A certified copy of proof of registration or incorporation in Kenya
- A certified copy of the PIN card
- A non-refundable licence application fee
- A letter of application with company seal, where applicable

  

- Whether any of the partners, directors or shareholders:
  - Is an undischarged bankrupt
  - Has a beneficial interest in any other business licensed to provide or operate postal services
  - Has had a previous licence application rejected
  - Has had any previous licence cancelled, suspended or modified.

This information requirement relating to ‘postal services’ is the only instance in this form where a particular type of licence is mentioned. No other form requiring this level of information regarding the applicant is provided in the KIC Act, so it is presumed that this form applies to all licence applicants. Further, on the final page of Form 1, where the granting or rejection of the application is indicated with the official stamp, the type of licence to be granted has to be written in by the CA.

It should be noted that all copies of documents submitted with the application forms must be certified as true copies of the originals.

In addition, according to regulation 10(2), the shareholding in a licensee must comply with the government’s communications sector policy, as may be published from time to time. The CA must be informed of any change in ownership, control or proportion of shares at least 90 days prior to the change being effected – regulation 10(3). A change in shareholding exceeding 15% of the issued share capital, or the acquisition by an existing shareholder of at least 5% of additional shares, requires the prior written consent of the CA. The information required and considerations influencing the CA’s decision are detailed in regulation 10(4)–(5). For companies that are listed on the stock exchange, the Capital Markets Authority Act applies – regulation 10(8).

#### ***Licence application requirements***

The application fee, initial licence fee and annual operating fee for each of the different categories of broadcasting-related licences is provided in the ‘Fee schedule for broadcasting services licences’<sup>27</sup> document available on the CA’s website. For most of them, the fee payable on 1 July each year is in the region of 0.5% of annual turnover. It should be noted that this document also specifies, under Note 3, that only the public broadcaster (the KBC) is eligible to apply for public radio or television licenses.

When applying for a licence, there are a number of requirements that must be met by anyone wishing to provide broadcasting services in Kenya. The relevant provisions of the Broadcasting Regulations are summarised as follows:

- A free-to-air commercial licence applicant must submit a business plan to the CA, which includes – regulation 4(1):
  - Evidence of technical capacity
  - Evidence of experience and expertise
  - Evidence of the capacity to offer broadcasting services for at least eight continuous hours a day
  - A programme line-up or schedule
  - Any other information the CA may prescribe.
- A subscription television or radio licence applicant must – regulation 4(2):
  - Meet all the requirements specified for the free-to-air applicant
  - Satisfy the CA that it has the capacity to offer a minimum of 10 channels to each subscriber.
- A community broadcasting licence applicant must provide – regulation 5(1):
  - Information on the service for which the licence is sought
  - Minutes of the meeting where it was resolved to establish a community broadcasting station
  - Proof of the sources of funding and sustainability mechanisms
  - Weekly programme schedules
  - Any other information the CA may prescribe.

Subscription broadcasting services licences may, upon application in the prescribed form, be granted for satellite broadcasting services, cable broadcasting services and subscription management services. There are various additional requirements applicable to satellite broadcasting services that are dealt with in the latter points of regulation 14 and in regulation 15.

Upon application in the prescribed form, the CA may grant a licence for terrestrial digital broadcasting and signal distribution services. There are various requirements that apply to terrestrial digital broadcasting services that are dealt with in regulation 16.

#### *Administrative regulations*

Regulation 6(2) requires all broadcasters to:

- Annually file documents with the CA showing their station identity and any changes thereto

- Ensure that their station identity is unique and does not cause confusion
- Keep records as prescribed by the CA
- Reveal their station's identity at intervals of 60 minutes during broadcast periods
- State, at least twice within every 24 hours, all the frequencies and channels on which they are licensed to operate.

All broadcasting licensees are required under regulation 40 to document their complaints-handling procedures, and those procedures need to be submitted to the CA for approval prior to the commencement of broadcasting services – regulation 41. Broadcast licensees must inform their listeners or viewers of the existence of these procedures at least once daily. Broadcast transcripts or recordings related to a complaint may not be disposed of until the issue is resolved.

On 1 July each year, licensees are required to submit to the CA a written report of all complaints received during the past period and how they were addressed. Persons who have exhausted a broadcaster's complaints handling procedure and are still unsatisfied may appeal to the CA under regulation 42, and the issue will then be dealt with under the Dispute Resolution Regulations (discussed below in this chapter) or as prescribed by the CA. Such a complaint must be lodged with the CA within 90 days of the date on which the material complained of was broadcast.

Funds generated by community broadcasters have to be reinvested in activities benefiting the community, according to regulation 13(3), and the CA is required to monitor this – regulation 13(4). Community broadcasters may carry on their stations advertisements that are relevant and specific to the community within the broadcast area – regulation 15(5).

The public broadcasting service may not source revenue from advertising or sponsorship, according to regulation 11(2), though the CA may, on application by the public broadcaster, grant the public broadcaster a licence to provide broadcasting services on a commercial basis – regulation 11(4).

This appears to contradict the provisions of section 38(1) of the KBC Act, which clearly envisages that the KBC is to conduct its business according to 'commercial principles', and it is clear that one of the most significant sources of revenue for the KBC is advertising.<sup>28</sup> The public broadcaster may enter into a public-private partnership when providing commercial services, though the partnership must comply with the law relating to public procurement – regulation 11(6).

### ***Content regulations***

Regulation 6(1) of the Broadcasting Regulations requires the CA to ensure that broadcasting services reflect the national identity, needs and aspirations of Kenyans. Accordingly, the CA requires a licensee to commit a certain amount of time to the broadcast of local content, as may be specified in the licence or by notice in the Gazette – regulation 35. The CA's Programming Code for Free-to-Air Radio and Television Broadcasters in Kenya contains definitions of what constitutes local programming and prescribed minimum local content quotas in regulation 18 thereof. In brief these are: 40% local content within one year of being awarded a licence, increasing to 60% within four years (note this excludes news and advertising). The CA may determine the financial penalty to be paid for failure to comply with the local content quota.<sup>29</sup> The CA is required to prescribe a minimum local content quota for foreign broadcasting stations that broadcast in Kenya as well.

All free-to-air broadcasters are required, in terms of regulation 6(3), to ensure that their services:

- Provide the amount of local content specified in the licence
- Include news and information in its programming, as well as discussions on matters of national importance
- Adhere strictly to the CA's or subscribed programme codes in the matter and time of programming schedules.

A commercial free-to-air broadcaster is required, in terms of regulation 12, among other things:

- To provide a diverse range of programming that reflects the identity, needs and aspirations of people in its broadcasting area
- Not to acquire exclusive rights for the non-commercial broadcast of national events identified by the CA to be of public interest.

A community broadcaster is required, in terms of regulation 13, to:

- Reflect the cultural, religious, language and demographic needs of the people in the community
- Deal with community issues which are not normally dealt with by other broadcasting services covering the same area

- Be informational, educational.

In terms of regulation 11(1), a public broadcaster is required to:

- Provide independent and impartial services
- Offer information, education and entertainment in English and Kiswahili, and other languages as it may decide
- Consider the interest and susceptibilities of the different communities in Kenya
- Provide and receive from others material to be broadcast while maintaining the distinctive character of the public broadcasting service and catering for audiences not generally catered for.

All broadcasting licensees are required to inform their listeners or viewers of the existence of their complaints handling procedures and how they can lodge a complaint at least once daily – regulation 40(1)(b).

All broadcasters are required by regulation 43 to make public notice of an emergency or public disaster announcements as requested by a person authorised by government, and in a manner specified in the Gazette.

#### *The programme content code*

The CA is required by regulation 37 to prescribe a programme code that sets the standards for the time and manner of programmes to be broadcast by licensees, which code is, in terms of regulation 18, required to conform to the requirements of regulations 19 to 34 which set out clear restrictions on the kind of content that can be broadcast. These restrictions are extremely numerous and are not summarised herein.

All licensees are subject to this programme code, or to a code prescribed by a recognised body of broadcasters that has been accepted by the CA – regulation 38.

In late June 2016, the Media Owners Association (MOA) submitted such a code to the CA. The director general stated that the submission had been reviewed by the CA, and had been returned to the MOA with advice on the areas to address before submitting a revised version for further consideration by the CA. As of the date of writing, no progress has been reported,<sup>30</sup> though regulation 38(5)(b) specifies that the body of broadcasters is required to resubmit the revised programme code within 30 days of the date of notification. Until such a code is approved by the CA, the CA's

programme code is the one in force. The Programming Code for Free-to-Air Radio and Television Services in Kenya (Programming Code) dated March 2016 is available for download from the CA's website.<sup>31</sup>

The Programming Code is 35 pages long and is too voluminous to summarise here in great detail. However, it is important to be aware of the type of content that is covered by the Programming Code, namely:

- *General principles*
  - The requirement to broadcast in a manner that serves the public interest at all times
  - The requirement to respect the dignity of individuals and basic rights of others
  - Adhering to generally accepted values, ethical and moral standards.
- *Family programming/Good taste and decency*
  - During the watershed period (05:00–22:00), programming must be suitable for family listening and viewing.
- *Protection of children*
  - Children may not be put at physical or moral risk.
  - Child victims of abuse may not be identified.
  - Children involved in criminal matters shall be interviewed only upon the consent of a parent or legal guardian.
  - A minimum of five hours of radio or television programming per week must be devoted to programmes suitable for children.
- *News and public affairs*
  - News must be fair, factual, accurate and objective.
  - Comment or station editorials must be clearly separated from news.
  - At least one-and-a-half hours of daily programming must be news.
  - Receiving any consideration to favour one side of the story is outlawed.
  - When broadcasting controversial issues of public interest, a wide range of opinions should be presented.
  - Sources of news must be clearly identified unless they are confidential.
  - Unconfirmed reports shall not be broadcast unless there is an immediate and urgent need for the public to know about them.
  - The use of hidden cameras or microphones may be resorted to only when the information being sought is vitally important in the public interest and after exhausting conventional methods.

- Morbid, violent, sensational or alarming detail is not essential to a factual news report and not permitted.
- *Analysis and commentaries*
  - Commentary must be based on facts.
- *Fundamental rights*
  - Broadcasters are obliged to respect the right to privacy of individuals and other fundamental rights particularly with regard to:
    - Grief
    - The presumption of innocence
    - The right to reputation.
- *Personal attacks*
  - Personal attacks on or unfair criticism of the character of an individual, institution or group on matters that have no bearing on the public interest are prohibited and the right of reply in such cases must be provided.
- *Election period and political parties*
  - Equitable opportunities to access unpaid airtime shall be given to candidates and political parties.
  - No programme is allowed manifestly to favour or oppose any candidate or political party.
  - The amount of airtime allotted to political propaganda and the rates to be charged shall be consistent to all parties and candidates.
  - Election propaganda shall be clearly identified as such.
- *Crime and crisis situations*
  - Coverage of crimes in progress or crisis situations shone shall not put lives in additional danger.
  - The identities of the victims shall not be broadcast until released by the authorities.
  - Coverage of crime shall not support the perpetrators.
  - Alleged perpetrators of sexual offences shall not be identified until formal charges have been filed.
- *Copyright*
  - Broadcasters are responsible for all obligations and liabilities to any third party associated with copyright or other rights that may arise from the broadcast of copyrighted programming.

**■ *Religious programmes***

- Religious programmes shall not be used to attack, insult or ridicule other religions or to favour a particular faith over another.

**■ *Advertisements***

- Advertising must be clearly distinguishable from other programming.
- Advertisements must contain at least 40% local content footage.
- Advertising may not be discriminatory.
- Particular care must be exercised in relation to children.
- Tobacco products advertising is outlawed.

**■ *Occultism and superstition***

- Programmes featuring superstitious beliefs and practices shall be carefully presented so as not to mislead the audience.
- Programmes that promote cult practices, witchcraft and similar activities may not be broadcast during the watershed period.

**■ *Discrimination***

- No programme that is intended to stir up tribal, racial, religious or ethnic hatred is entitled to be broadcast.
- Racist terms and stereotyped portrayals should be avoided.
- Humour which offends against good taste and decency must be avoided.

**■ *Sex, obscenity and pornography***

- Sex and related subjects must be treated with care and must conform to what is generally acceptable to Kenyan society.
- Explicit depictions of sex are prohibited during the watershed period.
- Unless there is a strong editorial justification, explicit or graphic descriptions of sex organs and acts are prohibited.
- Offensive, obscene, blasphemous, profane and vulgar double meaning words and phrases are prohibited.

**■ *Liquor, cigarettes and dangerous drugs***

- The use of liquor and dangerous drugs shall never be presented as socially acceptable.

**■ *Local content***

- The requirements are dealt with immediately above this section.

**■ *User-generated content***

- This is defined as including non-traditional sources of media such as Twitter, YouTube, Facebook, blogs, podcasts and mobile telephony.
- Broadcasters are required to ensure that no harmful, libellous, threatening and hateful user-generated content is broadcast.
- Broadcasters must ensure that their own user-generated content is accurate.

**■ *Persons with disabilities***

- Broadcasters must include persons with disabilities in different programmes.
- Programming relating to news, national events, emergencies and education shall provide a sign language insert or subtitles.
- Humour based on physical, mental or sensory disability should be avoided.

**■ *Public complaints***

- The Programming Code contains detailed guidelines on complaints by the public and how they are to be dealt with.

**■ *Offences and penalties***

- Failure to comply with the Programming Code is an offence and the penalty is as set out in the KIC Act, namely a fine, imprisonment or both.

***Offences***

Any person who contravenes any provision of the Broadcasting Regulations commits an offence and is liable to a fine, imprisonment or both – regulation 44.

**❖ The Kenya Information and Communications (Dispute Resolution) Regulations, 2010, CAP 411A – 26/2010 (Dispute Resolution Regulations)**

The Dispute Resolution Regulations were made by the Minister for Information and Communications in consultation with the Communications Commission of Kenya, of which the Communications Authority of Kenya (CA) is the successor in title. The purpose of these regulations is to resolve disputes between licensees, or between a consumer and a licensee, or any other persons as may be prescribed under the act – section 3.

Under regulation 3(3), the CA is empowered to hold hearings, inquiries and investigations, but regulation 3(4) states that it may waive any rule or requirement where necessary.

A dispute has to be submitted to the CA, and the other party to the dispute, in writing within 60 days of the occurrence prompting the dispute – regulation 4(1). The prescribed fees must accompany the submission, according to regulation 4(4), and the CA is required to acknowledge receipt of the complaint in writing – regulation 4(6). The CA may decline to accept a memorandum of complaint that:

- Does not raise any issue, under the KIC Act
- Does not conform to the provisions of the act or directions given by the CA
- Is trivial, frivolous or vexatious
- Is defective or presented incorrectly
- Has been filed with any other body that has jurisdiction to hear and determine the dispute – regulation 4(7).

However, the CA is required to give the complainant an opportunity to be heard before declining to accept the memorandum of complaint, and must give the complainant an opportunity to rectify any defects in the pleadings – regulation 4(8)–(9). It is then required to notify both parties in writing, stating the reasons for declining – regulation 4(10).

The CA is required to notify the party against whom the complaint is made within seven days of receiving a complaint, and provide a copy of the memorandum of complaint. A response is required from that party within 21 days of receiving the notification – regulation 5. A complainant may withdraw a complaint at any time, and the CA will make orders relating to costs as it considers fit – regulation 6.

The parties to a dispute are required to set the date for the hearing of the dispute within 15 days of the date of the filing of the last response from either party. Except where otherwise agreed by the parties, each is entitled to not less than seven days' notice of the time, date and place. The CA may decide a matter based on documents laid before it or oral testimony given. The CA may call on experts as it deems necessary – regulation 7.

The CA has to produce its decision in writing within 30 days of the conclusion of the hearing, and include in the document its reasons for the decision. Any party dissatisfied with the decision may appeal to the Communications and Multimedia Appeals Tribunal within 15 days of the decision. However, the decision of the CA is binding until the Tribunal rules on the matter – regulation 8.

The parties may reach an agreement and withdraw the dispute by submitting the negotiated agreement to the CA for approval. The CA may make orders relating to costs as it deems appropriate. The CA may, on application, extend the time appointed for the performance of any act, should that appear just and expedient to the CA.

Records of proceedings, excluding anything confidential or privileged, are open for inspection by any person after the conclusion of the hearing, subject to conditions the CA may prescribe, and payment of inspection fees. The CA may publish in the Gazette and other media its decisions on disputes it has heard and determined – regulation 9.

The Complaints Handling Procedure may be downloaded from the CA website.<sup>32</sup>

❖ **The Kenya Information and Communications (Tariff) Regulations, 2010, CAP 411A – 27/2010 (Tariff Regulations)**

The purpose of the Tariff Regulations, under regulation 3, is to provide a framework for the determination of tariffs and tariff structures that subscription broadcasters may charge their customers, and to:

- Ensure licensees maintain financial integrity and attract capital
- Protect the interests of investors, consumers and stakeholders
- Provide market incentives for licensees to operate efficiently
- Promote fair competition.

A licensee is required to set just and reasonable tariffs which are clearly understandable to the end-user and are non-discriminatory – regulation 4(1). A licensee must provide accurate billing information on tariffs, and may not apply tariffs that prevent market entry or distort competition. A licensee who contravenes this regulation commits an offence – regulation 4(2)–(4).

A licensee has to file the schedules with their tariff rates with the CA quarterly, and may not charge its customers tariff rates that have not been filed with the CA. All tariff rates filed with the CA have to be available to the public for inspection. A licensee which contravenes this regulation commits an offence – regulation 5.

The CA may from time to time publish in the Gazette a schedule of regulated services. Regulated services have to be charged by licensees at the tariffs filed and approved by the CA. The CA may, on its own motion, set or review tariffs for a regulated service. A licensee which contravenes this regulation commits an offence – regulation 6. A licensee wishing to review the tariffs for a regulated service has to file an application with the CA at least 90 days before the change is due to come into effect – regulation 7.

The CA is required to Gazette applications for tariff changes, and is required to allow at least 30 days for written public comment, which the CA has to take into account when making its final decision – regulation 8.

The CA may approve or reject tariffs proposed by a licensee for a regulated service if the proposed tariff is viewed as unjustifiable, unfair or unreasonable. The CA is required to render any rejection in writing, state the reasons for the rejection, and make the rejection available to the provider. If new tariffs are approved, the licensee is required to inform the public by publishing the new tariffs in two daily national circulation newspapers, or by any method the CA approves. This has to be done no less than 14 days before the implementation of the new tariff. A licensee which contravenes this regulation commits an offence – regulation 9.

Any licensee wanting to offer a promotion or special offer is required to file all details thereof with the CA at least seven days before the intended date of implementation. Promotions may not run for more than 90 days, nor be repeated before three months have elapsed. It should be noted that approval has to be obtained from the Betting Control and Licensing Board, where the promotion involves games of chance. The CA may discontinue any promotion that does not comply with the Tariff Regulations, and must state the reasons for doing so – regulation 11.

The CA may initiate an investigation on its own motion, or pursuant to a complaint made to it – regulation 10. Any person who commits an offence under the Tariff Regulations for which no penalty is provided is liable to a fine, imprisonment or both – regulation 12.

❖ **The Kenya Information and Communications (Compliance Monitoring, Inspections and Enforcement) Regulations, 2010, CAP 411A – 28/2010 (Compliance Regulations)**

The CA is empowered to monitor and enforce compliance with the KIC Act, regulations and conditions of licences by all licensees – regulation 3. It is required to issue guidelines on installation and maintenance of communication infrastructure – regulation 4.

In carrying out its duties, the CA is guided by the KIC Act, the regulations and principles including:

- Transparency, fairness and non-discrimination
- The need to provide modern, qualitative, affordable and readily available communications systems and services
- The need to promote fair competition
- The need to promote and improve the quality of service provided

■ Any other principle the CA considers necessary – regulation 5.

The CA may issue directions in writing to any person to secure compliance, and may enlist the assistance of law enforcement agencies and other departments as provided in the KIC Act. It may appoint a person to carry out the inquiry and provide a report. The CA may exercise its powers on its own initiative or in response to a complaint – regulation 6.

Every quarter and at the end of its financial year, a licensee is required to prepare and submit to the CA a report of its operations. Specifically, this report must address its operations and the extent to which it has adhered to the conditions of its licence. On the licensee's request, any information in these reports may be kept confidential – regulation 7.

Under regulation 8(3), a licensee is required to maintain proper records in a manner prescribed by the CA, and permit the CA access to the records as required. The CA inspectors, appointed under regulation 11, may at all reasonable times enter into any premises owned or controlled by a licensee for inspection purposes, and may examine, or remove for examination, any information, document, apparatus or equipment. Any person who obstructs a CA inspector in the performance of his duties commits an offence and is liable to a fine, imprisonment or both. However, under regulation 12(2), an inspector does not have the authority to compel any person to produce any document which he could not be compelled to produce in any civil proceedings.

An investigation into a licensee's compliance may be commenced where the CA has reason to believe the licensee has failed to comply with construction, installation or service provisions, or any condition of its licence or performance obligations – regulation 8(1). The CA may publish compliance or investigation reports in the Gazette, as it deems necessary – regulation 8(6).

Where an investigation has found contraventions taking place, the CA is required to notify the licensee in writing, and the licensee is required to remedy the contravention within three months as well as prove to the CA that it has sustainably remedied the contravention – regulation 9(1)–(3).

If a licensee fails, without reasonable cause, to remedy the contravention within the required period, the licensee is liable to a fine which is payable within 14 days of receipt of notification – regulation 9(4) and 10(1). The CA may also impose other sanctions on a licensee – regulation 10(2). Any licensee aggrieved by the decision of the CA may appeal to the Communications and Multimedia Appeals Tribunal within 15 days of receipt of the CA's notification – regulation 9(5).

The CA may institute civil proceedings against any person for remedies that may include injunctive relief, recovery of penalties, specific performance or pecuniary awards or damages – regulation 13.

❖ **The Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010, CAP 411A – 29/2010 (Competition Regulations)**

The Competition Regulations purpose, under regulation 3, is to:

- Provide a regulatory framework for the promotion of fair competition and equal treatment in the communications sector
- Protect against abuse of market power or other anti-competitive practices
- Provide the standards and procedures applied by the CA in determining whether conduct is anti-competitive
- Clarify agreements, conduct or practices that the CA considers anti-competitive or prohibited.

Under regulation 4, the CA has the power to determine, pronounce upon, administer and enforce compliance of all its licensees with competition laws and regulations relating to commercial activities in the communications sector. It may also cooperate with other statutory agencies where a matter falls concurrently under the jurisdiction of that body.

The CA may develop and publish in the Gazette guidelines to be followed when determining whether a licensee is in a dominant market position in a specific communications market – regulation 7. The criteria include the:

- Degree of market concentration
- Degree of price variation over time
- Ability to materially raise prices without suffering commensurate loss in service demand to other licensees
- Ability to maintain or erect barriers to entry to the market
- Ability to earn supernormal profits
- Power to make independent rate-setting decisions

- Degree of product or service differentiation and sales promotion in the market.

Where these criteria do not apply, the CA may presume dominance where the licensee's gross revenues exceed 25% of the total revenues of all licensees in the relevant market – regulation 8(4). The CA may direct a dominant service provider to cease a conduct that may have the effect of substantially reducing competition, or require that it implement appropriate remedies – regulation 8(5).

Licensees may not cross-subsidise prices for any service offered in the market with revenue from the sale of other services it may provide – regulation 10(1).

Under regulation 11, the obligations of licensees include:

- Providing a uniform, non-preferential service on a first-come-first-served basis
- Not violating the principle of equal access and non-preferential treatment if it considers the ability of the person to pay for a service when deciding whether to provide the service, or make other rational classifications among subscribers, such as business and residential, and to provide service on the basis of the classification.

Where a licensee intends to enter into an agreement or take any action that may affect another licensee in the same market segment, it may seek guidance from the CA at least 30 days prior to entering the agreement or taking the action – regulation 12. The CA is required to respond within 30 days of receiving the request, and to state whether the agreement or conduct is likely to contravene the Competition Regulations.

The CA may, on its own motion or upon a complaint, investigate a licensee whom it has reason to believe has breached the requirement for fair competition or equality of treatment – regulation 13. In conducting an investigation, the CA may:

- Require the production of any document or information which it considers relevant
- Take copies of, or extracts from, any document produced
- Require explanation of any such document
- Where a document is not produced, require a statement specifying where it can be found
- Enter any premises with a warrant and require the production of any relevant

document, including those stored in a computer, in a form in which it can be read and taken away

- Enter any premises with a warrant and search the premises and take copies of any relevant document, including those stored in a computer, in a form in which it can be read and taken away.

These regulations do not apply to conduct which is necessary for the operation of essential communications services insofar as the application of the Competition Regulations would obstruct the performance of the tasks assigned to the licensee, nor to conduct necessary to comply with a legal requirement, nor to conduct necessary to avoid conflict with international obligations.

❖ **The Kenya Information and Communications (Consumer Protection) Regulations, 2010, CAP 411A – 54/2010 (Consumer Regulations)**

According to the Consumer Regulations', the rights of customers, under regulation 3, include:

- Receiving clear and complete information about rates, terms and conditions
- Being charged only for the products and services they subscribe to
- Personal privacy and protection against unauthorised use of personal information
- Accurate and understandable billing, and prompt redress in the event of a dispute
- Protection from unfair trade practices, including false and misleading advertising and anti-competitive behaviour by licensees
- Equal opportunity for access to and quality of service as other customers in the same area at substantially the same tariffs.

A service provider is required to take appropriate measures to safeguard the security of its services and to inform subscribers if there is risk of a breach thereof – regulation 4.

A licensee is required to establish a customer care system through which customers can make enquiries and complaints concerning its services in a format and in such detail as required by the CA – regulation 5. The CA may publish guidelines relating to customer care systems.

A licensee must provide easily understood information about its complaint-handling processes in various media and formats – regulation 7. A customer must lodge any complaint in writing, and within six months of the date of the incident. The licensee must acknowledge receipt of a complaint and advise the customer, where possible at the time of making the complaint, the expected action, timing for investigation and resolution. If the service provider regards the customer complaint as frivolous or vexatious, the consumer must be informed accordingly. The complaints handling process must include ways in which the customer may remain informed of the progress of his or her complaint. Where a customer is not satisfied with a decision made on a complaint, he or she must be offered the option to escalate the complaint within the organisation in accordance with an identified process. If the customer is still not satisfied after that process has been followed, the customer may refer the complaint to the CA.

A licensee may not charge for complaint handling, but may impose a reasonable charge where the case warrants it, according to regulation 7(11), and the charge must be agreed to by the customer and referred to the CA before being imposed – regulation 7(12). A licensee is required to file quarterly with the CA information and statistics on all complaints reported, including those resolved and those outstanding – regulation 7(13).

Regulation 9 requires a licensee to establish mechanisms that enable parents or legal guardians to block harmful content from children. A licensee who promotes or glamorises alcohol and tobacco products to children commits an offence.

Licensees are required under regulation 11 to provide clear and comprehensive information on services, rates, terms, conditions and charges, as required by the CA. An outage credit system must be developed by a licensee and, on approval by the CA, this must become part of the licensee's standard subscriber service agreement – regulation 12.

A licensee must submit to the CA, within six months of being granted a licence, a commercial code of practice for approval – regulation 13. The CA may approve, recommend alterations, or reject the code, or extend the period for review thereof. The code must include the licensee's complaints handling procedure, advertising policy, system of outage credit, and emergency safety and assistance services, as well as any other information the CA may determine. Once approved, the code has to be delivered to all subscribers within three months of commencement of service.

A licensee must submit its standard subscriber service agreement to the CA for approval – regulation 14.

No private information of a customer may be offered by the licensee for sale or free to a third party without the prior consent of the customer concerned – regulation 15. The CA is required, under regulation 22, to monitor sector performance, conduct consumer satisfaction surveys and publish its finding at least once in every two years.

A licensee commits an offence under regulation 23 if the licensee:

- Fails to perform measurement, reporting and record-keeping tasks within required time frames
- Fails to reach a target for any of the parameters stipulated under the Consumer Regulations
- Fails to submit, within the time specified, any information requested by the CA pursuant to the Consumer Regulations
- Submits or publishes false or misleading information about the quality of its services
- Obstructs or prevents inspections or investigations by the CA
- Engages in any act or omission to defeat the purposes of the Consumer Regulations.

A person who commits an offence under these regulations is liable to a fine, imprisonment or both.

❖ **The Kenya Information and Communications (Radio communications and frequency spectrum) Regulations, 2010, CAP 411A – 58/2010 (Spectrum Regulations)**

Among the purposes of the Spectrum Regulations are meeting the country's socio-economic and cultural needs, and the equitable and fair allocation and assignment of spectrum to benefit the maximum number of users – regulation 3.

The CA is required to publish guidelines that specify eligibility criteria for the granting of spectrum licences – regulation 4. No person may possess, establish, install or use any radio communication equipment which requires licensing unless that person has a valid licence granted by the CA – regulation 5.

Regulation 8 details the obligations of licensees, including:

- Maintaining proper records

- Paying annual fees
- Putting the assigned frequencies into use within the period specified by the CA
- Not making any material changes to a licensed station without written authorisation from the CA.

The CA prescribes the methods for determining frequency spectrum pricing, according to regulation 10. The pricing formula set by the CA accords with the economic value of the frequency spectrum in order to encourage efficient use and stimulate growth – regulation 11.

Unlimited access to installations must be permitted to authorised CA officers for inspection purposes, according to regulation 13, and the CA may disable or confiscate any equipment that contravenes the conditions of the licence – regulation 16. A licensee who misuses frequencies is liable to a fine, imprisonment or both – regulation 17.

‘Application form for frequency assignment and licence in radio communication service’ is Form No. 5 in the First Schedule of the KIC Act. It requires administrative details on the applicant, including the name of the organisation or individual making the application as well as the nationality, identity or passport number, postal and physical addresses, contact numbers, name and contact information of its local suppliers, if any, the type of radio communication service to be licensed (HF, MF, FM), the broadcast area (with a certified copy of the broadcasting permit) and the name of the person or organisation responsible for the payment of bills.

Form 5 requires extensive technical detail including:

- Transmitter site details
- Transmitter equipment details including for the antenna and other equipment and their performance
- Hours of operation
- Proposed service commencement date

Form 6, ‘Application for frequency assignment and licence in the fixed and mobile radio communication service’, requires a similar level of detail relating to all relevant equipment.

The ‘Second Schedule – Fees’ lists the licence fees payable by various types of operators and service providers in Kenya. Section 14 deals with the fees payable by broadcasting stations and fixed satellite earth stations, which are calculated to be commensurate with the power and occupied bandwidth. The formula and explanatory notes are part of section 14 of the Second Schedule.

‘Type approval/acceptance fees’ are also part of the Second Schedule, and lists fees payable for MUXs, radio broadcast transmitters and television broadcast transmitters.

❖ **The Kenya Information and Communications (Universal access and service) Regulations, 2010, CAP 411A – 70/2010 (Universal Access Regulations)**

Among the purposes of the Universal Access Regulations is facilitating development and access to a wide range of local and relevant content – regulation 3(e). The requirements of the universal service levy imposed under regulation 84J(3) of the KIC Act are clarified under regulation 4 of the Universal Access Regulations. The levy is imposed on all licensees offering communications services on a commercial basis, and may not exceed one percent of gross revenue of a licensee.

❖ **The Kenya Information and Communications (Licensing and quality of service) Regulations, 2010, CAP 411A – 71/2010 (Service Regulations)**

Anyone wishing to operate any communication system or provide any communication service (note: these terms are not defined but we assume they include broadcasting services) requiring a licence under the KIC Act must apply to the CA for a licence – regulation 4. The application has to be done in the manner and form prescribed by the CA.

An applicant has to ensure that its shareholding conforms to the prevailing communications sector policy, and has to provide the CA with:

- Registration or identification documents prescribed by the CA
- The applicant’s contact address
- Detailed business plans for the proposed services, where applicable
- Detailed information relating to the proposed system or services to be provided
- Information relating to any previous experience in management of the proposed system or services for which the licence is sought, where applicable
- Any other information the CA may require.

A licensee must notify the CA of any change of particulars, including to the name or contact address filed, and must notify the CA and the public of any change of trade or brand name, at least 30 days before the change takes place – regulation 8.

The shareholding must always comply with the government communications sector policy published from time to time, and the CA has to be notified of any proposed change in ownership, control or proportion of shares held in it at least 30 days before the change is effected. Any changes must comply with the regulation 9 requirements.

Written consent must be received from the CA prior to any transfer or assignment of

a licence. The CA must communicate its decision within 30 days of receiving the request – regulation 10.

Licence renewals (regulation 11) and licence revocation (regulation 12) are handled in accordance with the requirements of the KIC Act. Any person who is aggrieved by the CA's decision may appeal to the Communications and Multimedia Appeals Tribunal.

The obligations of a licensee in terms of providing quality of service are dealt with in regulation 13, and regulations 14 and 15 cover quality of service standards.

The CA is required to Gazette quality of service parameters from time to time, and licensees are required to take measurements, compile, summarise and submit them to the CA in the prescribed format within the specified period – regulation 16. The CA may investigate matters relating to these reports (regulation 17) and publish results submitted by licensees (regulation 18).

A licensee is responsible for obtaining any licenses and approvals it needs from other relevant authorities regarding infrastructural installations – regulation 20.

A person who provides any services under the KIC Act without a licence issued by the CA commits an offence and is liable to a fine, imprisonment or both.

#### **4.2.2 Regulations contained in the Films and Stage Plays Act, CAP 222 of 1962 (Films Act)**

There are two pieces of subsidiary legislation to the Films Act:

- Films and Stage Plays (Cinematographic Films) (Forms and Fees) Regulations, 1967 (Fees Regulations)
- Films and Stage Plays (Film Censorship) Regulations, 1968 (Censorship Regulations)

❖ **The Films and Stage Plays (Cinematographic Films) (Forms and Fees) Regulations, 1967 (Fees Regulations)**

Every application for a filming licence has to be made to the licensing officer in writing, and must be accompanied by a full description of the scenes in, and a full text of the spoken parts (if any) of the entire film which is to be made. This must be accompanied by a written statement by the applicant as to the duration of the film to be made and the part or parts thereof which are to be made in Kenya, or which have been made outside Kenya – regulation 2(1). Where a film has been granted a licence, but is made differently from the particulars provided to the licensing officer, without having obtained the necessary permissions, every person engaged in the making thereof

commits an offence – regulation 4. Languages other than English have to have their text translated into English to the satisfaction of the licensing officer – regulation 2(2).

Any person who makes any statement or representation which he knows or has reason to know to be false for the purpose of obtaining a filming licence is guilty of an offence – regulation 2(3).

The licensing officer may require the licence applicant to enter into a bond, with or without sureties, prior to granting the licence – regulation 3.

The filming licence with its charges and conditions is contained in the First Schedule of these regulations. The fees payable are assessed by the licensing officer in accordance with the written statement of the applicant as to the duration of the film – regulation 5(2) – and based on the fee table in the Second Schedule. The Second Schedule provides a list of fees based on length of film, type of film, number of days shooting, as well as fees for agents and agencies and so on. It should be noted that this licence does not authorise the licensee to take photographs within the meaning of the National Parks of Kenya (Photography) Regulations, for which separate authority is required – note on First Schedule.

Any person guilty of an offence under these regulations is liable to a fine, imprisonment or both. The court may, in addition to or in lieu of any other penalty, order the confiscation and destruction of the film and may revoke the filming licence, whether the person convicted is the holder of the licence or not – regulation 7.

#### ❖ **The Films and State Plays (Film Censorship) Regulations, 1968 (Censorship Regulations)**

The chairman and vice chairman of the Film Censorship Board are, according to regulation 4(1), to hold office as such and as members of the board until their appointments are terminated by the minister. Other board members hold office for a three-year term, renewable once.

A certificate of approval issued under section 16(5) of the act, in Form 1 or Form 2 of the First Schedule to the Censorship Regulations, may be signed by the chairman, vice chairman or secretary of the board – section 11(1). A certificate of approval, or a decision of the board under section 16(1)(c) of the act to refuse approval for a film to be exhibited in public, remains valid for five years from the date of issuing or when the decision is made – regulation 11(2).

Where approval is declined, the board is required to notify the applicant and give him its reasons for doing so as soon as practicable – regulation 12. A person aggrieved by

a decision of the board may appeal under section 29 of the act to the minister in writing within 30 days of receiving notification – regulation 13.

The fees applicable to this process are contained in the Second Schedule of these regulations. Certificates of approval are required for films, recorded video, trailers of films, and commercials, among other things, and there is also a fee payable for lodging an appeal under section 29 of the act.

#### **4.2.3 The Capital Markets Authority (Advertising) Regulations 2011 (Capital Markets Advertising Regulations)**

Only regulated persons may issue or cause the issue of investment advertisements – regulation 3, except in instances where the advert relates to government or central bank securities, where the prospectus has been approved by the Capital Markets Authority (CMA) under section 50 of the act, or issued in accordance with the Securities Industry (Takeovers) Regulations 2011 – section 4. All the requirements in the schedule to these regulations have to be complied with – section 5.

According to section 2(2) of the Capital Markets Advertising Regulations, an investment advertisement issued outside Kenya shall be treated as issued in Kenya if it is directed at persons in Kenya, or it is made available to persons in Kenya via media principally published or broadcast in Kenya.

Specific dating is required by section 13 of the Advertising Regulations:

- An advert in a newspaper must have the date on which it was first issued in its bottom right-hand corner.
- A broadcast advertisement must have the date on which it was first issued shown prominently at the beginning or end of the advertising material.

## **5 MEDIA SELF-REGULATION**

In this section you will learn:

- What self-regulation is**
- Key self-regulatory provisions intended to govern the media in Kenya**

### **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.

Section 46H of the KIC Act specifies that the programming code described under that section shall not apply to licensees that are members of a body, which has proved to the satisfaction of the CA that its members subscribe and adhere to a programming code enforced by that body by means of its own mechanisms, and further provided such programming code and mechanisms have been filed with and accepted by the CA.

Regulation 37(1) of the Broadcasting Regulations states that the CA is required to prescribe a Programme Code. Section 37(2) states that licensees shall be subject to the programme code prescribed by the CA ‘or by a duly recognised body of broadcasters under regulation 38’. Regulation 38 specifies that pursuant to section 46H of the KIC Act, any registered body of broadcasters wishing to operate under its own programme code is required to submit such a code to the CA for approval. This is not unfettered self-regulation, but does put some initiative in the hands of the people and organisations in the industry.

The MOA has been vocal in the media on the subject of the programme code, and in late June 2016 submitted its own proposed independent programme code. According to the director general, the CA had reviewed the MOA’s proposed code, and advised the MOA on the areas to address before submitting a revised version for further consideration by the authority.

As of the date of writing, no further progress has been reported,<sup>33</sup> despite the specification of regulation 38(5)(b) that the body of broadcasters is required to resubmit the revised programme code within 30 days of the date of notification. Until such a code is approved by the CA, the CA’s Programming Code is the one in force and is dealt with in the Regulations section of this chapter.

## 6 COMMON LAW AND THE MEDIA

In this section you will learn:

- The definition of common law
- How Kenya’s courts have dealt with a number of media-related common law issues, including:
  - Commentary versus hate speech
  - Contempt of court
  - The constitutional right of access to information as it relates to non-citizens and juristic persons

- The protection of freedom of the media under article 34 of the Constitution and the validity of licences issued by a non-independent body
- Violation of fundamental rights and freedoms by servants and institutions of the state
- Gazette notices that infringe constitutional rights
- Protection of whistleblowers
- Defamation
  - The defence of fair comment to an action for libel
  - Privilege as a defence for defamation
  - Remedies for defamation
  - Defamation of a public body

## 6.1 Definition of common law

The common law is judge-made law. It is made up of judgments handed down in cases adjudicating upon disputes brought by people, whether natural (individuals) or juristic (for example, companies). In common law legal systems such as Kenya's, judges are bound by the decisions of higher courts and also by the rules of precedent. This requires that rules laid down by the court in previous cases be followed, unless they were clearly wrongly decided. Legal rules and principles are therefore decided on an incremental, case-by-case basis.

This section focuses on a number of judgments that have a bearing on media law or freedom of expression in some way.

## 6.2 Commentary versus hate speech

In the 2010 case of *The AIDS Law Project (ALP) v Nation Media Group, Matuma Mthiu and Kwamchetsi Makokha* [Complaint No, 092 of 2010], heard by the Media Complaints Commission, the ALP complained that an article headlined 'Thou shalt not lie with mankind as with womankind', published in the *Saturday Nation* of 9 October 2010, was inaccurate, unfair, biased and in breach of article 1 (accuracy and fairness) of the Code of Conduct for the Practice of Journalism (Journalism Code). It claimed the article was inflammatory and promoted hate speech against the homosexual community in Kenya, in breach of article 25 (hate speech) of the Journalism Code.

The commissioners held that freedom of expression is the right to express one's own ideas and opinions freely through speech, writing and other forms of communication,

but without deliberately causing harm to others' character and/or reputation by false or misleading statements. Freedom of the press is part of freedom of expression.

The Media Complaints Commission found that the article was a satire and that the respondents did not aim to harm any person or persons with their opinion piece, which was clearly labelled as such.

The commissioners declined to make a recommendation to the director of public prosecutions to institute criminal proceedings against Mr Makokha for hate speech, as requested by the complainant, and advised that a complaint could be lodged with the National Cohesion and Integration Commission (NCIC) in relation to the hate speech aspects of the case.

Note: we are of the view that this was done because hate speech falls under the particular jurisdiction of the NCIC.

Having found that the article was a satirical piece and there was no malice either intended or proved, the Media Complaints Commission declined to order the respondents to publish an apology and correction.

### **6.3 Contempt of court**

In general terms, the common law crime of contempt of court is made up of two distinct types of contempt, namely: the *sub-judice* rule; and the rule against scandalising the court. The *sub-judice* rule guards against people trying to influence the outcome of court proceedings while legal proceedings are underway. Scandalising the court is criminalised to protect the institution of the judiciary. The point is to prevent the public undermining the dignity of the courts with resultant loss of faith in the judicial system among the populace. This case is interesting because it deals with both aspects of contempt of court.

In Kenya, the law applicable to the High Court and the Court of Appeal in the exercise of their respective powers to punish for contempt of court are the same as those possessed by the High Court of Justice in England, following the coming into force of Order 52 of the Rules of the Supreme Court 1965.

The *Republic v Tony Gachoka and The Post Limited* (Criminal Application No. Nai 4 of 1999) was heard by the Court of Appeal and concerned the publication of two articles in *The Post on Sunday*, which the applicant contended contravened the *sub-judice* rule, as they related to matters still before the court because the court had not yet given the reasons for its decision.

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Further, the articles were claimed to be a scurrilous and unjustified attack upon the court that was calculated to bring into disrepute and contempt the administration of justice in Kenya.

The first article alleged that the chief justice was involved in bribery and subversion of justice, and that a High Court judge and several Court of Appeal judges were involved in conspiracy and irregular conduct. The headlines used and the general tone of the articles were clearly sensationalist. The following week's publication carried several articles critical of the chief justice and some judges of the Appeal Court. Under section 5 of the Judicature Act, CAP 8 of 1967, the Court of Appeal has the power to consider, conduct a trial and make judgment on an allegation of contempt of court itself. The committal proceedings for contempt of court against the respondent were criminal in nature.

The first respondent did not deny publishing the articles, but averred that he wrote them pursuant to an investigation he carried out on the subject of corruption. He stood by the articles, for which he had sought the opinions of several legal luminaries prior to publication, and contended that he had not acted or sought in any way to ridicule, scandalise, abuse or bring the court into contempt. Further, he contended that once a ruling was made in a case, he was, as a lay man, at liberty to criticise it as what is left is a mere 'administrative exercise'.

The court disagreed, stating that the articles 'amount to scandalising the court' and were acts calculated to bring both the High Court and the Court of Appeal into contempt or lower their authority. The court also termed them 'a calculated attempt to interfere with the due process of justice'. In the court's opinion, contempt of court under the *sub-judice* rule is committed when comments are made on pending legal proceedings, and that a judgment cannot be conclusive in deciding on a dispute before it unless reasons are given for the finding.

According to the court, because the matter is one in which the court is directly involved, it must at all times appear that the main principle involved is the protection of the public interest that is paramount and not the protection of the judge or court from 'fair, temperate criticism' made in good faith, however strongly worded it might be. However, the innuendo from the words used, and the interpretation that an ordinary, reasonable person would attach to the language used was such that the articles amounted to scurrilous attacks and could not be viewed as fair criticism. According to the court, the publisher's language was insulting, abusive and derogatory, and it was clear that the motive was to scandalise the court and bring it into contempt.

Journalistic criticism of a judge's decision on principles of law is something the press

is entitled to do, but personal attacks impugning their honesty and integrity, and imputing improper motives to them, have to be provable and justifiable.

The court, by majority decision, found both respondents guilty of contempt of court. Tony Gachoka, the publisher and chief executive of the *Post on Sunday*, was sentenced to six months in prison. A large fine was imposed on The Post Limited and it was ordered to cease publication of its weekly magazine, the *Post on Sunday*, and any other publication by it until the fine was paid in full.

#### **6.4 The Constitutional right of access to information as it relates to non-citizens and juristic persons**

In *Famy Care Limited v Public Procurement Administrative Review Board and Others* (Petition No. 43 of 2012), heard by the Constitutional and Human Rights Division of the High Court of Kenya, the petitioner was aggrieved by the tendering process for certain family planning commodities. Famy Care sought access to the complete record of correspondence between the interested parties and any other party in the matter.

Famy Care's second application related to requesting certified copies of Technical Committee and Tender Committee minutes and evaluation reports relating to the specific tender. These applications were based on the protection of fundamental rights and freedoms on its own behalf and in the public interest.

The defendants argued that the petitioner was a company incorporated in India, and thus a 'foreign citizen' not entitled to the access to information rights enshrined for citizens under article 35 of the Constitution. The petitioner's counsel contended that the petition was brought under article 22 to enforce fundamental rights and freedoms, and that these fundamental rights and freedoms relate to the petitioner, who is also acting in the public interest as provided in article 22(2)(c). Being a suit in the public interest, counsel contended that every member of the public affected is entitled to the full protection of article 35, and therefore the petitioner must be included in the definition of citizen.

The court held that article 260 of the Constitution states that a person 'includes a company association or other body of persons whether incorporated or unincorporated', so rights which accrue to a person apply equally to juristic persons. Although 'citizen' is not defined in article 260 of the Constitution, citizenship is dealt with in articles 12–18. The effect of these provisions is that citizenship is in reference to natural persons, as article 14 specifically uses 'birth', 'parents' and 'born' in its wording – all terms which apply only to a human being.

The court found that the protections of article 35 thus did not apply to a juristic person, and Famy Care was excluded from enjoyment of the right to access to information.

Famy Care's counsel argued that as a citizen of Kenya he was entitled to information under article 35(1) of the Constitution, but the court rejected what it termed 'actively and deliberately circumventing constitutional or other legal provisions by using his privileged position in the course of proceedings'. Further, the court decided that Famy Care's argument that the petition was brought in the public interest could not alone circumvent the clear limitation of article 35(1), as there is nothing in the article which permits the limitation of citizenship to be overwritten by public interest.

The petitioner's applications were struck out and costs were to abide by the petition.

The effect of this judgment was that juristic persons such as companies, NGOs and the like, whether foreign or Kenyan, did not enjoy the right of access to information, as such a right is available only to natural persons who are citizens. This was, of course, a disappointingly narrow interpretation of the scope of the constitutional right of access to information. However, the recently passed Access to Information Act, 2016 (also discussed elsewhere in this chapter) has defined 'citizen' as including 'any private entity that is controlled by one or more Kenyan citizens'. This is welcome as it restores the right of access to information to juristic persons controlled by Kenyan citizens which was taken away in this case.

## **6.5 The protection of freedom and independence of the media under article 34 of the Constitution**

The Constitutional and Human Rights Division of the High Court heard the case between *Royal Media Services Ltd and Others v Attorney and Others* (Petition No. 557 of 2013), which related to the nature and extent of the freedom of the media protected under article 34 of the Constitution, and whether it had been violated by the respondents in the context of the migration of terrestrial television broadcasting from the analogue to the digital platform.

The petitioners were Kenyan broadcasting companies that collectively controlled 85% of the television coverage in the country, and which had not been issued broadcasting signal distribution (BSD) licences. The first three respondents are bodies of the state, while the 4th and 6th respondents were companies that had been granted BSD licences by the CA. Other respondents included the holder of a temporary licence for a broadcast subscription management service, a television broadcaster in Kenya, and a media company licensed to broadcast by the CA.

From the petition, the court identified two broad areas relevant to the broadcast media that needed to be determined, namely:

- Whether and to what extent the petitioners were entitled to be issued with BSD licences by the CA, and whether the issue of the licences to the other licensees to the exclusion of the petitioners was a violation of articles 33 and 34 of the Constitution
- Whether implementation of the digital migration constituted a violation of the petitioners' fundamental rights and freedoms and, if so, whether the process should be stopped, delayed or varied in order to vindicate or ameliorate the petitioners' fundamental rights.

As digital migration occurs within a global context and the process is implemented through a framework established by the International Telecommunication Union Convention, which Kenya ratified in 1964, the court determined that the issues had to be resolved with that in mind.

The court found that the petitioners were not entitled to be issued with BSD licences by the CA on the basis of their established status, or on the basis of any legitimate expectation. Licensing is subject to statutory provisions which allow the CA, in the exercise of its mandate, to make certain considerations and impose conditions necessary for the achievement of the objects and purposes of the Constitution and the law. The issuing of BSD licences to other licensees to the exclusion of the petitioners, as alleged in the petition, was not a violation of articles 33 and 34 of the Constitution.

The court also found that the implementation of the digital migration was not a violation of the petitioners' fundamental rights and freedoms, and no basis had been made by the petitioner to stop, delay or vary the digital migration process. The process of migration of the broadcasting platform from analogue to digital had been consultative and participatory and in line with Kenya's international obligations.

Accordingly, the petition was dismissed with costs awarded to the respondents and the 2nd interested party as the court was convinced that the petitioners' motivation to bring the petition was intended to protect their commercial interests and not in the nature of public interest litigation.

The petitioners were aggrieved by this ruling and filed *Civil Appeal No. 4 of 2014: Royal Media Services Limited and Others v Attorney General and Others*. The judges of the Court of Appeal delivered separate but largely concurring judgments setting aside the judgment of the High Court and issuing a number of orders including:

- That the CA's direction to the 4th, 5th, 6th and 7th respondents to air the appellant's free-to-air programmes without their consent was a violation of the appellant's intellectual property rights and was declared null and void
- In its composition at the material time, the CA was not the independent body envisaged by article 34(3)(b) of the Constitution, and consequently its public procurement process of determining applications for BSD licences was null and void, and that an independent body constituted strictly in accordance with the above constitutional article should conduct the tendering process afresh
- That a BSD licence was to be issued to the appellants upon their meeting the terms and conditions set out in the appropriate law and applicable to other licensees, in view of their massive investment in the broadcasting industry
- That the BSD licence issued to the 6th respondent was null and void and that the CA should refund whatever fees it was paid for the licence
- That the 2nd and 3rd respondents were restrained from switching off the appellants' analogue frequencies, broadcast spectrums and broadcasting services and that the new switch-off date should be no later than 30 September 2014.

These and consequential orders prompted the original respondents to file applications under certificate of urgency in the Supreme Court of Kenya, and after hearing the parties on 11 April 2014 the court made orders, including the following:

- Signet Kenya Limited, Star Times Media Limited, Pan Africa Network Group Kenya Limited and GOTv Kenya Limited were prohibited from broadcasting any content from Royal Media Services Limited, Nation Media Group Limited and Standard Group Limited without their consent, pending the hearing and determination of the intended appeal.
- The CA was prohibited from switching off any frequencies, broadcast spectrums or broadcasting services pending the hearing and determination of the intended appeal.
- The legal effect of the Court of Appeal's declaration that the CA was not the independent body envisaged under article 34(3)(b) of the Constitution as a regulator of airwaves was held in abeyance pending the hearing and determination of the intended appeal.
- The new switch-off date of 30 September 2014 would remain valid pending the hearing and determination of the intended appeal.

The petitions were consolidated – *Petitions 14, 14A, 14B and 14C of 2014*.

The Supreme Court of Kenya upheld the constitutionality of the CA and its independence to consider and issue licences under article 34(3), as flowing from the Constitution’s supremacy clause it was imperative to provide a formula by which old legislation would transit into the new constitutional dispensation without creating a vacuum.

In its conclusion, proposal and orders, the court signalled certain directions that will have bearing on constitutional initiatives by other agencies of governance, including the following:

- The CA was urged to ensure that the sale of set top boxes was open to competition to avoid creating a monopoly or duopoly. Towards this end, the CA could consider incorporating subsidising the cost of set top boxes as part of the requirement for signal distribution licensees.
- The CA must realign operations and licensing procedures to be in tune with articles 10, 34 and 227 of the Constitution.

The court then went on to make the following orders:

- The Orders of the Court of Appeal were set aside.
- The annulment of the issuance of a BSD licence to Pan African Network Group Kenya Limited by the CA was set aside.
- The order by the Court of Appeal directing the independent regulator to issue a BSD licence to the 1st, 2nd and 3rd respondents was set aside.
- The CA was required to consider the merits of applications for a BSD licence by the 1st, 2nd and 3rd respondents, and any other local private sector actors in the broadcast sector, whether singularly or jointly, within 90 days of the judgement.
- The CA was to ensure that the BSD licence issued to the 5th appellant be duly aligned to constitutional and statutory imperatives.
- The CA, in consultation with all the parties to this suit, had to set timelines for the digital migration, pending the international analogue switch-off date of 17 June 2015.

## **6.6 Gazette Notice requiring certificates of approval prior to publicly exhibiting films, including on television**

The Constitutional and Judicial Review Division of the High Court heard the civil application of *Nation Media Group Limited v The Attorney General (Mic. Civil Application No. 821 of 2002)*, which hinged on a Gazette notice issued by the Minister for Information, Transport and Communication in terms of the Films and Stage Plays Act (CAP 222 of 1962), which Nation Media Group contended infringed its constitutional rights and freedoms. Judgment was delivered in 2007.

In Gazette Notice No. 4014, dated 6 June 2001, the minister issued a legal notice requiring ‘broadcasting networks, cinema theatres, production houses, advertising agents and all those involved in films (including television commercials, television dramas, comics, documentaries and features) for public exhibition, screening or broadcast, whether foreign or locally produced’ to obtain a certificate of approval from both the Film Licensing Officer and the Kenya Film Censorship Board prior to being exhibited. Further, according to the notice, any person who exhibited any film in contravention of this requirement committed an offence.

The applicant’s counsel contended that the minister’s action was unconstitutional and, according to precedent, the burden of proof had shifted to the respondent to justify the law, and that the state had to justify the reasonableness of the limitation to the right. Since the publication of the Gazette Notice, the respondent had demanded the applicant’s compliance by two letters. Further, the applicant’s counsel submitted that the minister could not issue orders which make it impossible to run a modern television station. For a constitutionally guaranteed right to be taken away, it had to be done in accordance with the law, and not by a mere Gazette Notice. According to Counsel, the Communications Commission of Kenya was the body with licensing authority for television, and the minister was extending provisions meant for stages, theatres and cinemas to the broadcast and television media.

The court held that the Films and Stage Plays Act was meant to control the making and exhibition of films, and the places where exhibition is contemplated are cinema halls, stages and theatres – closed areas or rooms – especially in the light of the opening words of section 12(10): ‘No person shall exhibit any film at an exhibition to which the public are admitted unless the board has issued a certificate of approval in respect thereof approving it for exhibition’.

It held that the Films and Stage Plays Act did not envisage or make reference to the licensing of media houses or the regulation of their broadcasts, and the Constitution requires any curtailment of right to be according to the law, thus the extension by the

minister to include television communication was not valid according to any existing law.

Additionally, the regulations could not be deemed to pass the test of reasonableness as the way they are stated means they would even cover live broadcasts. It is not reasonable to expect the applicant to submit a live coverage film for approval before airing. If the legal notice was found to be inapplicable to media houses that broadcast into Kenya from other countries, that would be a case of discrimination against local media houses, which is outlawed under the Constitution.

The requirement to obtain a certificate of approval from two bodies – the Licensing Officer and the Kenya Film Censorship Board – for the same licence, was viewed by the court as a waste of time and an unnecessary expense. Further, no criteria were provided as to how the two bodies would exercise their power in approving or rejecting a film, and the court was of the opinion that objective standards should be applied to avoid arbitrary decisions and possible abuses of power.

The Film and Stage Plays Act came into force in 1963, at which time videos, DVDs, and the like did not exist. The court stated that the legal notice as promulgated was out of time and tune with current trends in information technology, and in the court's opinion it was impracticable, oppressive and unreasonable.

The Gazette Notice did not, according to the court, pass the tests of legality, reasonableness or of being in the interest of defence, public safety, order, morality or health, and the respondents did not demonstrate that the decision to have the notice or its contents was informed by those tests. Consequently, the notice and its contents were ineffective, restrictive and limited the applicant's right to freedom of expression. The court issued declarations that:

- The order by the Minister of Information Transport and Communication infringed upon the applicant's right of freedom of expression and related rights
- The order by the minister published in the Gazette was null and void and of no legal effect in that it did not satisfy the principle of legality set out in the Constitution, and that it was not necessary or justifiable in a democratic society such as Kenya.

## **6.7 Defamation**

In this chapter, we have already dealt extensively with the general issue of defamation as it arises in respect of criminal defamation. However, it is important to note that

defamation is more usually dealt with as a civil matter, where a person who has been defamed seeks damages to compensate for the defamation. All of the cases dealt with in this section arise in the context of civil cases of defamation, which is also known as 'libel' in Kenya. That term will be used in this section.

### **6.7.1 The defence of fair comment to an action for libel**

This case deals with the 'fair comment' defence to an action for libel. The High Court of Kenya heard the case of *CFC Stanbic Bank Limited (Stanbic) v Consumer Federation of Kenya (COFEK) (Civil Case No. 315 of 2014)*, in which the plaintiff claimed it had been defamed and claimed damages for libel, aggravated damages and for a permanent injunction to restrain the defendant from publishing the article under contention.

At the beginning of October 2014, COFEK published on its website an article entitled 'How true is this allegation on Stanbic Bank Juba Branch on Foreign Exchange Transactions'. The article contained allegations of lack of integrity in foreign exchange dealings, breach of Central Bank regulations, arrogance by the plaintiff's foreign exchange dealer, breach of consumer rights and lack of integrity and responsibility by the plaintiff's management team.

Stanbic's advocates demanded the immediate removal of the article from the COFEK website, Facebook and Twitter accounts. COFEK responded that they were not the authors of the anonymous article, but had brought the article to the attention of the public in general to elicit complaints and have a public explanation given. Stanbic sought various injunctive orders against COFEK, contending that the website, Facebook and Twitter accounts were open to millions, and that COFEK had declined to remove the article and, further, had published it to the Central Bank of Kenya, as well as intimating it would continue to publish the article and invite comments from the public.

Stanbic's position was that the article was affecting its reputation, and the re-publication of the article to the Central Bank of Kenya and the public was actuated by malice as COFEK has the power to control who posts on its site by blocking users. The plaintiff claimed that the company's reputation was at stake, the continued publication of the article was causing immense reputational damage to it, and the publication on the Twitter account amounted to a republication. Further, it stated that the defences of fair public comment and justification were not open to the defendant.

COFEK contended that the article constituted fair public comment and was not defamatory, and since Stanbic had not produced a report to show what was contained

in the article was false or unfounded, or that it was actuated by malice, the defendant was entitled to rely on the defences of fair public comment and justification.

The court found that the words of the article would indeed tend to lower Stanbic's reputation in the estimation of right thinking members of society, and therefore on a *prima facie* basis the words may be defamatory. Regarding the issue of malice, the court found that COFEK did not seek to verify the authenticity of the contents of the article before republication, then published it further to the regulatory authorities. COFEK had received the article at its email address and then chosen to post it to its website, Facebook and Twitter accounts, and the court regarded this as 'publishing'.

The court referred to a number of previous cases in its judgment, and thus held that by republishing what was libellous, COFEK assumed responsibility in respect thereof – precedent being that every republication of a libel is a new libel. COFEK put forward the defences of public fair comment and justification, but at the time the application was being argued, no defence had been filed, so the court was unable to dismiss or uphold those defences.

The court judged that the article complained of was not only defamatory, but its continued publication on the worldwide web may continue to damage Stanbic's international reputation and business. This could be remedied by summary removal of the offending publication and the court so ordered the removal thereof. The costs of the application were awarded to the plaintiff.

### **6.7.2 Privilege as a defence for defamation**

The High Court heard the case of *Ndungu Njoroge and Others v The Standard Limited and Others (Civil Case No 117 of 2004)*.

The 1st plaintiff is a law firm in which the 2nd plaintiff is a partner. The 2nd plaintiff was also the chairman of the Presidential Commission of Inquiry into Illegal/Irregular Allocation of Public Land, known as the Ndungu Commission. The suit was filed against a media house, its managing editor and the reporter of an article published in the *East African Standard*, in which was written: 'The head of the presidential commission investigating irregular land allocations could be forced to resign following allegations involving him in an irregular land deal. The National Academy of Sciences claims that Ndung'u Njoroge and Company Advocates, where the commission Chairman is a partner, conspired with "powerful conmen" to grab the land ... .'

The article quoted both the 2nd plaintiff and documents forwarded to the newspaper

by staff of the Kenya National Academy of Sciences, the public body which claimed the law firm was involved in the transaction in which the National Academy was 'duped' into swapping a piece of land it had been allocated for a plot that was found to be non-existent. As the 2nd plaintiff was chairman of the commission investigating these issues, he would thus be in the position of investigating his own firm, which was against the rules of the commission. The 2nd plaintiff stated that commission investigations indicated that the swap involved the then commissioner of lands, and the then permanent secretary in the Ministry of Research, Technical Training and Technology, and that none of the commission's members had raised the issue of his stepping down.

According to the plaintiffs, the publication of the claims was done knowing, or with reason to know, they were false, or reckless or without taking any care to ensure that the words were true. They claimed the publication defamed them as they were depicted, among other things, as having plotted and conspired with conmen to defraud the Kenya National Academy of Sciences of its land. The plaintiffs stated that, prior to publication, the full facts and documentary material had been provided to the defendants showing that the allegations linking the plaintiffs in such a conspiracy were false. The plaintiffs claimed that the defendants failed to tender an apology, and the plaintiffs had to place advertisements in the media to correct the position. They further claimed that their reputation and goodwill were seriously injured, they suffered embarrassment in the eyes of the reasonable man, business was adversely affected, and they were subject to public ridicule, odium and had suffered loss and damage. They therefore claimed special damages, general damages for libel, damages on the footing of aggravated or exemplary damages, an injunction restraining further publication of similar statements as well as costs of the suit and interests.

The defendants filed a joint defence that while admitting the publication of the material, denied it was published falsely or recklessly and stated that it was not defamatory of the plaintiffs. They pleaded that they had made an offer of rejoinder to the plaintiffs, which the plaintiffs ignored and proceeded to file the suit. As a rejoinder had been published, it was the defendants' view that there was no need to publish the advertisement. Alternatively, they pleaded that the material was published as fair information in a matter of public interest and concern – the Kenya National Academy of Sciences is a public institution – without malice towards the plaintiffs and under a common interest with and duty to the public, hence the occasion was privileged. According to the defendants, the publication was meant to bear the meaning attributed to them by the plaintiff and therefore denied that the plaintiffs had been injured thereby. The defendants therefore denied that the plaintiffs were entitled to the claims sought.

The court referred to article 32(1) of the Constitution relating to the right of freedom of conscience, religion, thought, belief and opinion, and the right to express that opinion, and article 33 which gives the right to freedom of expression, but drew special attention to clause (3), which provides that in exercising freedom of expression, the rights and reputation of others are to be respected. The court therefore has the duty, it said, to balance the public's rightful interest in how its affairs are being administered with the protection of the dignity and reputation of others.

However, according to the court, the law recognises certain defences that may be invoked by a defendant in cases of defamation. Also, there are occasions when the freedom of communication without fear of an action for defamation is more important than the protection of a person's reputation, and such occasions are said to be 'privileged' – either absolute or qualified. Qualified privilege is a valid defence only when the maker of a defamatory statement acts honestly and without malice. It is up to the plaintiff to prove malice. Further, the protection of privilege is not valid unless the publication is in the public interest and the newspaper can be said to be fulfilling a duty in revealing it.

The court found that the plaintiffs' reputation, credibility and goodwill must have been dented by the publication, but in publishing the article the defendants were not motivated by malice. This means that the plaintiffs would, in the absence of privilege, have been entitled to compensation.

The defendants had offered rejoinder to the plaintiffs, and on the day following the original publication a rejoinder was published in the newspaper, which, in the court's view, was appropriate to what had been published the previous day, even though it was not published on the first page.

From this, the court declined to give the plaintiffs the relief claimed, as the defendants were covered by the defence of qualified privilege. However, as the court felt the defendants could have conducted more thorough investigations into the matter before publishing, costs would not be awarded to them.

The court further stated that the publication was not done 'with guilty knowledge', and as aggravated damages would have been appropriately ordered against a defendant that acted out of improper motivation, this was not the case. Also, a rejoinder was duly published. The court referred to article 34 of the Constitution, which provides for the freedom of the media, and that the state is prohibited from 'penalising any person for any opinion or view of the content of any broadcast, publication or dissemination'. This being the court's finding, the suit was dismissed.

### 6.7.3 Remedies for defamation

*Kipyator Nicholas Kiprono Biwott v Clays Limited and Others (Civil Case 1067 & 1068 of 1999)* was heard in the High Court. The case was brought by Kenyan Minister of Tourism, Trade and Industry Nicholas Biwott against the authors, publishers and printers of a book entitled *Dr. Ian West's Casebook*, which Biwott claimed defamed him by implying that he killed, or participated in the murder of, Dr Robert Ouko, as well as implicating him in corruption. The book was published in the United Kingdom (UK) and was sold in many parts of the world, including Kenya. Biwott held that the book had damaged his reputation both locally and internationally.

Papers for each of the cases noted above were served on the UK-based companies and the co-authors, but all failed to enter appearance within the prescribed time. Default judgments were entered against all of them, and this consolidated case was before the court for the determination of damages. Book Point Ltd and Chandermohan Bahal t/a Bookshop (which distributed and sold the book) are both Kenyan defendants, and although they initially entered a defence, Salim Dhanji & Co eventually admitted liability and a consent judgment was entered against them. They were required to pay damages to the plaintiff and make an unqualified apology for their publication of the offending material by its sale. For this reason, although the Kenyan defendants were not part of this case, the award against them was judged to be relevant and taken into account in making the ultimate award against the UK-based defendants.

In looking at precedent cases, the judge expressed being ‘particularly troubled by the inordinately low awards made by the High Court in libel cases’. In assessing the measure of damages in this case, the court used the settlement amount reached with the Kenyan defendants as a starting point – their role in the perpetration of the libel was viewed by the court as ‘rather marginal’ and in addition they tendered an acceptable apology. The UK-based defendants had refused to either apologise or withdraw the publication, and the court judged that this constituted aggravation of the damage. ‘They have continued to repeat the libel, have refused to apologize and continue to make profits from their wrong.’

Larger damages were adjudged against them – indeed, the highest ever made in Kenya for libel. The court justified this by stating as follows: ‘I believe that time is propitious to send a clear message to all those who libel others with impunity, and who get away with ridiculously small awards, that the Courts of law will no longer condone their mischief. No person should be allowed to sell another person’s reputation for profit where such a person has calculated that his profit in so doing will greatly outweigh the damages at risk.’

The court also awarded a permanent injunction against the selling and circulation of the book within the jurisdiction of the Supreme Court. Costs were awarded to the plaintiff.

#### **6.7.4 Defamation of a public body**

In the case *Media Council of Kenya v Eric Orina* (Civil Suit No. 540 of 2012) heard in the High Court, the Media Council sought an injunctive order to restrain the defendant, a member of the Media Council, from writing, printing and publishing further ‘defamatory’ statements against the Media Council and its members, pending the hearing and determination of this suit.

The respondent published six emails in five publications online via the portal Jackal News, and the applicant’s contention was that the nature of the statements were erroneous and damaging to the Media Council’s reputation, its functions and the best interests of the public at large. The applicant further argued that the respondent was likely to continue to publish more derogatory material, which was likely to be published by the Jackal News, that such statements would hamper the core aims and objectives of the Media Council, and that he should therefore be restrained.

According to the applicant, the defendant’s conduct was not in keeping with the applicant’s constitutional right to have its reputation respected and not compromised in the minds of right thinking members of society, and that further publications by the defendant would so damage the Media Council as to be beyond being compensated by damages.

The respondent admitted publishing the emails, but as a member of the Media Council he had correctly challenged and questioned the applicant in respect of the state of affairs in the Media Council and the unlawful manner in which its members were conducting the Council’s mandate. He contended he was not throwing mud at the Media Council, but was an insider ‘blowing the whistle’ in a justified and fair manner in the realm of ‘fair comment’.

The court’s view was that, although the plaintiff had a *prima facie* case with a probability of success, the Media Council itself was established for the purpose of protecting the right to freedom of speech and free expression – a right the respondent was trying to assert in his publications that were in question. The Media Council is accordingly expected to be more tolerant on the issue than private individuals, and the court therefore ruled, because the plaintiff was not a private person but a public body, any damage done to it in respect of its reputation could sufficiently be compensated with damages.

The court found the application for an injunction of restraint therefore had no sufficient merit and the case was dismissed with costs.

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## 1 INTRODUCTION

The Republic of Rwanda, a landlocked state in the African Great Lakes region of East Central Africa, is one of the smallest countries on the continent. With a land area of 63,890 km<sup>2</sup> and a population of about 12.6 million, Rwanda is located a few degrees south of the equator, and is bordered by Burundi, with which it has close ties, the Democratic Republic of the Congo, Tanzania and Uganda.

The population is young (more than 60% are aged 24 years or younger), predominantly rural, and comprises three main ethnic groups – the Hutu (about 84%), Tutsi (14%), and Twa or Pygmy (1%).

Prior to the Berlin Conference of 1884–85, which assigned the territory to Germany as part of German East Africa, the region was home to several kingdoms. In the 19th century, King Kigeli Rwabugiri of the dominant Kingdom of Rwanda initiated *uburetwa*, a system which forced Hutus to work for Tutsi chiefs, causing a long-lasting rift. While the Germans did not significantly alter the country's social structure, direct colonial rule was implemented after Belgian forces took control of Rwanda and Burundi during the First World War. The Germans and Belgians both entrenched the status quo of Tutsi dominance.

Ethnic tensions were high amid the clamour for decolonisation in the late 1950s, with Hutus rejecting Tutsi calls for independence based on the prevailing Tutsi monarchy. In November 1959, a violent incident sparked a Hutu uprising in which hundreds of

Tutsis were killed and thousands, including the Tutsi king, Kigeri V, were forced into exile. The violence prompted Belgium to organise elections in 1960. The result was a massive Hutu win, marking a dramatic shift in the power structure in their favour. Following a constitutional referendum in 1961, the Tutsi monarchy was abolished and a republic established.<sup>1</sup>

In that same year, the country's first direct elections saw Gregoire Kayibanda, a Hutu, elected president. He shepherded the country to independence on 1 July 1962, and proceeded to turn the country into a one-party state. Ethnic violence continued throughout his tenure. In December 1963, several hundred Tutsis entered southern Rwanda from Burundi and advanced to within 20 km of the capital, Kigali, before being repelled by the Rwandan Army.<sup>2</sup> In all, 10 such attacks occurred between 1962 and 1967, each leading to retaliatory killings of large numbers of Tutsi civilians in Rwanda and creating new waves of refugees.

Kayibanda, the only candidate, was re-elected in 1969; but in July 1973 he was overthrown by defense minister Major General Juvénal Habyarimana in a military coup.<sup>3</sup>

For most of the next 20 years Habyarimana ruled dictatorially, and it was widely suspected that electoral fraud ensured his unopposed re-elections. Though some economic progress was made, the great majority of Rwandans remained in dire poverty. Hutu-Tutsi tensions remained high, as they also did in neighbouring Burundi. In 1988, some 50,000 Hutu refugees fled to Rwanda from Burundi following ethnic violence there. Violence erupted in Rwanda again in October 1990, when forces of the mainly Tutsi rebel Rwandan Patriotic Front (RPF) invaded from Uganda, launching a civil war.<sup>4</sup>

The RPF demanded a share in power, ultimately forcing Habyarimana to introduce a constitutional amendment reintroducing multi-party politics. This constitution was never effective, however, as the war provoked a parallel process that supplemented internal reforms with a negotiated settlement. On 4 August 1993, Habyarimana signed a power-sharing agreement with the Tutsis in Arusha.<sup>5</sup>

However, Habyarimana was killed on 6 April 1994, when his aircraft, also carrying Cyprien Ntaryamira, president of neighbouring Burundi, was shot down close to Kigali International Airport. His assassination ignited ethnic tensions in the region and helped spark the Rwandan Genocide.

Blaming the RPF for the shooting, Hutus slaughtered some 800,000 people in just 100 days. The victims were not all Tutsis. Political opponents, irrespective of ethnic

origin, were targeted as well. Lists of government opponents were handed to militias, who were told to kill them and their families. At the time, identity cards noted the holder's ethnicity, so militias set up roadblocks where Tutsis were killed, usually with machetes.

The Uganda-backed RPF took the capital of Kigali in July, ending the killing of Tutsis. Some two million Hutus then fled across the border into the Democratic Republic of the Congo (then called Zaire), fearing revenge attacks. Human rights groups say the RPF killed thousands of Hutus as they took power.<sup>6</sup>

The RPF quickly established a government of national unity with Pasteur Bizimungu (a Hutu) as president, and RPF leader Paul Kagame (a Tutsi) as vice president. Following a dispute over the make-up of a new cabinet, Bizimungu resigned in March 2000 and Kagame became president, a position he still holds.<sup>7</sup>

In 2003, a new Constitution was introduced which, among other things, limited the president to two terms in office. This Constitution was amended in December 2015, and as a result of those changes and a subsequent court ruling Kagame may legally be president until 2034.<sup>8</sup>

Kagame has prioritised economic development, launching a programme to develop Rwanda as a middle-income country by 2020. Annual growth between 2004 and 2010 averaged 8%, and there have been noted improvements in health care and education.

Tourist numbers have grown rapidly, as has the Human Development Index – between 2006 and 2011 the poverty rate reduced from 57% to 45%, and life expectancy rose from 46.6 years in 2000 to 59.7 years in 2015. Gross domestic product per capita in 2014 was US\$772, compared with US\$303 for neighbouring Burundi, its former 'twin' state.

The literacy rate for those aged 15 and over is estimated at 70.5% (male 73.2%, female 68%).<sup>9</sup> State-owned publications predominate in the print sector, which includes:

- *The New Times* – private, pro-government, English-language
- *Rwanda Herald* – private, English-language
- *Rwanda Newsline* – owned by Rwanda Independent Media Group, English-language
- *Umuseso* – sister paper to *Rwanda Newsline*, Kinyarwanda-language.

On the positive side, Rwanda's telecommunications sector has grown rapidly since it was liberalised in 2001, and the number of companies providing telephone and

internet services increased from one – the state-run Rwandatel – to 10 or more currently. Kigali is connected to provincial centres by microwave radio relay and cellular telephone. Combined fixed-line and mobile-cellular telephone density has increased and now exceeds 40 telephones per 100 persons.<sup>10</sup>

Government owns and operates the only television station, *Television Rwandaise*. Government-owned and operated Radio Rwanda has a national reach, and there are also nine private radio stations. Internet users were estimated to number 1.1 million in 2014, about 9.2% of the population,<sup>11</sup> and Rwanda ranked in first place in Africa for broadband download speeds (62nd globally) with a speed of 7.88 Mbit/s in February 2013.<sup>12</sup>

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

- Media and the constitution
- Media-related legislation
- Media-related regulations
- Media self-regulation
- Media-related case law based on decided cases

The aim of the chapter is to equip the reader with an understanding of the main laws governing the media in Rwanda. Key weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Rwanda, 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 Rwanda
- 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 Rwanda 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.

In December 2015, Rwanda introduced 'The Constitution of the Republic of Rwanda of 2003 Revised in 2015'. The discussions in this chapter are based on this 2015 revision of the 2003 Constitution.

The Constitution of Rwanda sets out the foundational rules for the Republic of Rwanda. These are the rules upon which the entire country operates. The Constitution contains the underlying principles and values of the laws of Rwanda.

A key constitutional provision in this regard is article 1(1), which states: 'All power derives from Rwandans and is exercised in accordance with this Constitution. No individual or section of people can arrogate to themselves the exercise of power. National sovereignty belongs to Rwandans who exercise it directly by means of referendum, elections, or through their representatives.'

Further to this, article 4 states: 'The Rwandan State is an independent, sovereign, democratic, social and secular Republic. The founding principle of the Republic of Rwanda is: Government of Rwandans, by Rwandans and for Rwandans.'

Article 10 deals with fundamental principles of the State of Rwanda. It commits to preventing and punishing crimes of genocide and revisionism of genocide, as well as eradicating genocide ideology and all its manifestations – article 10.1. Discrimination and divisionism based on ethnicity, region or on any other grounds are to be eradicated, and national unity is to be promoted – article 10.2, and power sharing is to be equitable – article 10.3.

Rwanda is committed to building a state governed by the rule of law, a pluralistic democratic government, and equality of all Rwandans and between men and women, and this is to be affirmed by women occupying at least 30% of positions in decision-

making organs – article 10.5. A state committed to promoting social welfare and establishing appropriate mechanisms for equal opportunity to social justice is to be built – article 10.5, and solutions are to be constantly sought through dialogue and consensus – article 10.6.

## **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 Rwanda makes provision for constitutional supremacy. Article 3 specifically states that: ‘The Constitution is the supreme law of the country. Any law, decision or act contrary to this Constitution is without effect.’ However, the phrasing of many of the articles in the Constitution speaks against this as numerous articles are subject to a version of the following: ‘This right is exercised under conditions determined by law.’ This undermines the supremacy of the Constitution by making rights subject to statutes. The ultimate strength of the constitutional supremacy article will be determined by the judges of the Supreme Court.

Subsection 5 of the Rwandan Constitution is entitled ‘Hierarchy of laws and their authentic interpretation’.

Article 95 gives the hierarchy of laws as follows:

1. Constitution
2. Organic law – these are laws designated as such and empowered by the Constitution to regulate other key matters in the place of the Constitution
3. International treaties and agreements ratified by Rwanda
4. Ordinary law – statutes passed by Parliament
5. Orders.

A law cannot contradict another law that is higher in the hierarchy.

The Supreme Court interprets laws, according to article 96. Cabinet may request an interpretation – or indeed any person may request such through the Bar Association. In cases of conflict between the languages in which a law was published in the Official Gazette, the language in which that law was adopted prevails.

## 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 Rwanda makes provision for three types of legal limitations on the exercise and protection of rights contained in Chapter IV, 'Human Rights and Freedoms'.

### 2.3.1 Internal limitations

These are limitations that are right specific and contain limitations or qualifications to the particular right that is provided for in the Constitution. These will be dealt with in more detail when discussing the applicable rights below.

### 2.3.2 Constitutional limitations

Article 136 of the Constitution of Rwanda deals with states of siege and emergency. It provides that a state of emergency is provided by law and declared by the president with the approval of Cabinet. Significantly, article 136 provides that a declaration of a state of emergency must specify the part of the national territory to which it applies, and indicate the rights, freedoms and guarantees provided by law that are suspended under the state of emergency. A state of emergency must be clearly justified and may not exceed a period of 15 days without the approval of a two-thirds majority vote in each chamber of Parliament – that is, the Chamber of Deputies and the Senate.

Article 136 makes certain rights non-derogable. A state of siege or emergency cannot under any circumstances violate the right to life and physical integrity of the person or the rights accorded to people by law in relation to their status, capacity and nationality.

Further, the principle of non-retroactivity of criminal law, the right to legal defence, freedom of conscience and religion are also non-derogable. Unfortunately, many of the critical rights for the media, including the basic right to freedom of expression and the right to information, can be derogated from in a state of emergency.

### 2.3.3 General limitations

The last type of limitation is a general limitations provision. General limitations provisions apply to the provisions of a bill of rights or other statement setting out the fundamental rights. These types of clauses allow a government to pass laws limiting rights, generally provided this is done in accordance with the constitution.

Article 41, entitled ‘Limitations of rights and freedoms’, makes it clear that a law may limit any right entrenched in the Constitution. It states: ‘In exercising rights and freedoms, everyone is subject only to limitations provided for by the law aimed at ensuring recognition and respect of other people’s rights and freedoms, as well as public morals, public order and social welfare which generally characterise a democratic society.’ This is an interesting provision that requires some explanation.

- It is clear that rights can be limited on two main bases: to protect the rights and freedoms of other individuals; and to protect public morals, public order and social welfare which generally characterise a democratic society.
- It is important to note that there is no requirement that a limitation of a right be narrowly tailored to suit the public purpose.
- Lastly, it is not clear why it is necessary to have internal limitations clauses if there is a general limitations clause as well. Often, internal limitations clauses effectively undermine the substantive nature of the rights to which they apply.

## 2.4 Constitutional provisions that protect the media

The Constitution of Rwanda contains provisions in Chapter IV, ‘Human 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 38, entitled ‘Freedom of press, of expression and of access to information’. These freedoms are recognised and guaranteed by the state in this article.

However, as with many freedoms in the Rwandan Constitution, these are not absolute. The article goes on to limit them by stating:

Freedom of expression and freedom of access to information shall not prejudice public order, good morals, the protection of the youth and children, the right of every citizen to honour and dignity and protection of personal and family privacy.

The article then goes on to provide that the conditions for exercising these freedoms are determined by law. For example, there is a law relating to how the freedom of access to information is to be exercised, which is dealt with under the legislation provisions of this chapter.

## PRIVACY

Article 23 of the Constitution of Rwanda, which is entitled ‘Respect for privacy of a person and of family’, offers some important protection for the media. It specifies in its first paragraph that ‘[t]he privacy of a person, his or her family, home or correspondence shall not be subjected to interference in a manner inconsistent with the law’.

Paragraph 3 states that the confidentiality of correspondence and communication shall not be waived, ‘except in circumstances and in accordance with procedures determined by the law’. This would include email and telecommunications. The protection of a person’s correspondence is important to the working journalist.

A person’s home is inviolable as well, according to article 23. It states that ‘[n]o search or entry into a home shall be carried out without the consent of the owner, except in circumstances and in accordance with procedures determined by the law’.

In all these instances, the circumstances in which the rights may be limited are not specified. There are no grounds for such action stated anywhere in the Constitution, and the power of ‘the law’ to determine the procedures which can limit these rights is problematic because, in effect, a constitutional right is subject to an ordinary statute.

## RIGHT TO FREEDOM OF MOVEMENT AND RESIDENCE

Article 26 of the Constitution of Rwanda gives every Rwandan the right to move freely and to reside anywhere in Rwanda, as well as to leave the country and return. The article states that ‘[t]hese rights may only be restricted by law for reasons of public order and of national security, in order to avert a public threat or to protect persons in danger’.

This right is important in that it permits Rwandan journalists to cover events in other parts of the country, such as elections. This right is not extended to non-citizens.

## PROTECTION OF FREEDOM OF CONSCIENCE

Article 37 provides the protection of freedom of conscience: ‘Freedom of thought, conscience, religion, worship and public manifestation thereof is guaranteed by the State in accordance with the law.’ Freedom of thought and the public manifestation thereof is important for the media as it provides additional protection for commentary on public issues of importance.

However, there is the internal limitation that propagation of ethnic, regional, racial discrimination or any other form of division is punishable by law. In practice, this restriction is known as the law on ‘divisionism’.

## PROTECTION OF FREEDOM OF ASSOCIATION AND THE RIGHT TO FORM TRADE UNIONS AND EMPLOYERS’ ASSOCIATIONS

Article 31 entrenches the right to form trade unions and employers’ associations. It states: ‘The right to form trade unions for the defence and promotion of legitimate professional interests is recognised. Every worker may defend his or her rights through a trade union in accordance with the law. Every employer has the right to join an employers’ association.’

Article 39 of the Constitution of Rwanda provides that: ‘The right to freedom of association is guaranteed and does not require prior authorisation.’ These rights not only guarantee 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.

As discussed previously, constitutional rights are never absolute. Article 39, for example, contains an internal limitation in that the right it bestows is exercised under conditions determined by law.

### **2.4.2 Other constitutional provisions that assist the media**

#### **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 68 specifically states that no member of Parliament may be prosecuted, pursued, arrested, detained or judged for his or her opinion expressed or vote cast in the exercise of his or her duties. The effect of this is to protect freedom of

expression for members of the chambers of Parliament, which ought to assist in ensuring robust debate.

- Article 70 specifies that the sittings of each chamber of Parliament are public; however, each chamber may decide, by an absolute majority vote of members present, to sit in camera upon request of the president of the Republic, the president of the Senate, the speaker of the Chamber of Deputies, one-quarter of the members of the concerned chamber or the prime minister.

## PRINCIPLE OF OPEN JUSTICE

Article 151.2 requires that court proceedings are conducted in public unless the court determines that the proceedings are to be held in camera, in circumstances provided for by law. Article 151.3 requires that every judgement must be written in its entirety and delivered in public, together with the grounds for the decision.

## PRINCIPLE OF DIALOGUE

Article 10 of the Rwandan Constitution sets out the fundamental principles which the state of Rwanda commits itself to upholding. Article 10.6 is the ‘constant quest for solutions through dialogue and consensus’. We think that the emphasis on dialogue and consensus to which the Rwandan state has committed itself necessarily requires a dialogue between the state and its people, which in turn necessitates a free press and the free flow of information.

### **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 or 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 Dignity and privacy**

Article 23 deals with ‘respect for privacy of a person and of family’. The privacy of a person, his or her family, home and correspondence are protected, and the person’s honour and dignity are to be respected.

Article 38, which guarantees freedom of the press, expression and access to information, limits these freedoms in stating that every citizen has the right to honour and dignity, and the protection of personal and family privacy.

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 the press, requiring a balancing of constitutional rights.

Similarly, the right to privacy 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.

### **2.5.2 Internal limitation to the right to freedom of expression, freedom of the press and access to information**

According to article 38 on freedom of the press, of expression and of access to information limits, exercising these rights may not prejudice public order, good morals, the protection of the youth and children, the right of every citizen to honour and dignity, and protection of personal and family privacy.

These grounds upon which the rights to freedom of expression, the press and access to information can be limited are extremely broad. Consequently, it is possible for laws to be drafted widely, thereby restricting these rights provided for in the Constitution.

### **2.5.3 Denial and revisionism of genocide**

The first noted, and presumably the most important, fundamental principle in article 10 of the Rwandan Constitution relates to the country’s genocidal history. It aims at the prevention and punishment of the crime of genocide, fighting against denial and revisionism of genocide as well as eradication of genocide ideology in all its manifestations.

As is clear from the case section below in this chapter, article 10 has been used against the media to repress even discussions about the causes and history of the genocide.

### **2.5.4 Discrimination**

Article 16, paragraph 2 makes discrimination of any kind or its propaganda punishable by law. Specifically, this relates to, among other things, ethnic origin,

family or ancestry, clan, skin colour or race, sex, region, economic categories, religion or faith, opinion, fortune, cultural differences, language, economic status, physical or mental disability or any other kind of discrimination. The second fundamental principle listed in article 10 also addresses the requirement to eradicate discrimination and divisionism.

While equality is an important principle and right, it must be noted that any prohibition upon expression, such as propaganda, potentially undermines the work of the media if the term 'propaganda' is interpreted too broadly.

### **2.5.5 States of siege and emergency provisions**

Article 136 deals with 'state of siege and state of emergency'. Such a state may be declared by the president, following approval by Cabinet. A declaration of a state of siege or a state of emergency must be clearly justified, specify the part of national territory to which it applies and its consequences. It also has to indicate the rights, freedoms and guarantees provided by law that are suspended, and the duration of the state of siege or state of emergency, which may not exceed 15 days. It cannot be extended beyond 15 days without the approval of Parliament, which requires a two-thirds majority vote of the members of each chamber – that is the Chamber of Deputies and the Senate.

Several of the important rights that protect the media could be derogable under state of emergency provisions, among them: the right to privacy – article 23; the right to liberty and security of person – article 24; the right to freedom of movement and residence – article 26; the rights to freedom of the press, of expression and of access to information – article 38; the right to freedom of association – article 39; and the right to freedom of assembly – article 40. Article 136 requires any declaration of a state of emergency to indicate which rights, freedoms and guarantees provided by law are suspended.

Article 137 details the circumstances under which a state of siege or of emergency may be declared. A state of emergency is declared when the 'gravity' of the circumstances do not 'warrant the declaration of a state of siege'. Such circumstances include both 'a public disaster' and a 'constitutional crisis'. Unfortunately, the term 'constitutional crisis' is not defined.

There are some rights and principles that article 136 paragraph 6 make non-derogable under a state of emergency, namely: the right to life and physical integrity of the person; the rights accorded to people by law in relation to their status, capacity and nationality; the principle of non-retroactivity of criminal law; the right to legal defence; and freedom of conscience and religion.

## 2.5.6 Ignorance of the law is not an excuse

Article 176 assists the media in that laws and orders cannot enter into force without their prior publication in accordance with procedures determined by law. However, it goes on to state that ignorance of a duly published law is not an excuse. Accordingly, journalists should endeavour to stay up to date with legislation affecting them.

## 2.6 Key institutions relevant to the media established under the Constitution of Rwanda

While there are no media-specific institutions established under the Constitution of Rwanda, there are a number of state organs that are important to the media.

Article 139 of the Constitution establishes a number of national commissions, specialised organs and national councils. And again, a number of these are relevant to the media, in particular:

- The National Commission for Human Rights
- The Ombudsman
- The judiciary
- The High Council of the Judiciary.

Article 139 provides for ‘a law’ to establish other national commissions, specialised organs and national councils, as well as removing them, where it is deemed necessary.

### 2.6.1 The National Commission for Human Rights

The responsibility for promoting human rights in Rwanda is particularly exercised by the independent National Commission for Human Rights (NCHR), according to article 42 of the Constitution of Rwanda.

Bodies such as human rights commissions are important for the media because, if they are truly independent of government, ordinary people as well as institutions such as the media can turn to them for protection of their human rights, such as the right to freedom of expression.

Such bodies are important in preserving human rights and can act as a bulwark against heavy-handed or illegal government restrictions on fundamental rights. It goes without saying that the effectiveness of such institutions is usually linked to the level of genuine independence they enjoy.

The NCHR is governed by the law, Determining Missions, Organisation and Functioning of the National Commission for Human Rights, Law 37 of 2013 (NCHR Law). The law states that the NCHR is independent and permanent, and that it shall not be subject to instructions from any other organ – article 3.

The NCHR's overall mission is to promote and protect human rights – article 4 – through, among other things, educating the public, collaborating with local and foreign organisations, and examining violations in Rwanda committed by state organs and those working in the public service abusing their powers, as well as associations and individuals – article 5. It is also required to monitor respect for human rights throughout the elections process – article 6.5.

The NCHR has permanent judicial police powers – article 8, and may file legal proceedings in civil, commercial, labour and administrative matters – article 9 – for violations of human rights guaranteed by the Constitution.

The NCHR consists of the Council of Commissioners, which comprises seven members, a Bureau of Commissioners (comprising the chairperson and the vice chairperson, according to article 31 of the NCHR Law) and a General Secretariat of Commission – article 15. All commissioners must be Rwandan. Cabinet submits a list of seven candidate commissioners to the Senate for approval, and on Senate acceptance they are appointed by a presidential order – article 21.

The candidates are nominated by a committee, which is charge of selecting candidate commissioners – article 19. This selection committee comprises five members and they are appointed from: non-governmental organisations (NGOs) for the promotion and protection of human rights; the Public Service Commission; civil society; and other relevant experts with expertise and skills in human rights issues.

During his or her term of office, a commissioner shall not be prosecuted, arrested, or sentenced due to his or her views expressed or other acts committed in carrying out his/her duties.

The committee in charge of selecting candidate commissioners submits to the government a list of seven selected candidates. At least 30% of those candidates must be female – article 20. The Cabinet then submits for Senate approval seven candidate commissioners before their appointment by a presidential order – article 21. Should some candidates on the list not be approved by the Senate within 15 days, the committee in charge of selecting candidate commissioners has to put forward candidates to replace those not approved. Cabinet then submits the replacement candidates, whose number is equivalent to those not approved.

NCHR Council of Commissioners' members serve four-year terms, which may be renewed only once – article 23. A commissioner may be removed from office if: he or she is no longer able to perform his or her duties; has demonstrated behaviour contrary to his or her duties; abuses human rights; jeopardises the interests of the Commission; or has been definitively sentenced to at least six months of imprisonment without suspension of sentence – article 26.

## **2.6.2 The Ombudsman**

Article 139 of the Rwandan Constitution includes the Office of the Ombudsman as one of the specialised organs assisting in resolving important issues facing the country, and article 86 gives the Senate the responsibility to approve the appointment of the ombudsman and his deputies. The ombudsman is governed by a law, Determining the Mission, Powers, Organization and Functioning of the Office of the Ombudsman, Law 76 of 2013 (Ombudsman's Law). In terms of article 4 of the Ombudsman's Law, the Office of the Ombudsman's mission includes to:

- Act as a link between the citizen and public and private institutions
- Follow up the enforcement of access to information law
- Prevent and fight injustice and corruption.

The ombudsman's funding comes from the state's budget, subsidies, donations and bequests – article 41 of the Ombudsman's Law. The ombudsman and deputy ombudsmen, who must be Rwandan, are appointed by presidential order once the Senate has selected them from a list agreed upon by the Cabinet.

The ombudsman's mission focuses strongly on dealing with corruption, particularly among civil servants, and promoting good governance in both government and NGOs. Of interest to the media is point 15 of article 4 of the Ombudsman's Law, which requires the Office of the Ombudsman to follow up the enforcement of the law relating to access to information.

Article 6 paragraph 3 gives the ombudsman the power to identify laws that hamper the general interests of the population. The ombudsman and his or her deputies have the powers of judicial police, the power to prosecute, and the power to request the Supreme Court to reconsider and review judgements rendered by other courts – articles 11–15.

The Office of the Ombudsman consists of the Ombudsman Council and the Permanent Secretariat – article 18. The Ombudsman Council is the supreme organ of the management of the office. It comprises the ombudsman and deputy ombudsmen

– at least 30% of the deputy ombudsmen must be women – articles 19 and 20. For each position of the Ombudsman Council, the government submits for Senate approval the names of candidates agreed upon by Cabinet. Approved candidates are appointed by presidential order.

The permanent secretary of the Office is appointed by presidential order upon request of the Office – article 27. Although the Office of the Ombudsman has autonomy to recruit and appoint its staff members, those staff members are governed by the General Statute for Rwanda Public Service. The organisational structure of the Office is determined by prime minister's order.

The ombudsman serves a five-year term, and the deputies serve for four years – article 20. The terms are renewable only once through the same procedure that was applied in the first term. The ombudsman and deputy ombudsmen may be removed if they fail in their duties, their integrity is compromised, or they no longer exhibit the qualities for which they were appointed to the post – article 22.

### 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.

Judicial authority is vested in the judiciary, which is composed of ordinary and specialised courts. Article 152 clarifies that ordinary courts comprise the Supreme Court, the High Court, intermediate courts and primary courts, with the Supreme Court being the apex court in Rwanda.

Specialised courts include the commercial courts and military courts. An organic law may establish or remove either type of court, and a law determines their organisation, functioning and jurisdiction. Article 150 of the Constitution provides that the judiciary is independent and exercises financial and administrative autonomy.

#### ■ *The Supreme Court*

- In terms of article 153 of the Rwandan Constitution, the president and vice president of the Supreme Court are appointed by presidential order after approval by the Senate and consultation with

Cabinet and the High Council of the Judiciary (HCJ). They are appointed for five years, according to article 156, and this term is renewable once.

- Other judges of the Supreme Court are appointed by the president after consultation with the Cabinet and the HCJ, according to article 154.
- *The High Court and the Commercial High Court*
  - In terms of article 153 of the Rwandan Constitution, the president and vice president of the High Court and Commercial High Court are appointed by presidential order after approval by the Senate and consultation with Cabinet and the HCJ.
  - They are appointed for five years, according to article 156, and this term is renewable once.

Article 157 of the Constitution of Rwanda specifies that the president, vice president and judges of the Supreme Court, as well as the presidents and vice presidents of the High Court and the Commercial High Court, may be relieved of their duties for misbehaviour, incompetence or gross professional misconduct upon request by a three-fifths majority vote of either the Chamber of Deputies or the Senate, and a decision to remove them from office is taken by a two-thirds majority vote of each chamber of Parliament in a joint sitting.

#### **2.6.4 The High Council of the Judiciary**

In terms of article 149 of the Constitution of Rwanda, the HCJ is the ‘supreme governing organ of the Judiciary’ and as such sets general guidelines governing the organisation of the judiciary. It appoints and removes the court registrars and judges in charge of ordinary and commercial courts.

The HCJ is governed by the organic law, Determining the Organization, Powers and Functioning of the High Council of the Judiciary, Organic Law 7 of 2012. Its budget comes out of the Supreme Court budget. The HCJ has 28 members which comprise:

- Judges elected from the various levels of courts by their peers
- Academics
- A Ministry of Justice representative
- The president of the NCHR
- The ombudsman
- Court registrars also elected by their peers.

Importantly, this wide selection pool contributes to the independence of the body. The chairperson of the HCJ is the president of the Supreme Court.

Elected members of the HCJ hold office for four years and may not serve more than two consecutive terms.

## **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 15 guarantees all persons equal protection of the law, and several other articles make contravention of the provisions in question ‘punishable by law’. Article 43 makes the judiciary the guardian of human rights and freedoms, and states that this duty is exercised in accordance with the Rwandan constitution and other laws. However, there is no further detail provided of how those protections are to be enforced, and it is left to the Penal Code (Organic Law 1 of 2012) to determine procedures and penalties. Chapter IX of the Penal Code deals with offences which infringe human rights, Chapter X deals specifically with offences against privacy, and Title III Chapter V deals with press offences. These are dealt with in more detail in the legislation section below.

Article 49 requires every Rwandan to respect the Constitution and other law of the country, and it also gives every Rwandan the right to defy superior orders if they constitute a serious and obvious violation of human rights and freedoms.

Perhaps one of the most effective ways in which rights are protected under the Constitution is through the provisions of the Constitution that govern the procedure for making amendments to it.

Paragraph 2 of article 175 of the Constitution of Rwanda specifies that a three-quarters majority vote of the members of each chamber of Parliament is required before an amendment or revision of the Constitution may be made. Paragraph 4 states that no proposal of amendment to article 175 is permitted.

## **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 Rwandan Constitution recognises them as separate and independent from each other, but complementary. Chapter VII of the Rwandan Constitution deals with the branches of government.

### THE EXECUTIVE

Article 97 of the Constitution of Rwanda provides that the executive power of Rwanda vests in the president and in Cabinet. The president promulgates laws – article 106, has the power to call a referendum – article 107, and is commander-in-chief of the Rwanda Defence Force – article 108.

The president is elected whenever the Office of the President becomes vacant, in terms of article 105 of the Constitution. Organic Law 17 of 2003, Governing Presidential and Parliamentary Elections, specifies in article 5 that all Rwandans who are at least 18 years of age as of the date of elections and are registered on the electoral list are eligible to vote. However, article 10 of the law lists those who do not have the right to vote, namely:

- Those who have been deprived of that right by a competent court
- People convicted of, or who have confessed to, genocide
- People convicted of murder or manslaughter
- Refugees and detainees.

The president is elected for a five-year term and may be re-elected once, according to article 101 of the 2015 Constitution. This is in accordance with most international practices. After that he/she may apply for a seat in the Senate and that term is not subject to any time limit.

However, there is a serious constitutional exception made to this in article 172 of the Constitution of Rwanda, which falls under Chapter XI, ‘Transitional Provisions’.

Under the 2003 Constitution, the president was elected to a seven-year term renewable once. The 2015 revision to that Constitution specifies in the first paragraph of article 172 that the president in office at the time the new constitution came into force should continue to serve the term of office for which he was elected. The second paragraph of article 172 states that a seven-year presidential term of office is established to immediately follow the conclusion of the existing term of

office. According to the third paragraph of article 172, the provisions of article 101 take effect only after that seven-year term. This could potentially give the presidential incumbent an effective term of 41 years made up of: two seven-year terms (2003–2017); one seven-year term served according to the second paragraph of article 172; and a further two five-year terms served according to article 101.

Article 114 makes a former president exempt from prosecution for treason or serious and deliberate violation of the Constitution if no legal proceedings in respect of that offence were brought against him/her while in office.

Article 115 of the Constitution of Rwanda provides for a Cabinet consisting of the prime minister, ministers, state ministers and other members who may be determined by the president of the Republic, where deemed necessary. The prime minister is selected, appointed and dismissed by the president, according to article 116. Other Cabinet members are appointed by the president after consultation with the prime minister.

The Cabinet implements national policies agreed upon by the president and the Cabinet, according to article 117, and Cabinet is accountable to the president and Parliament. Article 132 specifies that the president cannot dissolve the Chamber of Deputies due to a serious matter of national concern more than once during his or her term of office.

Article 131 gives the Senate authority to set up commissions of inquiry for oversight of Cabinet activities; however, it cannot conduct interpellation – i.e. ask a government official to explain an act or policy – or initiate a motion of no confidence. Article 132 specifies that the Senate cannot be dissolved.

## THE LEGISLATURE

Legislative or law-making power in Rwanda vests in Parliament which, in terms of article 64 of the Rwandan Constitution, consists of two chambers:

- The members of the Chamber of Deputies, known as deputies
- The members of the Senate, known as senators.

Parliament debates and passes laws, and exercises control over the executive in accordance with procedures determined by the Constitution.

Article 74 of the Rwandan Constitution gives each chamber of Parliament its own budget and specifies that each enjoys financial and administrative autonomy.

The president of the Senate and the speaker of the Chamber of Deputies must be Rwandan, and may not hold any other nationality – article 66, third paragraph. No parliamentarian may be a member of the Chamber of Deputies and the Senate at the same time – article 67. Cabinet members may not be drawn from either of these chambers.

The Chamber of Deputies, according to article 75, consists of 80 deputies of whom at least 30% must be women. Deputies are elected for a five-year term and may be re-elected to additional terms. Article 79 states that, for election purposes, the president dissolves the Chamber of Deputies at least 30 days, and not more than 60 days, before the end of the parliamentary term. Elections must be held prior to the expiry of their terms of office.

According to article 83 of the Law Governing Presidential and Parliamentary Elections, Organic Law 17 of 2003, appointments to the Chamber of Deputies take place as follows:

- 53 members are nominated by political organisations or stand as independent candidates and are elected by universal suffrage in a secret ballot using a closed list and based on proportional representation
- 24 women are elected according to national administrative entities. A presidential order determines the number of persons to be elected and the electoral constituency
- Two member are elected by the National Youth Council
- One member is elected by the federation of the associations for the disabled.

The Senate is composed of 26 senators appointed as follows – article 80:

- 12 elected by specific electoral colleges in accordance with national administrative entities
- Eight appointed by the president of the Republic
- Four designated by the National Consultative Forum of Political Organisations, established in terms of article 59
- One academic or researcher holding at least the rank of associate professor from a public university or institution of higher learning elected by the academic and research staff of the same institution

- One academic or researcher holding at least the rank of associate professor from a private university or institution of higher learning elected by the academic and research staff of the same institution.

In addition, former heads of state who successfully completed their term of office or resigned voluntarily may become members of the Senate upon request to the president of the Senate and approval by the Bureau of the Senate, which is composed of the president of the Senate and two vice presidents. Senators who are former heads of state are not subject to term limits.

The Supreme Court approves the list of candidates to the position of senators, according to the Organic Law Governing Elections (Organic Law 17 of 2003). The eight senators appointed by the president are not subject to approval by the Supreme Court, and their appointment follows the election and designation of senators from other organs.

The modalities by which the Supreme Court approves the list of candidates to the position of senators, their requirements and their election are determined by the Organic Law Governing Elections – article 80.5. The organs responsible for the nomination of senators are required by article 80.5 to take into account national unity and the principle of gender equality as at least 30% of elected and appointed senators must be women.

According to article 81 of the Rwandan Constitution, elected and appointed senators serve a five-year term, renewable once. A senator may be removed from office by a court decision.

Each chamber, through the organic law determining its functioning, may provide for gross misconduct which may lead to removal from office of a member, but in that case the decision can be taken only with a three-fifths majority vote of the members of the chamber concerned (Organic Law 6 of 2006: Establishing Internal Rules of Procedure of the Chamber of Deputies in the Parliament, and Organic Law 8 of 2012: Establishing Internal Rules of the Senate). These organic laws and article 70 of the Rwandan Constitution specify that the sittings of each chamber of Parliament are public, but each chamber may decide to sit in camera under certain circumstances.

## 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 Rwanda 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 Rwanda is weak. If these provisions were strengthened, there would be specific benefits for Rwanda’s media.

### 2.9.1 Remove internal constitutional qualifiers to certain rights

The Constitution of Rwanda, as set out above, makes provision for certain rights in Chapter IV 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. As has been more fully discussed above, the right to freedom of expression, for instance, contains such an internal limitation.

Article 41 of the Constitution contains a generally applicable limitation on rights and freedoms. This applies to all of the provisions of Chapter IV of the Constitution of Rwanda – that is, to the fundamental rights and freedoms. It allows government to pass laws limiting rights generally, provided this is done in accordance with article 41. 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.

In our view the internal limitations provisions are not necessary given the existence of the general limitations clause.

### 2.9.2 Independent broadcasting regulator and public broadcaster

There is no doubt that the broadcasting sector would be greatly strengthened if the Rwandan Constitution provided for an independent broadcasting regulator and

public broadcaster. Given the importance of both these institutions for ensuring access to news and information by the public, it is suggested that such amendments to the Constitution would be in the public interest, and would serve to strengthen both the media and democracy more generally in Rwanda.

### **2.9.3 Strengthen the independence of institutions**

While it is laudable that the Rwandan Constitution makes provision for institutions such as the NCHR, 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.

## **3 THE MEDIA AND LEGISLATION**

In this section you will learn:

- What legislation is and how it comes into being**
- Legislation governing journalists**
- Legislation governing the print media**
- Legislation governing the online media**
- Legislation governing the broadcasting media generally**
- Legislation governing the state broadcasting sector**
- Legislation governing broadcasting signal distribution**
- Legislation that undermines a journalist's duty to protect sources**
- Legislation that prohibits the publication of certain kinds of information**
- Legislation relating to the interception of communication**
- 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, which is the legislative authority. According to the Constitution of Rwanda, legislative authority in Rwanda vests in a Parliament, which is made up of two chambers, namely the Chamber of Deputies and the Senate – article 91, and in special circumstances the president may promulgate decree laws that have the same force as ordinary laws. However, they cease to have legal force if not adopted by Parliament at its next session – article 92.

Article 73 specifies that an organic law determines the functioning of each Chamber (Organic Law 8 of 2012: Establishing Internal Rules of the Senate, and Organic Law 6 of 2006: Establishing Internal Rules of Procedure of the Chamber of Deputies in the Parliament).

There are rules in the Constitution of Rwanda 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 Rwanda requires different types of legislation to be passed in accordance with particular procedures. The procedures are complicated and need not be explained in detail here. In brief, the different kinds of laws that each have particular procedures include:

- Ordinary laws subject to article 85 (which are laws on defence and national security, and laws approving international treaties or agreements) – article 91
- Ordinary laws not subject to article 85 – article 91
- Ordinary laws dealing with the functioning of the Senate – articles 88 and 91
- Organic laws – articles 85 and 91
- Organic laws dealing with the functioning of the Senate – articles 85, 88 and 91
- Laws impacting government revenue or state expenditure – articles 89 and 91
- Laws amending the Constitution – articles 85 and 175
- Decree laws – article 92
- Unwritten customary law – article 176

### **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 promulgated by the president, in terms of article 106 of the Constitution of Rwanda. The president has to promulgate a law within 30 days of its receipt or he may request that it be returned to Parliament for a second reading. If it is again passed by Parliament, the president has 30 days in which to promulgate it. According to the Constitution of Rwanda.

An act must be published in the Official Gazette of the Republic of Rwanda and becomes law only when it is has been so published – article 176.

It is important to note that some laws governing certain media-related aspects came into force prior to the coming into effect of the 2015 Constitution of Rwanda. As they were passed by the governing authority of the time and have yet to be repealed, they are still good law.

### **3.2 Legislation governing journalists**

Article 2 paragraph 20 of the law Regulating Media, Law 2 of 2013 (Regulating Media Law), envisages a media self-regulatory body to be set up by journalists themselves, the responsibility of which is to ensure compliance with the principles governing media and to defend the general interest.

The Rwanda Media Commission (RMC) was established in accordance with this law, and is the body particularly responsible for enforcing the journalistic code of ethics, acting as the primary and highest adjudicator of complaints against the media, representing the broader interests of journalists, and defending media freedom and media consumers in general.

Article 3 of the Regulating Media Law is extremely ambiguous: it requires Rwandan journalists and representatives of foreign media organs to be accredited by the media self-regulatory body (which is presumably the RMC, a statutory, yet ostensibly self-regulatory, body that is dealt with in detail below). However, article 3 also refers to journalists working for a foreign media organ to be given accreditation by a competent public organ, and it is not clear if this refers to the RMC or another body.

Article 5 deals with obligations of a journalist, and it states that the main obligations of journalists are to inform, educate the population, promote leisure activities, defend the freedom of information, and analyse and comment on information.

The state is required by article 8 to recognise and respect the freedom of the media and its freedom to receive information in accordance with the law. Every journalist has the right to freedom of opinion and expression, including the right to seek, receive, give and broadcast information and ideas through any media. This is an important article because it supports the media's right to provide news to the public.

Any resourceful person the journalist believes competent may be interviewed – article 14, and the journalist is not liable for any comments of that person reported verbatim. Article 14 also gives a journalist the right to refuse pressure or instructions from anyone who is not a member of the editorial team of the publication employing him or her.

A journalist whose rights have not been respected may, according to article 15, lodge a petition with the media self-regulatory board, the RMC. Where the journalist does not receive satisfaction from the RMC, he or she may refer the matter to a competent court.

Article 12 gives a journalist free access to all sources of information, the right to freely

inquire on all events of public life, and the right to publish them within the provisions of the law.

### **3.3 Legislation governing the print media**

The Regulating Media Law deals with the media in general, but contains several key articles specific to print media. The requirement for registration of newspapers set out in article 16 of the Regulating Media Law 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.

The requirement of right of reply or correction is provided for. Article 22 of the Regulating Media Law gives the NCHR and other public competent organs, registered associations and NGOs in charge of human rights, the authority to exercise the right of reply, correction or rectification at their own initiative or on request when an accusation in a media organ warrants it in terms of their responsibilities.

Article 16 requires the owner of a new media organ to apply in writing to the competent public organ. Note that the term 'competent public organ' is not defined. However, the 2013 formal memorandum of understanding (MOU) between the self-regulatory RMC and the state body, the Rwanda Utilities Regulatory Authority (RURA), entered into in accordance with article 4 of the Regulating Media Law, makes it clear that RURA issues permits for starting new print media organs – article 5 of the MOU; however, the RMC issues the certificate of registration for new media organs in terms of article 4 of the MOU. Consequently, both bodies are involved in the formal registration process.

Article 5 of the MOU empowers RURA to revoke print media licences should the RMC request it to do so, in terms of article 4 of the MOU.

Any application to RURA to start a print media organ must have, accompanying the RURA forms: a certificate of registration from the RMC; a document certifying that the company is registered as a print media organ; and a copy of national identity or passport of the director and chief editor of the applicant.<sup>13</sup>

Chapter V, 'Press Offences' in the Organic Law Instituting the Penal Code, Organic Law 1 of 2012 (Penal Code), starts at article 699 and includes print, audio, audio-visual, information communication technology and the internet as falling under its authority.

Article 700 details the penalties and other consequences of not complying with the requirements for starting a media organ. These include a fine and suspension of the

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newspaper or other press enterprise until official authorisation is granted. Repeated offences will result in permanent withdrawal of the authorisation to establish a newspaper or other press enterprise.

The right of correction, reply and rectification in print media is specifically addressed in article 21 of the Regulating Media Law. Every individual, association, public entity and organisation with legal personality has this right. If the applicant is unsatisfied with the result of his/her request, a case may be filed with the RMC and, if still unsatisfied, with a competent court.

The definition of 'print media publications' in the Regulating Media Law is extremely broad and includes 'documents made public, multiplied by whatever method and regularly published in a specific period of time'. Further, the definition of 'print, audio or audio-visual media communication' is a 'message transmitted to the public through signs, gestures, written works, images, sounds or messages which do not bear any characteristic of a private correspondence'. The definition of 'media organs' includes 'print media publications and news agencies that circulate, at continued or regular intervals, general or specialised pieces of information meant for being disseminated'. These definitions taken together are extremely broad, with the consequence that the registration provisions apply to a significant range of print media activities.

Another body that is important to the print media is the Media High Council (MHC) established in terms of the law, Determining the Responsibilities, Organisation and Functioning of the Media High Council (MHC), Law 3 of 2013 (MHC Law).

The MHC is, according to article 2 of the MHC Law, an independent institution responsible for media capacity building. Previously, the MHC was also involved in regulation of the media, but the enactment of this law removed that responsibility from this body.

Article 4 specifies that a prime minister's order determines the supervising authority of the MHC, so its independence is clearly compromised. However, article 6 gives this body some important responsibilities, namely to:

- Advocate for media capacity building, and to build partnerships with other institutions to facilitate this
- Conduct regular research enabling media capacity building
- Participate in initiating and implementing policies and strategies to develop the media sector

- Liaise, collaborate and cooperate with other national, regional and international institutions with similar or related responsibilities
- Assist in setting up an enabling environment that facilitates investments in the media sector.

### **3.4 Legislation governing the online media**

Article 20 of the Regulating Media Law provides that the provisions of that law relating to print media and audio or audio-visual media (that is, broadcasting), also apply to information published via the internet. This seems extremely draconian given the registration and licensing provisions that apply to print or broadcast media, and it is not clear whether or not this is enforced in practice. Indeed, article 19 gives every person the right to receive, disseminate or send information through the internet and create a website through which information is disseminated to the public. It specifically states that doing so does not require the person to be a professional journalist.

### **3.5 Legislation governing the broadcasting media generally**

#### **3.5.1 Legislation that regulates broadcasting generally**

Broadcasting in Rwanda is regulated by the following legislation:

- Establishing Rwanda Utilities Regulatory Authority (RURA) and Determining its Mission, Powers, Organisation and Functioning, Law 9 of 2013 (RURA Law)
- Regulating Media, Law 2 of 2013 (Regulating Media Law)
- Determining the Responsibilities, Organisation and Functioning of the Media High Council (MHC), Law 3 of 2013 (MHC Law)
- Organic Law Instituting the Penal Code, Organic Law 1 of 2012 (Penal Code).

#### **3.5.2 Establishment of RURA, the RMC and the MHC**

Rwanda has more than one regulatory authority for broadcasting.

RURA is established in terms of article 1 of the RURA Law.

The RMC is established under the terms of article 2.20 of the Regulating Media Law,

which required the establishment of an organ set up by the journalists themselves. The RMC was established as the self-regulatory body for the media in Rwanda.

Generally, broadcasting in Rwanda is regulated by RURA. RURA works in cooperation with the RMC to regulate audio, audio-visual and internet media matters related to content, according to the MOU signed between the two bodies in 2013.

According to article 2 of the MHC Law, the MHC is an independent institution responsible for media capacity building. Previously the MHC was also involved in regulation of the media, but the enactment of this law removed that responsibility from the MHC.

### **3.5.3 Main functions of RURA, the RMC and the MHC**

#### **RURA**

RURA was established, in terms of article 2.1 of the RURA Law, to regulate public utilities including telecommunications, information technology, broadcasting and converging electronic technologies, including the internet and any other audio-visual information and communications technology (ICT). It works in cooperation with the RMC on issues relating to media content, according to the MOU signed by the two organs in September 2013.

Article 4 of the RURA Law mandates RURA to set up necessary guidelines in order to:

- Implement laws and regulations
- Ensure compliance with those regulations
- Ensure service delivery by the licensed entities
- Issue permits, authorisations and licences for the regulated sectors
- Ensure fair competition in all regulated sectors. (RURA is also responsible for postal, energy, water, sanitation, transport and other public utilities.)

Article 5 of the RURA Law provides that specific missions of RURA with regard to the media shall be governed by prime minister's order.

RURA is empowered to carry out investigations, impose administrative sanctions, settle and facilitate the settlement of disputes, and issue directives to regulated service providers, according to article 6. It may also regulate tariffs and charges – article 7, require any regulated public utility to provide information – article 8, and may be empowered by an order of the justice minister with judicial police powers – article 9.

## THE RMC

The RMC is involved in registering a new media organ. Article 16 of the Regulating Media Law requires the owner of a new media organ to apply in writing to the competent public organ. Note that the term ‘competent public organ’ is not defined. However, the 2013 formal MOU between the self-regulatory RMC and the state body, RURA, entered into in accordance with article 4 of the Regulating Media Law, makes it clear that the RMC issues the certificate of registration for new media organs in terms of article 4 of the MOU.

Further, article 4 of the Regulating Media Law specifies that both the RMC and RURA are involved in regulating audio, audio-visual media and the internet. In this regard, the RMC appears to focus on the daily functioning of the media *vis-à-vis* content issues, while RURA is responsible for overall regulatory issues.

## THE MHC

Article 6 of the MHC Law gives the MHC some important responsibilities, including to:

- Advocate for media capacity building, and to build partnerships with other institutions to facilitate this
- Conduct regular research enabling media capacity building
- Participate in initiating and implementing policies and strategies to develop the media sector
- Liaise, collaborate and cooperate with other national, regional and international institutions with similar or related responsibilities
- Assist in setting up an enabling environment that facilitates investments in the media sector.

### 3.5.4 Appointment of members

#### RURA

RURA comprises the Regulatory Board and the General Directorate – article 13 of the RURA Law. The Regulatory Board consists of seven members, including the director general, and is RURA’s supreme management and decision-making organ.

The RURA Law does not specify how the candidates are selected, but the chairperson and members of the Regulatory Board are appointed by presidential order for a term of four years, renewable only once – article 16.

The director general is also appointed by presidential order, but has a term of five years, renewable only once – article 32. The director general is head of the General Directorate, has executive powers, and coordinates and directs RURA's daily activities – article 33. He or she assigns employees in accordance with the laws upon their appointment by the Regulatory Board – article 33. Regulations governing the staff, organisational structure and responsibilities of departments are determined by the Regulatory Board – article 35. RURA is supervised by the Prime Minister's Office in terms of article 11 of the RURA Law.

## THE RMC

There are no statutory provisions regarding the RMC as it is a self-regulatory body. The RMC Board is currently composed of seven commissioners appointed by a general assembly of journalists and media practitioners. The RMC Secretariat currently has nine members and is headed by an executive secretary, who is responsible for managing the day to day affairs of the RMC.<sup>14</sup>

## THE MHC

The MHC has a board of directors as its supreme governing body. The Board of Directors consists of seven members all appointed by presidential order. Members serve a three-year term of office renewable only once – article 9. According to article 10, the Board is responsible for, among other things:

- Providing strategic vision, directing decisions and approving action plans of the MHC
- Approval of internal rules and regulations of the MHC
- Approval of the MHC annual budget
- Evaluating the performance of the MHC
- Monitoring the performance of the MHC Executive Secretariat.

A director can be removed from office for, among other things, jeopardising the interests of the MHC, being no longer able to perform his/her duties due to physical

or mental disability, being found guilty of crimes relating to divisionism and genocide, or being sentenced to a term of imprisonment of six months or more – article 12.

Article 16 sets up an Executive Secretariat headed by an executive secretary. Article 17 makes the executive secretary responsible for various MHC issues including:

- Implementing the decisions taken by the Board of Directors
- Monitoring daily activities of the MHC
- Drafting plans of action, proposals and budgets
- Performing any other task relevant to the MHC assigned to him or her by the Board of Directors.

The executive secretary is appointed and dismissed by an order of the prime minister – article 18. Article 4 specifies that a prime minister's order determines the supervising authority of the MHC, so its independence is compromised.

### **3.5.5 Funding for RURA, the RMC and the MHC**

#### **RURA**

According to article 36 of the RURA Law, the property and funding of RURA comes from:

- Fees levied on application and grant of licences, permits, contracts, concessions and allocations to each public utility operator
- Grants, donations and legacies
- Annual regulatory fees based on a percentage of the turnover from each regulated service (not more than 1% of regulated service's turnover, and must be uniform across one sector – article 37)
- All administrative fines imposed by the Regulatory Board
- Loans
- Fees for services rendered by RURA

- Any other payment or property due to RURA in respect of any activity related to the regulated services.

## THE RMC

We were unable to ascertain the sources of funding for the RMC, but we assume that these are sourced from media houses, possibly in the form of membership fees, given that it is a self-regulatory body.

## THE MHC

According to article 20 of the MHC Law, the property and funding of the MHC comes from:

- The state budget allocation
- Grants, donations and bequests
- Loans
- Funds from its services
- Former property of the MHC.

### 3.5.6 Making broadcasting regulations

Unfortunately, the Regulating Media Law, the RURA Law, and the MHC Law do not specify how media-related regulations are to be made.

### 3.5.7 Licensing regime for broadcasters in Rwanda

#### BROADCASTING LICENCE REQUIREMENT

Article 4.9 of the RURA Law empowers RURA to issue permits, authorisations and licences required for regulated sectors. In terms of article 700 of the Penal Code, any person or organisation that illegally starts an audio or audio-visual press enterprise (which clearly encompasses broadcasting) shall be liable to a fine. The effect of article 700 of the Penal Code is to make it an offence to broadcast without a licence.

#### CATEGORIES OF BROADCASTING LICENCES

Rwanda completed its migration to digital terrestrial television (DTT) by June 2015. Consequently, a reference to television means a reference to DTT unless satellite television is specified.

RURA's Broadcasting Service Licence application form identifies the following types of services for which licence applications can be made:<sup>16</sup>

- Free-to-air television
- Subscription satellite television
- FM radio
- IPTV
- Any other service, for which it requires a description

## BROADCASTING LICENSING PROCESS

RURA has a number of different application forms and/or procedural guidelines for different kinds of broadcasting services. Section III of the Broadcasting Services application form<sup>15</sup> requires information relating to:

- Source of content (locally produced/imported [in percentages]). If content is imported, the international source has to be identified, e.g. the BBC
- Types of programmes (commercial advertising, cultural, sports, political, religious, entertainment, etc.)
- Time and hours of operation per day
- Expected date of commencement of operations.

Any foreign licences held by the applicant have to be specified, and a very precise location of the studio is required, but no other guidelines are provided. In particular, the form does not give any further information on requirements for each category.

RURA has also issued an advisory document entitled 'Procedures to Award Frequencies in FM Band (87.5-108MHz)', which sets out requirements and criteria to be fulfilled for an FM frequency to be awarded to an applicant. In terms of this document, applicants had to:

- Be registered in the name of a natural person or a legal entity owned by a person or persons normally resident in Rwanda
- Prove that the manager/s of the radio station have more than five years' experience in broadcasting
- Provide financial projections of the business plan

- Provide a weekly programme of the intended radio station, with more than 60% local content (Monday to Sunday and 06:00 to 22:00)
- Not hold, directly or through associations, any controlling interest in other licences for FM broadcasting in Rwanda
- Be paying regularly all required fees and following the technical terms of the licence (for existing broadcasters). New applicants had to prove they had the financial means to pay regulatory and spectrum fees, and be able to provide technical broadcasting means to operate within the assigned frequency bandwidth
- Be ready to commence providing FM radio broadcasting services within one year of the date of being awarded the licence.

As a general rule, the Regulating Media Law gives any person or legal entity the right to establish a media company – article 11, but article 16 requires someone wishing to set up a new media organ to apply in writing to RURA. RURA then puts in place instructions to determine the requirements for setting up the media organ.

The RMC registers and issues a certificate of registration for a new media organ, and works with RURA on matters related to content. However, RURA regulates the audio, audio-visual and internet media in terms of licensing and technology used.

### **3.5.8 Responsibilities of broadcasters under the RURA Law**

All broadcasters are required to adhere to the guidelines and regulations governing their activities, and article 4 of the RURA Law mandates RURA to:

- Set up necessary guidelines in order to implement laws and regulations
- Ensure compliance with those regulations
- Ensure service delivery by the licensed entities
- Issue permits, authorisations and licences for the regulated sectors
- Ensure fair competition in all regulated sectors. (RURA is also responsible for postal, energy, water, sanitation, transport and other public utilities.)

RURA is empowered to carry out investigations, impose administrative sanctions, settle and facilitate the settlement of disputes, and issue directives to regulated service

providers, according to article 6. It may also regulate tariffs and charges – article 7, require any regulated public utility to provide information – article 8, and may be empowered by an order of the minister with judicial police powers – article 9.

The requirement of right of reply or correction is provided for. The right of correction, reply and rectification is specifically addressed in article 21 of the Regulating Media Law. Every individual, association, public entity and organisation with legal personality has this right. If the applicant is unsatisfied with the result of his/her request, a case may be filed with the RMC and, if still unsatisfied, with a competent court. Further, article 22 of the Regulating Media Law gives the NCHR and other public competent organs, registered associations and NGOs in charge of human rights, the right to exercise the right of reply, correction or rectification on behalf of someone else, either on their own initiative or on request when an accusation in a media organ warrants it in terms of their responsibilities.

The Penal Code specifies large fines as the penalty for any journalist who refuses to publish a correction, a reply or rectification either in a newspaper – article 701, or on audio or audio-visual media – article 702.

Article 23 of the Regulating Media Law specifies that audio or audio-visual media organs are required to keep their recorded programmes for at least three months after broadcast. If any complaint or petition relating to those programmes arises before the expiry of those three months, the obligation to keep those recordings ceases only once the complaint or petition is concluded.

### **3.5.9 Are RURA, the RMC and the MHC independent regulators?**

#### **RURA**

RURA cannot be said to be independent in terms of regulating the media. Despite its founding act (RURA Law, article 21) requiring that its Regulatory Board shall always act in ‘an independent, transparent and objective manner’, article 5 makes its specific mission with regard to the media subject to a prime minister’s order. Further, article 11 specifies that RURA is supervised by the Prime Minister’s Office.

#### **THE RMC**

The RMC is established according to the Regulating Media Law article 2.20 as ‘an organ set up by journalists themselves’, and as such a level of independence is presumed. Unfortunately, the RMC’s ‘Blueprint on Self-Regulation in Rwanda’ could not be sourced, so further analysis is not possible.

## THE MHC

The MHC cannot be said to be independent in terms of regulating the media. Despite its founding act (MHC Law, article 2) stating that the MHC is an independent institution, the organ's supervising authority is determined by a prime minister's order – article 4, and all members of the MHC's Board of Directors are appointed by presidential order – article 9.

The executive secretary is appointed and dismissed by an order of the prime minister – article 18, and in terms of article 16, the personnel of the executive secretariat are governed by the general statutes for Rwanda Public Service Law, 2 of 2002 – which clearly identifies them as government employees.

### **3.5.10 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 Rwanda:

- Splitting the departments of RURA responsible for broadcasting and internet issues away from the more basic utilities would facilitate a better focus for the regulatory body. Although RURA board members are required to have a breadth of knowledge in fields related to public utilities, the market forces and technical issues relating to broadcast and internet media require specialised knowledge that generalists cannot be expected to have.
- There ought to be more public participation in the broadcasting service licensing process.
- The RURA Board is not sufficiently independent. The law does not currently state how candidates for the Board are selected, but their appointment by presidential order speaks against independence. Additionally, having RURA's mission relating to the media specifically governed by prime minister's order further compromises its independence. In any event, it is clear that there is no public nominations process and that a multi-party body such as Parliament is not involved in the appointment of RURA board members.
- The MOU between RURA and the RMC should specify in detail the process of licensing new media, including highly specific and detailed requirements as to content, staffing, transmitter equipment and sustainability. Procedures used to evaluate the applications should be clearer, and objective criteria should be used in frequency allocation. The MOU should also clarify the regulations regarding

cross-ownership of media (in relation to print and broadcast media). Further, the existing ambiguities as to the precise roles of RURA and the RMC ought to be clarified.

### **3.6 Legislation governing the state broadcasting sector**

The state broadcaster in Rwanda is the Rwanda Broadcasting Agency (RBA), which was established as a new institution in the place of, and taking over most of the assets of, ORINFOR (*Office Rwandais d'Information*), which had functioned as the state broadcaster since its creation in 1963. The RBA's governing law is, Establishing Rwanda Broadcasting Agency and Determining its Mission, Organisation and Functioning, Law 42 of 2013 (RBA Law).

#### **3.6.1 Establishment of the RBA**

The RBA was established in terms of article 1 of the RBA Law, as a body with separate legal personality and administrative and financial autonomy.

#### **3.6.2 The RBA's mandate**

Article 2 of the RBA Law states that the objective of the RBA is to provide a wide range of information and broadcasts, as well as entertainment programmes, via radio broadcasting, television and modern information technology.

Objectives of the RBA specified in article 4 include to:

- Provide national and international news
- Provide educational, recreational and entertainment programmes
- Promote Rwandan culture and act as a catalyst for national development
- Establish relations and collaborate with other regional and international partners
- Deliver to residents of Rwanda the benefit of new ICTs.

It is important to note the provisions of article 4 paragraph 9, which require the RBA to ensure equitable distribution of infrastructure for audio and video broadcasting by interested licensed operators. This seems to imply that the RBA controls the country's signal distribution infrastructure.

#### **3.6.3 Appointment of RBA board members**

The RBA operates through a Board of Directors and a Directorate General in terms of article 5 of the RBA Law.

The Board of Directors of the RBA comprises seven members, at least 30% of whom must be women, who are appointed by a ‘Presidential Order upon approval by the Cabinet after transparent and public selection’ – article 8 paragraph 2 of the RBA Law, though how this takes place is not clarified. They are selected from civil society and the private sector. Directors are appointed for a three-year term, renewable only once.

Article 6 identifies the responsibilities of the Board of Directors, which includes:

- Establishing the strategic vision and action plan of the RBA
- Ensuring that the RBA operates in the general interest of the population
- Approving the RBA’s annual activity plan and various aspects of its financial management
- Approving the internal rules and regulations of the RBA
- Monitoring the performance of the Directorate General of the RBA.

The General Directorate of the RBA is involved in the daily activities of the RBA – article 15, and its responsibilities include the monitoring and coordination of Editorial Board activities and artistic output. The director general and deputy director general of the RBA are appointed and dismissed by presidential order. The president of the Republic appoints them after consultation with the Board of Directors.

### **3.6.4 Funding for the RBA**

The RBA is funded, according to article 17 of the RBA Law, by income from services rendered, revenue from its property, government subsidies, partners’ subsidies, donations and bequests, as well as movable and immovable property.

### **3.6.5 The RBA: Public or state broadcaster?**

Without the clearly mandated involvement of a multi-party body such as Parliament, presidential appointments of the RBA Board infer executive involvement to a very great extent. However, there are some aspects of the regulatory framework for the RBA which suggest that it is at least somewhat publicly inclined. Article 9 provides that the members of the Board shall ‘demonstrate independence’ and ‘shall always act in the public interest’.

The director general and the deputy director general, who are responsible for the daily activities of the RBA, are both appointed and dismissed by presidential order. They are nominated by the president after consultation with the Board of Directors of the RBA. The words ‘after consultation’ in this context indicate that the Board

does not have a veto over whom is appointed as the director general and the deputy director general. Again, these requirements would indicate that the RBA is strongly influenced by the executive at the highest levels.

### **3.6.6 Weaknesses in the RBA Act which should be amended**

Important weaknesses which ought to be addressed through legislative amendments are the following:

- Appointments of RBA board members ought to be made by the president on the recommendation of the Chamber of Deputies following a public nominations, interview and short-listing process.
- The RBA Board ought to be able to appoint and dismiss the director-general of the RBA without any involvement from the president.
- The RBA Law ought to explicitly state whether or not the RBA acts as a public or a state broadcaster. Further, it ought to be amended to transform the RBA from a state into a public broadcaster in line with international best practice.

### **3.7 Legislation governing broadcasting signal distribution**

Unfortunately, the laws of Rwanda are unclear with regard to how signal distribution is regulated in the country. Signal distribution is not specifically mentioned in any of the governing statutes, although there are some indications that signal distribution is carried out by the broadcasters themselves – see, for example, article 4 paragraph 9 of the RBA Law, as well as article 7 of the Satellite Television Regulations.<sup>17</sup>

On the other hand, RURA's policy document entitled 'Managing the change from analogue to terrestrial digital broadcast in Rwanda'<sup>18</sup> makes it clear that RURA envisages that the signal distributor, the MUX Operator, should not be a broadcaster, in order to ensure sufficient neutrality to focus on the success of providing the DTT platform.<sup>19</sup> This appears to indicate a growing understanding of the need to separate the roles of signal distribution and broadcasting.

In the law, Governing Telecommunications, Law 44 of 2001 (Telecommunications Law), the term 'signal distribution' does not appear; however, the definition of 'telecommunications network' in article 1 is broad enough to include a signal distribution network.

Further, the Telecommunications Law empowers RURA to make regulations on

various aspects of telecommunications licensing. Acting in terms of the Telecommunications Law, RURA has passed 'Regulations governing licensing for Digital Terrestrial Television', which deal extensively with signal distribution. These regulations are dealt with elsewhere in this chapter.

### **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.

#### **❖ Regulating Media, Law 2 of 2013**

Article 13 guarantees journalist confidentiality in respect of his or her sources, but includes a paragraph giving the court the right to order a journalist to reveal his or her sources of information whenever it is considered necessary for purposes of carrying out investigations or criminal proceedings.

Article 10 authorises the seizure of documents and audio-visual recordings, provided the seizure is exercised only in terms of an urgent court decision and in accordance with legal provisions governing seizure.

#### **❖ Organic Law Instituting the Penal Code, Organic Law 1 of 2012**

Section 9 of the Penal Code is headed 'Support of citizens to better administration of justice and national security'. Section 9 subsection one deals with 'Obstructing the course of justice' and makes a period of imprisonment, a fine or both, the punishment for a number of offences, including:

- Failure to appear when regularly summoned by a prosecutor, a judicial police officer or other authority – article 569
- Voluntary refusal to give evidence to judicial authorities in respect of the guilt or innocence of another – article 576
- Refusal to answer questions from judicial authorities – article 577

- Refusal to answer questions from security organs – article 578.

Section 9, subsection three deals with ‘Common provisions relating to disclosure of information’. It makes imprisonment, a fine or both, the penalty for:

- Delaying disclosure or provision of information without good cause by any person obliged to do so – article 590
- Refusing to provide information without justification or withholding information – article 591.

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 depend on the particular circumstances of 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**

The first paragraph of article 9 of the Regulating Media Law specifically provides that censorship of information is prohibited. Sadly, the same law and a number of other statutes contain provisions which clearly undermine the public’s right to receive information and the media’s right to publish information.

These statutes are targeted and prohibit the publication of certain kinds of information, including:

- Prohibition of publications relating to legal proceedings
- Prohibition of publications relating to proceedings held in camera
- Prohibition of publications relating to state security-related information
- Prohibition of publications that are alarming
- Prohibition of publications that constitute incitement
- Prohibition of publications that insult national symbols

- Prohibition of publications that insult Parliament and administrative authorities
- Prohibition of publications affecting relations with foreign states and external tranquillity
- Prohibition of publications that are contrary to public morality
- Prohibition of publications that constitute gender-based violence
- Prohibition of publications that undermine public order
- Prohibition of publications that are contrary to the interests of children
- Prohibition of publications that invade privacy
- Prohibition of publications that are defamatory
- Prohibition of publications that undermine religion
- Prohibition of publications that do not acknowledge that they are not original
- Prohibition of publications that promote discrimination
- Prohibition of publications that promote sectarianism
- Prohibition of publications that negate or justify the Tutsi genocide
- Prohibition of publications relating to voting.

### **3.9.1 Prohibition of publications relating to legal proceedings**

#### **❖ Organic Law Instituting the Penal Code, Organic Law 1 of 2012**

Section 9, subsection 2 of the Penal Code is entitled ‘Discrediting the judiciary and committing violence against those in judicial organs’. Insulting a judicial officer is an offence in terms of article 586 of the Penal Code, and the punishment is a period of imprisonment, a fine or both.

Further, publicly discrediting a judicial decision using words, writings, images or any acts – article 588 – is an offence. The punishment is a period of imprisonment, a fine or both.

### **3.9.2 Prohibition of publications relating to proceedings held in camera**

#### **❖ Regulating Media, Law 2 of 2013**

Article 6.2 of the Regulating Media Law prohibits journalists from publishing judicial proceedings, parliamentary sessions and Cabinet deliberations held in camera.

### **3.9.3 Prohibition of publications relating to state security-related information**

#### **❖ Regulating Media, Law 2 of 2013**

Article 6.1 of the Regulating Media Law prohibits journalists from publishing documents from legislative, executive or judicial powers, where those powers have deemed confidentiality necessary in respect of national security and integrity.

#### **❖ Organic Law Instituting the Penal Code, Organic Law 1 of 2012**

Article 447 of the Penal Code prohibits the publication of state secrets (defined in article 448 as including information which must not be revealed to a foreign government in the interests of national defence). Intentional publication of state secrets constitutes the offence of treason, in terms of article 447 read with article 449. The offence is punishable by a long period of imprisonment, or a lesser term of imprisonment if the publication was negligent as opposed to intentional.

### **3.9.4 Prohibition of publications that are alarming**

#### **❖ Organic Law Instituting the Penal Code, Organic Law 1 of 2012**

Article 463 of the Penal Code makes it an offence to, by writings, images or emblems, posters sold, on sale or displayed to the public, knowingly spread rumours to create alarm in the population. The offence is punishable by a term of imprisonment.

### **3.9.5 Prohibition of publications that constitute incitement**

#### **❖ Organic Law Instituting the Penal Code, Organic Law 1 of 2012**

Article 463 of the Penal Code makes it an offence to, by writings, images or emblems, posters sold, on sale or displayed to the public, knowingly spread rumours to incite the citizens against the government. The offence is punishable by a term of imprisonment.

### **3.9.6 Prohibition of publications that insult national symbols**

#### **❖ Organic Law Instituting the Penal Code, Organic Law 1 of 2012**

Article 532 of the Penal Code provides, among other things, that ‘[a]ny person who, publicly and intentionally, contempts, despises, removes, destroys or desecrates the national flag or official emblems of sovereignty’ of Rwanda is guilty of an offence and

is liable to a period of imprisonment, a fine or both. This is also the case for disrespecting or desecrating the national anthem – article 535, including intentionally changing the text or notes of the national anthem – article 536. Contempt of official insignia is also liable to these penalties – article 538.

### **3.9.7 Prohibition of publications that insult Parliament and administrative authorities**

#### **❖ Organic Law Instituting the Penal Code, Organic Law 1 of 2012**

Article 539 of the Penal Code makes imprisonment, a fine or both, the penalty for any person who brings into contempt, verbally, in writing or by caricaturing an MP, a member of the Cabinet, security officers or any other person in charge of a public service ‘in the exercise or at the occasion of his/her mandate’.

If the act takes place during a session of Parliament or if it is directed to any of the top ranking authorities, the penalties are doubled.

### **3.9.8 Prohibition of publications affecting relations with foreign states and external tranquillity**

#### **❖ Organic Law Instituting the Penal Code, Organic Law 1 of 2012**

##### ***Bringing the Republic of Rwanda into international disrepute***

Article 451 of the Penal Code makes imprisonment, ranging from seven years to life, the penalty for spreading false information with the intent to create a hostile international opinion against the Rwandan state.

##### ***Defamation of foreign princes***

Article 483 of the Penal Code makes slandering publicly any foreign head of state, senior official or representative of diplomatic and consular corps, as well as representatives of international organisations, an offence which is punishable by imprisonment.

##### ***Abusing foreign symbols***

Article 484 of the Penal Code makes it an offence to abuse the flag or symbols of a foreign state. The offence is punishable by imprisonment.

### **3.9.9 Prohibition of publications that are contrary to public morality**

#### **❖ Regulating Media, Law 2 of 2013**

Article 7 of the Regulating Media Law specifically prohibits media for children from ‘acting as illustrations, story or opinion praising or promoting any malicious, indecent and delinquency acts that are likely to divert or demoralize them’.

Article 9 of the Regulating Media Law specifies the limits to freedom of opinions and information by stipulating that these ‘shall not jeopardize ... good morals’.

The Regulating Media Law does not specify a punishment in either case, though the Penal Code does contain provisions which would apply – see below.

❖ **Organic Law Instituting the Penal Code, Organic Law 1 of 2012**

Chapter VI of the Penal Code is headed ‘Offences of immorality’. Article 188 deals with the exhibition, sale or distribution of objects of a sexual nature. This is obviously extremely broadly framed and could conceivably include medical and other types of material that has very little to do with pornography. Objects of a sexual nature include songs, writings, symbols, images, emblems or any other object of a sexual nature.

The punishment is imprisonment, a fine or both. The same penalties apply to any person who transports, exports, imports or advertises such objects, and also to any person who produces such writings, drawings, who has printed or produced them, as well as any person who designed them.

Article 211, in the same chapter, states that ‘[a]ny person who uses ... children ... in pornography shall be liable’ to both a term of imprisonment and a fine.

### **3.9.10 Prohibition of publications that constitute gender-based violence**

❖ **Organic Law Instituting the Penal Code, Organic Law 1 of 2012**

Article 202 makes it an offence to commit gender-based violence through the use of pictures, signs, speeches or writings, with a penalty of imprisonment, a fine or both.

### **3.9.11 Prohibition of publications that undermine public order**

❖ **Regulating Media, Law 2 of 2013**

Article 9 of the Regulating Media Law specifies the limits to freedom of opinions and information by stipulating that these ‘shall not jeopardize ... general public order’.

The Regulating Media Law does not specify a punishment, though the Penal Code does contain provisions which would apply – see below.

❖ **Organic Law Instituting the Penal Code, Organic Law 1 of 2012**

Article 704 of the Penal Code makes any person who commits a press offence with the intent to undermine public order and territorial integrity, liable to both imprisonment and a fine.

### **3.9.12 Prohibition of publications that are contrary to the interests of children**

#### **❖ Regulating Media, Law 2 of 2013**

Article 9 of the Regulating Media Law specifies the limits to freedom of opinions and information by stipulating that these ‘shall not jeopardize ... the protection of children’.

The Regulating Media Law does not specify a punishment, though the Penal Code does contain provisions which would apply – see below.

#### **❖ Organic Law Instituting the Penal Code, Organic Law 1 of 2012**

Article 211 of the Penal Code states that ‘[a]ny person who uses ... children ... in pornography shall be liable’ to both a term of imprisonment and a fine.

Article 229 of the Penal Code makes any person who records a child’s image or voice, or disseminates it in any way, for pornographic purposes, liable to both imprisonment and a fine.

Article 230 of the Penal Code makes it an offence to display, sell, rent, disseminate or distribute pornographic pictures, objects, movies, photos, slides or other pornographic material involving children. The offence is punishable with imprisonment and a fine.

### **3.9.13 Prohibition of publications that invade privacy**

#### **❖ Regulating Media, Law 2 of 2013**

Article 9 of the Regulating Media Law specifies the limits to freedom of opinions and information by stipulating that these ‘shall not jeopardize ... the right to inviolability of a person’s private life and family’.

The Regulating Media Law does not specify a punishment, though the Penal Code does contain provisions which would apply – see below.

#### **❖ Organic Law Instituting the Penal Code, Organic Law 1 of 2012**

Article 281 of the Penal Code provides that taking a picture or audio-visual recording without permission constitutes an offence of invasion of personal privacy, which make a person liable to imprisonment, a fine or both. It can be presumed, therefore, that publishing such a picture or broadcasting such an audio-visual recording would be an offence, unless article 291 applied.

Article 291 specifies that legal action for offences against privacy are instituted by the

Public Prosecution service upon request of the victim, his or her authorised representative or rightful claimant. However, article 705 exempts a journalist from criminal liability when the revelation is in the public interest.

Article 286 makes imprisonment, a fine or both the penalty for anyone who gathers personal information, and inserts and uses in it computers and other specialised equipment in a way likely to adversely affect the privacy of people.

This is also the penalty under article 287 for any person who records voices, keeps records or uses other means saved in computers and other specialised equipment information likely to adversely affect the privacy of another. The penalty is increased if such information is made known to third parties who are not authorised to know it without the consent of the concerned person.

### **3.9.14 Prohibition of publications that are defamatory**

#### **❖ Regulating Media, Law 2 of 2013**

Article 9 of the Regulating Media Law specifies the limits to freedom of opinion and information by stipulating that these ‘shall not jeopardize ... individual’s right to honour and reputation in the public eye’.

The Regulating Media Law does not specify a punishment, though the Penal Code does contain provisions which would apply – see below.

#### **❖ Organic Law Instituting the Penal Code, Organic Law 1 of 2012**

Any person who publicly commits an act against another which is likely to damage the honour or dignity of that person, or bring him or her into public contempt, is liable to imprisonment, a fine or both, under article 288. This is also the case of any person who, under article 289, publicly insults another person. Defaming and insulting a person in a private area is also liable to these penalties, but the time of imprisonment is shorter and the amount of the fine is less.

Article 286 makes imprisonment, a fine or both the penalty for anyone who gathers personal information, and inserts and uses in it computers and other specialised equipment in a way likely to adversely affect the dignity of people. This is also the penalty under article 287 for any person who records voices, keeps records or uses other means saved in computers and other specialised equipment information likely to adversely affect the dignity of another.

The penalty is increased if such information is made known to third parties who are not authorised to know it without the consent of the concerned person.

### **3.9.15 Prohibition of publications that undermine religion**

#### **❖ Organic Law Instituting the Penal Code, Organic Law 1 of 2012**

Article 278 of the Penal Code makes any person who, by acts, speeches, gestures, writing or threats, publicly humiliates rites, symbols or objects of religion liable to imprisonment, a fine or both.

### **3.9.16 Prohibition of publications that do not acknowledge that they are not original**

#### **❖ Organic Law Instituting the Penal Code, Organic Law 1 of 2012**

Any person who publishes, in any manner, an ‘unoriginal’ version of a person’s statements, spoken words or pictures without stating that it is an ‘unoriginal’ version becomes liable to imprisonment, a fine or both, according to article 282 of the Penal Code. This article is noteworthy considering the growth of image-manipulation and sound editing software.

### **3.9.17 Prohibition of publications that promote discrimination**

#### **❖ Instituting Punishment for Offences of Discrimination and Sectarianism, Law 47 of 2001**

Article 3 of the Sectarianism Law describes discrimination as the authoring of any speech, written statement or action based on ethnicity, region or country of origin, colour of the skin, physical features, sex, language, religion or ideas with the aim of denying a person or a group of persons their human rights.

Article 8 of the Sectarianism Law states that any person who makes public any speech, writing, pictures or images or any symbols over radio airwaves, television, in a meeting or public place with the aim of causing discrimination against people is guilty of an offence. Article 8 read with article 136 of the Penal Code makes a person liable to imprisonment and a fine if they commit the crime of discrimination.

Article 15 of the Sectarianism Law provides that the crime of discrimination is not time bound. This is not clarified in the legislation, but we presume it means there is no statute of limitations on the offence.

### **3.9.18 Prohibition of publications that promote sectarianism**

#### **❖ Instituting Punishment for Offences of Discrimination and Sectarianism, Law 47 of 2001**

Article 3 of the Sectarianism Law describes sectarianism as an author making use of

any speech, written statement or action that causes conflict and that causes an uprising which may degenerate into strife among people.

Article 8 of the Sectarianism Law states that any person who makes public any speech, writing, pictures or images or any symbols over radio airwaves, television, in a meeting or public place with the aim of sowing sectarianism is guilty of an offence. Article 8 read with article 136 of the Penal Code makes a person liable to imprisonment and a fine if they commit the crime of sectarianism.

Article 15 states that the crime of sectarianism is not time bound. This is not clarified in the legislation, but we presume it means there is no statute of limitations on the offence.

### **3.9.19 Prohibition of publications that negate or justify the Tutsi genocide**

#### **❖ Organic Law Instituting the Penal Code, Organic Law 1 of 2012**

Article 116 of the Penal Code makes a person liable to imprisonment if they publicly, by their words, writings, images or any other means, show that they negate, minimise or attempt to justify or approve the genocide against the Tutsi.

Article 135 specifies the punishment for the crime of genocide ideology and related offences as imprisonment and a fine.

### **3.9.20 Prohibition of publications relating to voting**

#### **❖ Organic Law Instituting the Penal Code, Organic Law 1 of 2012**

Article 552 of the Penal Code legislates for imprisonment, a fine or both to any person who communicates false information, insults or influences voters' choices in any way.

## **3.10 Legislation relating to the interception of communication**

The growth of wireless and cellular communications, along with advances in ICTs raise the possibility of the monitoring, recording and intercepting of communications by the media and others, including government.

#### **❖ The Law Relating to Electronic Messages, Electronic Signatures and Electronic Transactions, Law 18 of 2010 (Electronic Communications Law)**

The Electronic Communications Law notes in article 58 that access to a computer system is unauthorised where the person is not entitled to control or access it, and does not have permission to access it from a person entitled to give such permission.

And article 60 makes unauthorised access and interception of data on a computer system an offence.

The Penal Code's article 285 makes imprisonment, a fine or both the penalty for recording, intercepting, diverting or disclosing correspondence sent or received by any means of telecommunication or installing devices designed to carry out such interceptions without authorisation of the judicial or public prosecution authorities.

The latter part of article 58 of the Electronic Communications Law, however, provides that an intercepting person is not liable, where he or she is acting in reliance on any statutory power arising under any enactment for the purpose of obtaining information, or taking possession of any document or other property.

#### ❖ **Organic Law Instituting the Penal Code, Organic Law 1 of 2012**

Article 281 of the Penal Code makes a person liable to imprisonment, a fine or both for maliciously invading the privacy of another by secretly listening and making that information known to the public without consent.

Article 291 specifies that legal action for offences against privacy are instituted by the Public Prosecution service upon request of the victim, his or her authorised representative or rightful claimant. However, article 705 exempts a journalist from criminal liability when the revelation is in the public interest.

### **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 be and often are used by the media to uncover and publicise information in the public interest.

Legislation that assists the media in Rwanda includes:

- Relating to Access to Information, Law 4 of 2013 (Access to Information Law)
- Relating to the Protection of Whistleblowers – Law 35 of 2012 (Whistleblowers Law)
- Organic Law Establishing Internal Rules of Procedures of the Chamber of Deputies in the Parliament – Organic Law 6 of 2008 (Deputies Law)

- Organic Law Establishing Internal Rules of the Senate – Organic Law 8 of 2012 (Senate Law)
- Organic Law Instituting the Penal Code – Organic Law 1 of 2013 (Penal Code).

#### ❖ **Relating to Access to Information, Law 4 of 2013**

Article 1 of the Access to Information Law describes this law's purpose as being to 'enable the public and journalists to access information possessed by public organs and some private bodies'. It also establishes procedures to promote the publication and dissemination of information.

Every person has the right of access to information in possession of a public organ and some private bodies, according to article 3. This includes:

- Information assessing activities, documents or records
- Taking notes, documents, extracts or copies of official documents or records
- Taking document or extracts of notified copies
- Obtaining information stored in any electronic form or through print-outs of information stored in a computer or any other device.

There are grounds for refusing access to the information referred to in article 3. Article 4 permits public organs and private bodies to withhold information that may:

- Destabilise national security
- Impede law enforcement or justice
- Interfere in the privacy of an individual when it is not of public interest
- Violate legitimate protection of trade secrets or intellectual property rights
- Obstruct actual or contemplated legal proceedings against the management of a public organ.

Article 5 gives the minister in charge of information, in consultation with the concerned organs, the authority to issue an order determining which information could destabilise national security. If only part of a record may be published, the part that may be published has to be made available to any person who requests it.

Article 10 makes the provision of information an obligation without fee; however, the applicant may be charged for the making of copies. The Office of the Ombudsman monitors the enforcement of this law – article 17.

#### ❖ **Relating to the Protection of Whistleblowers, Law 35 of 2012**

The purpose of the Whistleblowers Law is to protect, in the public interest,

whistleblowers who denounce illegal acts and behaviours in public and private institutions and elsewhere – article 1.

The Whistleblowers Law is focused on protecting whistleblowers who take their information to the authorities, and does not actually address procedures or protections for whistleblowers who approach the media.

#### *Institutions to which the Whistleblowers Act applies*

Article 1 in this law indicates that it applies to ‘public and private institutions and elsewhere’. Hence, it applies to virtually every type of institution.

#### *Protection given to whistleblowers*

No person who discloses information may be sued in civil and criminal matters or under administrative process for whistleblowing done in good faith – article 16.

Article 19 makes any authority who takes action against a whistleblower liable to punishment, including under the Penal Code.

Article 12 requires the entity which receives the information to establish reliable mechanisms designed to protect whistleblowers, including receiving information in secret and filing disclosures using a code to identify the information provider. Note, however, that article 7 requires a whistleblower to disclose his or her identity, so information cannot be provided on an entirely anonymous basis.

Article 17 states that a whistleblower may be summoned to testify in court, but their identity will be protected by using codes for their identification, and they shall be interrogated in camera without cross-examination.

#### *Who are public interest disclosures made to?*

Article 6 specifies that whistleblowing is made to the relevant organ verbally, in writing or through any other means. Organs empowered to receive whistleblower disclosures are ‘any public or private body to which, by virtue of the responsibilities and powers conferred upon it by law, any person discloses information in his or her possession or which has been brought to his or her attention’. Although it does not specifically name the Office of the Ombudsman, according to the Ombudsman’s Law, Law 76 of 2013 that office has the mandate to investigate corruption.

Should the whistleblower approach a public organ which does not have relevant responsibility, article 10 specifies that the information together with the identity of the whistleblower must be forwarded to the relevant public organ. Such transferring of information could compromise the identity of the whistleblower.

***On what grounds can an investigating authority decline to act on a public interest disclosure?***

The Whistleblowers Law does not give an investigating authority grounds for declining to investigate information so much as it notes penalties for whistleblowers who disclose information unlawfully. Such an individual may be prosecuted and punished in accordance with legal provisions governing him/her at work, or the Penal Code, or both – article 18, if the information disclosed is contrary to the provisions of article 8, namely:

- The disclosure is false and is given on the grounds of hatred, jealousy or potential conflict between the whistleblower and the subject of the whistleblowing
- The disclosure is made in the interest of a person he or she seeks to protect
- The disclosure is made with intent to defame and dishonour the individual or entity subject to the disclosures.

***Remedies to ensure that a whistleblower's claims are investigated***

The organ which receives information that falls within its responsibilities from a whistleblower is required to make use of the information within three months – article 11. The organ that receives the information is also required to make a written record of the information including:

- The basis for the whistleblowing
- The person subject to the whistleblowing and his/her co-offenders
- The place and time of commission
- The circumstances and motives, if the latter are known.

***Provisions relating to defamation in the Whistleblowers Act***

Article 8 makes it clear that lodging false information for personal gain or on the grounds of hatred or to defame or dishonour the individual subject to the disclosures removes all protections from the whistleblower and makes him or her liable to prosecution.

**❖ Organic Law Establishing Internal Rules of Procedures of the Chamber of Deputies in the Parliament, Law 6 of 2008**

The Deputies Law governs the operations of the Chamber of Deputies. There are a number of provisions that assist the media in reporting on the activities and proceedings of the Chamber of Deputies.

- Plenary sittings of the Chamber of Deputies are public, though in camera

proceedings can be requested by the president of the Republic, the speaker, the prime minister or a quarter of the members present – article 14.

- Verbatim reports and minutes adopted by the plenary sitting are published on the website of the Chamber of Deputies and are available in the library of the Chamber of Deputies in hard copy – article 17.
- Plenary sittings of the Chamber of Deputies have audio-visual equipment recording and transmitting the proceedings. If possible, these recordings are transmitted to the public galleries and to all halls of the Chamber of Deputies – article 100.

#### ❖ **Organic Law Establishing Internal Rules of the Senate, Law 8 of 2012**

The Senate Law governs the operations of the Senate. There are a number of provisions that assist the media in reporting on the activities and proceedings of the Senate.

- Plenary sittings of the Senate have audio-visual equipment recording and transmitting the proceedings. These recordings are transmitted to the public galleries ‘by means of information and communication’ – article 115.
- The plenary sittings of the Senate are public, though in camera proceedings can be requested by the president of the Republic, the president of the Senate, the prime minister or a quarter of the senators – article 23.
- The minutes and verbatim reports of the proceedings of the Senate are published and made available in the library of the Senate once they have been approved and signed – article 27.

#### ❖ **Organic Law Instituting the Penal Code, Organic Law 1 of 2012**

Article 283 of the Penal Code is a particularly interesting provision in that it makes it an offence for a person serving as a keeper to reveal a professional secret entrusted to him or her by virtue of function, occupation or religious authority.

Although it does not say so directly, journalism could be deemed to be such a profession, particularly with regard to the protection of journalists’ sources. However, caution is required in this interpretation because article 284 specifies that article 283 does not apply in cases where the law imposes or allows the revelation of a professional secret. These obligations are dealt with elsewhere in the chapter with regard to journalists and their sources.

## 4 REGULATIONS AFFECTING THE MEDIA

In this section you will learn:

- What regulations are
- Key regulations governing the media generally

### 4.1 Definition of regulations

Regulations are subordinate legislation. They are legal rules that are made in terms of an empowering statute (for example, an act of Parliament), and are made by a public functionary, usually a minister or a regulatory body.

### 4.2 Key regulations governing the broadcast media

#### 4.2.1 Regulations Governing Licensing for Digital Terrestrial Television, Regulation 4/RURA/2011 (DTT Regulations)<sup>20</sup>

The DTT Regulations apply to all DTT activity, including construction, maintenance, operation and management relating to digital multiplex and signal distribution in Rwanda, as well as the provision of signal distribution services – article 2. It makes provision for three signal distribution licence categories: national signal distribution licence; regional signal distribution licence; and community distribution licence – article 4.

The DTT Regulations specify in article 4(b) that there shall be two national signal distributors in Rwanda, though RURA may change this from time to time as necessary.

Signal distributors' primary obligations – article 5 – include:

- Ensuring that any broadcasting signal or content carried is sourced from a licensed content provider (this term is not defined, but we presume that a licensed content provider is in fact a licensed broadcaster)
- Providing signal distribution services in an equitable, reasonable and non-discriminatory manner
- Allocating one-third of transmission capacity to free-to-air services
- Giving priority to free-to-air services which contain 20% local content
- Ensuring free-to-air channels are accessible without constraints.

Data services may be provided as a value-added service, but may not exceed 15% of capacity allocated to a broadcaster in each multiplex – article 6(b).

Signal distribution licences are granted for a maximum of 15 years, depending on the category and service type – article 7. Article 9 clarifies the information that must be provided in a written application for a licence including:

- Name and business particulars of the applicant
- Names, addresses and contact numbers of the legal representative of the applicant
- Clearance from the Rwanda Revenue Authority
- Business registration certificate
- Information on the shareholding status of the company
- Article of association or MOU of the company, if any
- Description of the network and services, with five-year rollout targets
- Geographical area of activity
- Details of the communication network and an estimation of the investment and financing required
- A five-year business plan
- The performance bond from an insurance company or bank guarantee of US\$200,000 valid for the duration of the licence.

Should the applicant fulfil all requirements, RURA will issue the licence within three months.

RURA assigns the spectrum rights according to requirement and availability, and the signal distributor is then responsible for allocating its capacity to content service providers – article 12. Radio frequency spectrum licences may be cancelled by RURA under conditions dealt with in article 13, and article 15 details the conditions for cancellation, suspension and revocation of licences for signal distribution.

Radio licences may be modified or altered by RURA or on request of the licence holder – article 14, and any licensee aggrieved by a RURA decision may refer the matter to a court of law.

RURA establishes the fees related to licences in article 16. There is an initial payment required on submitting an application for a licence, whether or not the application is successful. Successful licensees then pay a one-off, non-refundable licence fee plus an ongoing 1% of annual turnover to RURA. A payment to the Universal Access Fund is determined by the regulatory board, and shall not exceed 2.5% of annual turnover. If the operator also has a radio frequency licence, initial and annual fees also apply.

Article 16(d) permits RURA to use the method of auctioning to get a best bidder for the signal distribution if it is deemed necessary.

The signal distribution regulations include, in article 17, the grounds on which a licence may be refused, namely:

- In order to protect national integrity and/or national security
- For reasons of limitations on the frequency spectrum resources
- If RURA reasonably believes that competition in the signal distribution sector can be adversely affected
- If the applicant has failed in meeting the information requirement and related obligations.

The unsuccessful applicant must be given written reasons for refusals by the regulatory authority, though RURA is not bound to do so in the case of national security matters.

Application for licence renewal must be done no later than three months before the expiry of an existing licence. The procedure is the same as for the initial granting of the licence – article 18.

#### **4.2.2 Regulations Governing Subscription Satellite Television, Regulation 2/RURA/2014 (SSTV Regulations)<sup>21</sup>**

The SSTV Regulations apply to any person carrying out or intending to carry out subscription satellite television (SSTV) services – article 2. Any person intending to provide an SSTV service is required to apply for a licence – article 4.

Information required for the application includes – article 5:

- The full address of the place of operation, plus the local point of presence for foreign companies
- A copy of the identity or passport of the contact person
- The applicant's financial and technical capacity to carry out satellite broadcasting services
- The company profile
- The domestic registration certificate for national or foreign satellite television operators
- Performance bank guarantee of US\$200,000
- A list of channels in the bouquet
- The agreements with the multi-channel satellite distributor as well as with the originator of the content, where the latter is applicable.

In the process of analysing the application, RURA also approves the channels that the applicant intends to air. Once the licence is approved, the licensee 'shall always broadcast the authorised channels' – article 18, but may reorganise and add channels to – article 19 – or remove channels from – article 20 – its bouquet. Article 22 requires the SSTV licensee to carry channels of the public television broadcaster in accordance with RURA's regulations.

The Regulatory Board is required to declare its decision within 90 days of receipt of the completed application – article 6, but if it requires additional time it has to provide the applicant with a written explanation for the delay.

Licences in this category are valid for five years, and can be renewed – article 9. A renewal application must be filed at least 90 days prior to expiry of the current licence, and the procedures are the same as for the original licence – article 11. Article 12 of the SSTV Regulations details the reasons for rejection of a licence application, and an unsuccessful applicant may reapply for a licence within three months following the rejection of the initial application – article 13.

Licence modifications may be initiated by RURA or on the request of the licence

holder – article 14, and licences may be transferred in accordance with the requirements of articles 15 and 16. The circumstances under which a licence may be revoked are dealt with in article 17.

An application fee of 500,000 Rwandan francs is required – article 5.8 and Annexure 3, an initial licence fee of 12,000,000 Rwandan francs is payable on the granting of the licence, and thereafter an annually payable regulatory fee based on a percentage of turnover is due – article 10.

## 5 MEDIA SELF-REGULATION

In this section you will learn:

- What self-regulation is**
- Key self-regulatory provisions intended to govern the media in Rwanda**

### 5.1 What is self-regulation?

Self-regulation is important because it usually involves regulations drafted and enforced by bodies which are established by media houses themselves. This alleviates the need for state regulation and improves the overall climate of media freedom in a country.

The key media self-regulatory body in Rwanda is the RMC, which was established in terms of the Regulating Media Law, Law 2 of 2013, specifically to regulate the media. Article 2 paragraph 20 of the Regulating Media Law envisages a media self-regulatory body to be set up by journalists themselves. The body has the responsibility of ensuring compliance with the principles governing media and defending the general interests of the media. The RMC was established in accordance with the mandate of this law, and is the body particularly responsible for enforcing the journalistic code of ethics, acting as the primary and highest adjudicator of complaints against the media, representing the broader interests of journalists and defending media freedom and media consumers in general. In April 2014, the RMC released the amended Rwanda Journalists and Media Practitioners' Code of Ethics (RMC Code of Ethics).

### 5.2 Key provisions of the RMC Code of Ethics

The key provisions of the RMC Code of Ethics are, in summary, as follows:

- *Journalists' obligations in information collection, processing, broadcasting and publication*
  - Defence of universal human values of peace, tolerance, democracy,

human rights, social progress and national cohesion respectful of each citizen in accordance with the Universal Declaration of Human Rights

- Honesty, to respect facts and search for the truth
- Social responsibility in terms of source and veracity of information published
- Spontaneous rectification and respect for the right of reply
- Be independent of external or internal pressure to modify or distort information
- Be mindful of the balance between information and fundamental regulations
- Refrain from plagiarism
- Observe the principle of presuming innocence before the verdict from a competent court or tribunal is announced in a punishable case.

■ *Discrimination and hate speech*

- Avoid incitement to hatred based on race, tribe, ethnicity, religion, sex, social status, disability, disease or health status or any basis for stigmatisation
- Respect for private life and human dignity, in that broadcasting or publication of information related to someone's private life shall only be dictated by public interest. Further, journalists should not ridicule 'the underdog', including minors, the old, the bereaved or any underprivileged person or community.

■ *Advocacy*

- Separate comments from facts
- Refrain from using sensational headlines and exaggerated facts
- Separate information from advertisement material.

■ *Comment*

- Separate comments from facts.

■ *Headlines, posters, pictures and captions*

- Refrain from using sensational headlines and exaggerated facts.

■ *Confidential sources*

- The media has an obligation to protect confidential sources of information.

**■ *Payment for articles***

- Maintain professional integrity in obtaining information and refusing any advantage – financial or in kind
- Not exercise the duties of a media or public relations officer or institutional spokesperson while being a professional journalist.

**■ *Violence***

- Avoid violence and obscenities or encouraging hostility
- Protect minors and victims of rape, particularly in terms of not publishing information or images likely to lead to their identification
- Publication of child pornography is prohibited.

**■ *General conduct***

- Avoid violence and obscenities or encouraging hostility
- Defend and protect the interests of the journalistic profession
- If they have confirmed the RMC code of conduct, to recognise the jurisdiction and authority of the RMC
- To make an effort to know national legislation and regulation governing the press.

In its code of ethics, the RMC also has a section detailing the rights of journalists. It goes so far as to say: '[a] journalist shall, in the exercise of his or her profession, claim the following rights':

- Free access to sources
- To refuse any subordination contrary to the press organ's editorial line
- To invoke the conscience provision. This means they may refuse to write or read political comments and editorials in contradiction with the rules of professional ethics, or to censor articles, radio, television and electronic works, or any other mass broadcasting aid from their peers, on grounds other than professional ones. Further, the refusal shall not be grounds for employment loss through firing, and if this happens, peers shall show solidarity and strongly denounce the act
- Security of person and working materials, legal protection and respect of their dignity, without any condition or restriction all over the national territory
- To refuse to disclose his or her sources. In no way shall journalists or media houses be subjected to threats owing to the refusal to disclose their sources

- For the editorial team to compulsorily be informed about any important decision likely to have an impact on the life of the institution, and at least be consulted before a final decision is made regarding editorial team recruitment, dismissal, transfer and promotion of a journalist
- To collective conventions and to an individual contract ensuring him/her material and moral security as well as remuneration proportional to his/her social role, which guarantees his/her economic independence.

The third section of RMC's document addresses enforcement of the code of ethics, including violations of the code, sanctions, complaints on adherence to the code, the right of reply, and interpretation and implementation of the code.

## 6 CASE LAW AND THE MEDIA

In this section we will deal with the following topics:

- An introduction to Rwandan case law
- How Rwanda's courts have dealt with a media-related law issue involving:
  - Minimisation of the genocide
  - Divisionism
  - Freedom of speech
  - Defamation of the president

### 6.1 An introduction to Rwandan case law

Rwanda's court and jurisprudential system is based on Belgian and German civil codes and customary law. Consequently, the case law is not as strictly based on precedent, as is seen in common law systems (mostly found in former British colonies).

Case law in Rwanda certainly affects the media and working journalists. However, accessing Rwandan case law is extremely difficult. Law reports on Rwandan case law have been available only since the last quarter of 2014.

This section focuses on judgments that have a bearing on media law or freedom of expression in some way. Please note that these judgements have been provided to us by local lawyers and are not published.

## **6.2 Using Rwanda's laws against genocide ideology, genocide minimisation and negationism to restrict free speech and the media**

In the 2011 case of *Le Ministère Public v Agnès Uwimana-Nkusi and Saidati Mukakibibi* (Case No. RP 0082/10/HC/KIG), the High Court of Kigali convicted Ms Uwimana-Nkusi on four separate charges on the basis of four articles she wrote for the publication *Umurabyo*, namely:

- Threatening national security
- Genocide minimisation
- Defamation of the president
- Divisionism.

An appeal was lodged, and at the end of January 2012 the Supreme Court of Rwanda heard the case. The journalists' international team of lawyers argued points of Rwandan law as well as points of regional, international criminal and international human rights law.

In its judgment, the Supreme Court focused on the Kinyarwanda word *gutemagurana*, which Ms Uwimana-Nkusi stated should be interpreted as 'killing each other with machetes'. The prosecution insisted that the term implied that a 'civil war' had taken place rather than genocide. The Supreme Court's judgment was that article 4 of the 2003 law does not explain clearly the acts constituting genocide minimisation, and that the Supreme Court had never taken a decision clarifying that.

The Supreme Court cited examples from the Holocaust, where asserting that there were acts of mutual killing in that context were considered genocide denial. With this in mind, the Court stated that Ms Uwimana-Nkusi's use of the word *gutemagurana* did minimise the genocide, but that in using it she needed to have intended it as such. In reviewing the article in question as well as others written by Ms Uwimana-Nkusi, the Court came to the conclusion that there was no intent, and acquitted her.

Ms Uwimana-Nkusi was acquitted of the charges of genocide minimisation and divisionism, but her conviction for defaming the president stood. She was left to serve four years instead of 17, with a deduction of time served. Ms Mukakibibi's sentence was reduced from seven to three years as the Court found that both journalists' convictions were for the same crime in the same trial (threatening national security, under article 166 of the Penal Code) and that they should therefore have the same sentence.

Both journalists have appealed to the African Commission on Human and Peoples'

Rights, contending a violation of their fair trial rights, and challenging the convictions upheld by the Supreme Court. They argue that their right to freedom of expression has been violated. The case has been heard, but at the time of writing the decision is pending.

## NOTES

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## 1 INTRODUCTION

The Republic of Uganda is the world's most ethnically diverse nation, according to a study by Harvard University's Institute for Economic Research.<sup>1</sup> It is a landlocked country in the Great Lakes region of East Central Africa. Lying astride the equator, it is bordered to the east by Kenya, to the north by South Sudan, to the west by the Democratic Republic of the Congo, to the southwest by Rwanda and to the south by Tanzania.

A system of customary law applied in Uganda prior to Britain declaring it a protectorate in 1884 and establishing colonial administrative law throughout the territory. In Buganda, largest of the traditional kingdoms in present-day Uganda, the  *kabaka* (king) appointed a trusted official, the *katikirro*, to be in charge of the kingdom's administrative and judicial systems. Importantly, the country was never fully colonised, as non-Africans were not allowed to acquire freeholds.<sup>2</sup>

Following the rise of African nationalism, a constitutional monarchy with a government based on the British model was implemented in 1955, and in 1957 political parties emerged and direct elections were held. Uganda became an independent Commonwealth nation on 9 October 1962, with Milton Obote as prime minister.<sup>3</sup>

Within four years, however, Obote abrogated this constitution and declared himself president under an interim constitution. Following an attempt on his life in 1969,

Obote banned opposition political parties, leaving himself the country's *de facto* absolute ruler.<sup>4</sup> Less than two years later, on 25 January 1971, Obote was ousted in a military coup led by armed forces commander Idi Amin Dada. Amin declared himself president, dissolved Parliament, and amended the constitution to give himself absolute power. The subsequent eight years proved a reign of terror marked by political repression, ethnic persecution, gross human rights abuses (including extrajudicial killings) nepotism, corruption and economic mismanagement.<sup>5</sup>

Obote was given sanctuary by Tanzanian leader Julius Nyerere, and was joined by some 20,000 followers. A year later, a group of these exiles attempted, unsuccessfully, to invade Uganda and remove Amin, who blamed Nyerere for backing and arming his enemies. Relations between the two states remained strained for many years.

By 1977, the Ugandan economy was floundering, as was Amin's hold on power. In an attempt to bolster his position, Amin ordered troops to attack Ugandan exiles in the Kagera salient, a narrow strip of Tanzania that juts north past Rwanda and Burundi and forms part of the southern border of Uganda.

On 21 January 1979, Nyerere ordered a Tanzanian invasion of Uganda. By early April, Tanzanian forces had captured the capital, Kampala, and Amin had fled the country. Tanzanian troops then spread throughout Uganda to maintain law and order during preparations for elections. As there was no potential successor who enjoyed national support, Obote was returned to the presidency in December 1980, but his government struggled to suppress opposition.<sup>6</sup>

In 1985, Obote was ousted in another military coup, this time led by Brigadier General Tito Okello, who ruled for six months before being deposed by the rebel National Resistance Army led by Yoweri Museveni, who was installed as president. Following promulgation of a new constitution in October 1995, Museveni won Uganda's first ever direct presidential election.<sup>7</sup>

In a referendum in July 2005, 92.5% supported restoring multi-party politics. The following month, Parliament voted to change the constitution to allow Museveni to run for more than two terms. He is now in his fifth five-year term of office. Opposition leaders claimed, however, that the 2016 election was marred by voter intimidation, arrests of opposition leaders and other irregularities.<sup>8</sup>

The Museveni years have proved a period of relative political and economic stability. Gross domestic product (GDP) in Uganda was worth US\$26.37 billion in 2015,<sup>9</sup> with GDP per capita ranking 37th of 53 African nations.<sup>10</sup> While Uganda surpassed the Millennium Development Goals target of halving poverty by 2015, and made

significant progress in reducing hunger and empowering women, a large proportion of its current (2016) population of 37.8 million<sup>11</sup> – almost half of whom are aged under 15 years – remains vulnerable to falling back into poverty.<sup>12</sup>

The country has substantial natural resources, including fertile soils, regular rainfall, small deposits of copper, gold and other minerals, and recently discovered oil, with estimated deposits of at least 3.5 billion barrels.<sup>13</sup> Agriculture is the most important economic sector, employing more than two-thirds of the workforce. Coffee accounts for the bulk of export revenues.<sup>14</sup>

Until the late 1990s, Uganda had only one television station, the state-owned Uganda Television, which began broadcasting the year after independence.<sup>15</sup> It is now called the Uganda Broadcasting Corporation, and also operates five radio stations. Competition came in the form of Sanyu TV and Wawah, and opened the way for other stations.

Radio was dominated by the state-owned Radio Uganda until the early 1990s, when the first independent radio stations received licences to operate. There are now more than 200 radio stations serving the country.<sup>16</sup>

There are some 30 newspapers in Uganda, almost all of them publishing in English. The state-owned *New Vision* is Uganda's oldest newspaper and has the largest national circulation. The *Daily Monitor* is independent, and the second oldest newspaper in the country.<sup>17</sup> *Red Pepper*, a daily tabloid that began publication in 2001, is arguably Uganda's most controversial news medium with its mix of politics, sensationalism and scandal. When, in May 2013, *Red Pepper* and the rival *Daily Monitor* published a confidential letter purportedly written by Army general David Sejusa calling for an investigation into allegations of a plot to assassinate people who were opposed to the Museveni family holding on to political power in perpetuity, the offices of both publications were raided by the police, who shut down operations for several days.<sup>18</sup> Since then, however, *Red Pepper* has extended its reach by upgrading its online presence.

Social media have made a significant impact on the country, but were ordered blocked by the Uganda Communication Commission in advance of Museveni's latest inauguration. Some analysts fear this could become a routine government practice.<sup>19</sup>

That said, relations between the media and the government are widely recognised as having improved since the mid-1980s, with government members holding open press briefings and making television appearances. This may, it is noted, have much to do with the fact that journalists now have avenues of legal recourse available to them.

In this chapter, working journalists and other media practitioners will be introduced to the legal environment governing media operations in Uganda. 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 the chapter is to equip the reader with an understanding of the main laws governing the media in Uganda. Key weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Uganda, 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 Uganda
- 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 Uganda 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 the Republic of Uganda, which came into force on 8 October 1995 and which has been amended numerous times since then, sets out the foundational rules for the Republic of Uganda. These are the rules upon which the entire country operates. The Constitution contains the underlying principles and values of Uganda.

The Preamble to the Constitution contains clear references to Uganda's violent history in its references to its 'struggles against the forces of tyranny, oppression and exploitation', and to building a better future 'by establishing a socio-economic and political order through a popular and durable national constitution based on the principles of unity, peace, equality, democracy, freedom, social justice and progress'.

Additional constitutional provisions which set out the principles and values of Uganda are contained in article I(i) of the part of the Constitution headed 'National objectives and directive principles of state policy', which states that:

The following objectives and principles shall guide all organs and agencies of state, all citizens, organisations and other bodies and persons in applying or interpreting the constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society.

The objectives and principles referred to are those set out in articles II–XXIX of that part of the Constitution, namely:

- Democratic principles
- National unity and stability
- National sovereignty, independence and territorial integrity
- Guaranteeing and protecting institutions responsible for protecting and promoting human rights
- Gender equality and fair representation of marginalised groups, including persons with disabilities
- Providing adequate resources for organs of state
- Right to balanced and equitable development, and the roles of the people and the state in that development

- Protection of natural resources and the environment
- State promotion of recreation, sports, education, the family, medical services, water, food security, cultural values, Ugandan languages, public property and heritage, accountability (including taking measures to combat corruption and abuse of power) and foreign policy objectives
- Effective responses to natural disasters
- Duties of citizens, which include promoting democracy and the rule of law and contributing to the well-being of the community.

Similarly, article 1 of Chapter 1 of the Constitution is headed ‘Sovereignty of the people’ and it too sets out certain values of democratic governance, including, that:

- The authority of the state emanates from the people, who shall be governed through their will and consent
- The people’s will and consent on who shall govern them shall be expressed through regular, free and fair elections or referenda.

## **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 a law could be challenged in a court of law and could be overturned on the ground that it is ‘unconstitutional’.

The Constitution of Uganda makes provision for constitutional supremacy. Article 2(1) of Chapter 1 of the Constitution specifically states that: ‘[T]his Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.’ Article 2(2) expands on this, stating that if any law or any custom is inconsistent with any of the provisions of the Constitution, ‘the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void’.

## **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 be done only in accordance with the constitution.

The Constitution of Uganda makes provision for three types of legal limitations on the exercise and protection of rights contained in Chapter Four of the Constitution of Uganda, 'Protection and Promotion of Fundamental and Other Human Rights and Freedoms'.

### 2.3.1 General limitations clause

Article 43(1) is headed 'General limitation on fundamental and other human rights and freedoms', and it specifically provides that the various rights provided for in Chapter Four are subject to such limitations designed to ensure that in the 'enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest'.

Importantly, article 43(2) of the Constitution provides that the public interest in article 43(1) shall not permit:

- (a) political persecution;
- (b) detention without trial;
- (c) any limitation of the enjoyment of rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.

This is an interesting provision that requires some explanation:

- It is clear that rights can be limited on two main bases: to protect the rights and freedoms of other individuals; and to protect the public interest. Note that the term 'public interest' is not defined so this is potentially extremely broad.
- What is useful, from a rights protection point of view, is the requirement in article 43(2)(c) that limitations be acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution. The effect of this is that, apart from what is provided for in the Constitution, there is a focus on standards required of freedom and democracy. And these limitations have also to

be ‘demonstrably’ justifiable. Consequently, if there is another method of dealing with the societal good protected by the limitation that is less limiting of rights, the limitation would not be ‘demonstrably’ justifiable.

- It is important to note that the prohibition on detention without trial is subject to the state of emergency provisions dealt with below.

### **2.3.2 Internal limitations**

These limitations are rights-specific and contain limitations or qualifications to the particular right that is dealt with in a particular section of the Bill of Rights. An example of an internal limitation is found in article 41 of the Ugandan Constitution, which deals with the right of access to information and which is covered in more detail below. Other rights of relevance to the media do not have such an internal limitation.

### **2.3.3 States of emergency**

Article 46 of the Ugandan Constitution is headed ‘Effect of laws enacted for a state of emergency’ and addresses the situations in which the rights provided for in Chapter Four may be limited or suspended during a declared state of emergency. A state of emergency can be declared, in terms of article 110, if the president is satisfied that circumstances exist in Uganda or in that part of Uganda:

- In which Uganda or that part of it is threatened by war or external aggression
- In which the security or economic life of the country or that part is threatened by internal insurgency or national disaster
- Which render necessary the taking of measures which are required for securing public safety, the defence of Uganda, and the maintenance of public order and supplies and services essential to the life of the community.

Article 46(1) provides that an act of Parliament ‘shall not be taken to contravene the rights and freedoms guaranteed in this Chapter, if that Act authorises the taking of measures that are reasonably justifiable for dealing with a state of emergency’.

Article 46(2) provides that there can be emergency provisions other than an act of Parliament, but these emergency provisions apply only to the part of Uganda where the emergency exists. The effect of this is that declarations of states of emergency can happen other than by way of an act of Parliament, provided this is for a localised emergency.

Article 46(3) provides that an act of Parliament that makes provision for a state of emergency may make provision for the detention of persons where necessary for the purposes of dealing with the emergency, but these are subject to the requirements of articles 47–49, which deal with detentions under emergency laws and the obligations of the Uganda Human Rights Commission (UHRC) and Parliament in reviewing such emergency detentions. Further, article 44 of the Constitution deals with rights that cannot be derogated from in terms of the Constitution (and these would apply in emergency situations too). These are:

- Freedom from torture and cruel, inhuman or degrading treatment or punishment
- Freedom from slavery or servitude
- The right to a fair hearing
- The right to an order of *habeas corpus* – that is, the right to have a detained person produced in court.

Note that rights that are critical for the press – such as the right to freedom of expression, and freedom of thought and opinion – are rights that can be derogated from in a state of emergency.

## **2.4 Constitutional provisions that protect the media**

### **2.4.1 Rights that protect the media**

The Constitution of Uganda contains a number of important provisions in Chapter Four, which is headed ‘Protection and Promotion of Fundamental and Other Human Rights and Freedoms’, which directly protect the media, including publishers, broadcasters, journalists, editors and producers.

#### **RIGHT TO FREEDOM OF EXPRESSION**

The most important provision that protects the media is article 29(1)(a), part of the article headed ‘Protection of freedom of conscience, expression, movement, religion, assembly and association’, which states:

Every person shall have the right to –  
freedom of speech and expression which shall include freedom of the press  
and other media.

This provision needs some explanation:

- This freedom applies to ‘every person’ 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 29(1)(a) specifies that the right to freedom of speech and expression includes ‘freedom of the press and other media’. This is very important for two reasons:
  - It makes it clear that this right can apply to corporate entities such as media houses, newspapers or broadcasters, as well as to individuals.
  - It makes it clear that the right extends to both the ‘press’ – with its connotation of the news media – and ‘other media’, which could include fashion, sports, gardening or business publications or broadcasting services, thereby protecting all media.

## RIGHT TO FREEDOM OF THOUGHT AND CONSCIENCE

Another important provision that protects the media is article 29(1)(b), part of the article headed ‘Protection of freedom of conscience, expression, movement, religion, assembly and association’, which states:

Every person shall have the right to –  
freedom of thought, conscience ...

Freedom of thought and conscience is important for the media as it protects the right to think and to hold opinions. This protects commentary on public issues of importance, which is critically important for the media as it protects editorials, opinion pieces, etc. As the right is available to ‘every person’, media houses, as well as individual journalists and editors, enjoy this right.

## FREEDOM OF ASSOCIATION

Another important provision that protects the media is article 29(1)(e), part of the article headed ‘Protection of freedom of conscience, expression, movement, religion, assembly and association’, which states:

Every person shall have the right to –  
freedom of association which shall include the freedom to form and join

associations or unions, including trade unions and political and other civic organisations.

Similarly, article 40(3)(a) provides that ‘every worker has the right to join a trade union of his or her choice for the promotion and protection of his or her economic and social interests’.

These provisions need some explanation:

- These rights guarantee the right of the press to form press associations as well as to form media houses and media operations more generally.
- Further, the specific freedom to join and form trade unions is an important right for working journalists.

## FREEDOM OF MOVEMENT

Another important provision that protects the media is article 29(2)(a), part of the article headed ‘Protection of freedom of conscience, expression, movement, religion, assembly and association’, which states:

Every Ugandan shall have the right to –  
move freely throughout Uganda... .

This is important as it makes it clear that all Ugandan journalists have the right to move freely in Uganda. This is useful when covering stories that require travelling to different parts of the country. Note that this would not apply to foreign journalists.

## RIGHT TO PRIVACY OF PERSON, HOME AND OTHER PROPERTY

Another important right that protects the working journalist is the right to privacy, which is contained in article 27 of the Ugandan Constitution. The right provides as follows:

- (1) No person shall be subjected to –
  - (a) the unlawful search of the person, home or other property of that person; or
  - (b) unlawful entry by others of the premises of that person.
- (2) No person shall be subjected to interference with the privacy of that person’s home, correspondence, communication or other property.

This requires some explanation:

- This right applies to all persons and not just citizens.
- The protection given to correspondence and communication is particularly important for working journalists as it gives additional protection to their sources of information.

## CIVIC RIGHTS AND ACTIVITIES

Another important provision that protects the media is article 38(2), part of the article headed ‘Civic rights and activities’, which states:

Every Ugandan has a right to participate in peaceful activities to influence the policies of government through civic organisations.

This is important as it makes it clear that all Ugandan journalists, media owners and media activists have the right to form and/or participate in media-related organisations in order to influence government-related media policy. This right does not apply to foreigners.

## RIGHT OF ACCESS TO INFORMATION

Another important right for the media is article 41(1) of the Ugandan Constitution, part of the right of ‘access to information’. It provides:

Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.

Article 42(2) provides that Parliament is to make laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information.

This requires some explanation:

- The right is available to citizens only and not to everyone.
- The right is against the state and organs and agencies of the state. Consequently, it is not available in respect of privately held information.

- The right is subject to an internal limitation, namely that the right does not apply in cases ‘where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person’.
- It is clear that Parliament is to give effect to the right through legislation. It has indeed passed such legislation, which is dealt with elsewhere in this chapter.

### RIGHT TO JUST AND FAIR TREATMENT IN ADMINISTRATIVE DECISIONS

Another important right for the media is article 42 of the Ugandan Constitution, which is the right to ‘fair treatment in administrative decisions’. It provides:

Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her.

This requires some explanation:

- The reason why this provision is important for journalists and the media is that it protects them (as it does all people) from administrative officials, such as broadcasting regulatory authorities, who act unjustly and unfairly.
- An administrative body is not necessarily a state body; indeed, these bodies are often private or quasi-private institutions. These constitutional requirements would therefore apply to non-state bodies too.
- Many decisions taken by bodies are ‘administrative’ in nature, and this requirement of just and fair administrative decision-making is a powerful one that prevents or corrects unjust and unfair conduct on the part of administrative officials.
- The reference to applying to a ‘court of law’ is clearly a reference to the right to seek judicial review of administrative action in terms of which judges consider the exercise of administrative discretion on the part of the decision-maker.

#### 2.4.2 Other constitutional provisions that assist the media

It is important to note that there are provisions in the Ugandan Constitution, apart from the fundamental rights provisions, that are important and assist the media in performing its functions.

## PROVISIONS REGARDING THE FUNCTIONING OF PARLIAMENT

Article 97(1) of the Ugandan Constitution provides that the speaker, the deputy speaker, members of Parliament (MPs) and any other person participating in, assisting in or acting in connection with or reporting, the proceedings of Parliament or any of its committees shall be entitled to such immunities and privileges as Parliament shall by law prescribe.

These immunities and privileges were already provided for in the Parliament (Powers and Privileges) Act, 1955, Chapter 258, which act remains in force. Section 2 provides, among other things, that no civil or criminal proceedings may be instituted against any MP for words spoken before, or written in a report to, Parliament or to a committee.

These provisions assist the media by protecting the right of parliamentarians to speak freely in Parliament without facing arrest or civil or criminal proceedings for what they say.

Parliament has incorporated the provisions of the Parliament (Powers and Privileges) Act, 1955, Chapter 258, relating to privilege in its prescribed Rules of Procedure of the Parliament of Uganda, and the latest version thereof is dated 2012.<sup>20</sup>

In terms of section 22(1) of the Rules of Procedure of the Parliament, the sitting of Parliament shall be public, subject to those rules. Section 22(2) does allow the speaker, with the approval of the House, and having regard to national security, to move into a closed sitting. No strangers are permitted to be present during a closed sitting – section 22(3) – and no person other than someone specifically authorised by the speaker may purport to describe the proceedings or any decision of a closed sitting – section 22(6).

Section 216 of the Rules of Procedure of the Parliament provides that parliamentary proceedings may be broadcast by electronic media, having due regard to the dignity of the House. In terms of section 217(1) of the Rules of Procedure of the Parliament, the parliamentary session shall be available for broadcast on radio and/or television during all hours of sitting unless determined otherwise by the House or speaker. Annexure G to the Rules of Procedure of the Parliament sets out the rules relating to television coverage of parliamentary proceedings.

These provisions assist the media by ensuring that it has a great deal of access to the workings of Parliament by being able to be physically present in Parliament and to broadcast the proceedings thereof.

## PROVISIONS REGARDING THE ROLE OF THE PEOPLE IN DEVELOPMENT

Article X appears in the part of the Constitution headed 'National objectives and directive principles of state policy'. It provides that the state shall 'take all necessary steps to involve the people in the formulation and implementation of development plans and programmes which affect them'.

This provision helps the media because popular involvement in policy development and programmes is difficult to achieve without an informed citizenry. Consequently, transparency and responsiveness is required of government which, almost by definition, requires the free flow of information to the country's press, and between the press and the citizens.

## RIGHT TO A PUBLIC HEARING

Article 28(1) of the Ugandan Constitution provides that in the determination 'of civil rights and obligations or any criminal charge, a person shall be entitled to a ... public hearing before an independent and impartial court or tribunal established by law'. Article 28(2) goes on to provide that the court or trade tribunal may exclude the press or the public from any proceedings before it 'for reasons of morality, public order or national security, as may be necessary in a free and democratic society'.

This provision helps the media because it makes it clear that the proceedings of courts and tribunals must be public and open to the press, unless they are specifically excluded. Further, the only basis for such exclusion are morality, public order or national security. This provision assists the media in reporting on civil and criminal cases before courts and tribunals.

## PROVISIONS REQUIRING SECURITY ORGANISATIONS TO OBSERVE HUMAN RIGHTS

Article 221 of the Ugandan Constitution is interesting in that it requires the defence forces, the police force, the prisons service, all intelligence services and the National Security Council 'to observe and respect human rights and freedoms in the performance of their functions'. This is useful for working journalists as security forces sometimes make it difficult for journalists to perform their reporting functions. This provision would prevent these security organisations from being able to undermine a journalist's right of access to information or freedom of expression, for example.

## **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 24 is headed ‘respect for human dignity and protection from inhuman treatment’, but in fact article 24 contains no wording in respect of human dignity as it deals entirely with prohibiting torture and cruel, inhuman or degrading treatment or punishment. Nevertheless, the right to have one’s dignity respected is clear from the title of the right even if the language of the right does not specifically mention this.

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 27 of the Constitution of Uganda, which guarantees the right to privacy. It provides:

- (1) no person shall be subjected to –
  - (a) unlawful search of the person, home or other property of the person; or
  - (b) unlawful entry by others of the premises of that person.
- (2) No person shall be subjected to interference with the privacy of that person’s home, correspondence, communication or other property.

The right of privacy is an interesting right because the way that it is worded in the Ugandan Constitution appears to envisage only state interference with personal privacy. Nevertheless, we are of the view that the right requires caution on the part of the media 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 State of emergency provisions**

Article 110 empowers the president, after consulting with the Cabinet, Parliament, the National Security Council and the Constitutional Court, to declare a state of emergency, as is set out above. This is important because of the fact that a number of rights can be derogated from during a state of emergency, including the right to freedom of expression, access to information and administrative justice.

## **2.6 Key institutions relevant to the media established under the Constitution of Uganda**

The Constitution of Uganda establishes a number of institutions that indirectly affect the media, namely, the Uganda Human Rights Commission, the Public Service Commission, the Inspector General of Government, the Judicial Service Commission and the judiciary.

### **2.6.1 The Uganda Human Rights Commission**

The Uganda Human Rights Commission (UHRC) is established in terms of article 51 of the Ugandan Constitution. Article 51 provides that the UHRC shall be composed of a chairperson (who shall be a judge of the High Court or qualified to be a judge of the High Court) and no fewer than three other persons appointed by the president with the approval of Parliament. In terms of article 52 of the Ugandan Constitution, the functions of the UHRC include:

- Investigating violations of human rights
- Visiting jails, prisons and places of detention to inspect conditions of the inmates and to make recommendations
- Establishing a continuing programme of research, education and information to enhance human rights
- Recommending to Parliament effective measures to promote human rights, including the payment of compensation to victims
- Creating and sustaining within society the awareness of the provisions of the Constitution

- Monitoring government's compliance with international treaty or convention provisions on human rights
- Publishing periodic reports on its findings and submitting annual reports to Parliament on the state of human rights and freedoms in the country.

Article 53 sets out the powers of the UHRC, which are extensive.

Article 54 provides that subject to the provisions of the Constitution, the UHRC shall be 'independent and shall not, in the performance of its duties, be subject to the direction or control of any person or authority'.

Article 55 makes it clear that the UHRC's funding is to come from the Consolidated Fund, which is essentially the state treasury.

Article 56 makes it clear that commissioners of the UHRC enjoy the same security of tenure as judges of the High Court – that is, they can be removed only in accordance with the constitutional provisions for removing a judge of the High Court.

Traditionally, human rights commissions are significant for the media because they protect not only the media's rights to publish information and to inform the citizenry but also citizens' rights to access information and to the free flow of information regarding both the public and private sectors.

## 2.6.2 The Public Service Commission

The Public Service Commission (PSC) is established in terms of article 156 of the Ugandan Constitution. The PSC consists of a chairperson, a deputy chairperson and seven other members appointed by the president with the approval of Parliament.

The functions of the PSC set out in article 166 of the Ugandan Constitution include, in brief:

- Promoting and exercising disciplinary control over persons holding office in the public service of Uganda
- Reviewing terms and conditions of service, standing orders, training and qualifications of public officials.

While article 166(2) provides that the PSC is independent, the PSC is also required to 'take into account government policy relating to the public service'.

Bodies such as the PSC are important to the media because they are useful in a number of ways. First, they are a source of information in relation to the functioning of the public service. For example, article 166(3) requires the PSC to report annually on the performance of its functions. Second, the fact that there is a PSC assists in developing an ethic of good governance within the state itself. Consequently, the PSC ought to assist in promoting transparency and accountability, which assist the media in reporting on governmental activities.

### **2.6.3 The Inspectorate of Government**

Chapter Thirteen of the Ugandan Constitution is headed ‘Inspectorate of Government’. Article 225 sets out the functions of the Inspectorate of Government (IG) and these include to:

- Foster strict adherence to the rule of law and principles of natural justice in administration
- Eliminate and foster the elimination of corruption, abuse of authority and of public office
- Promote fair, efficient and good governance in public offices
- Supervise the enforcement of the Leadership Code of Conduct provided for in article 233 of the Constitution (essentially this is a code signed by all government officials, parliamentarians and the like, to promote clean government)
- Investigate any act, omission, advice, decision or recommendation made by a public officer in the exercise of his or her administrative functions
- Stimulate public awareness about the values of constitutionalism.

In terms of article 223(2) of Ugandan Constitution, the IG consists of the inspector general of government and such number of deputy inspectors general as Parliament may prescribe, at least one of whom shall be a person qualified to be appointed a judge of the High Court. The members of the IG are appointed by the president with the approval of Parliament, in terms of article 223(4), and members of the IG may not hold any other offices in the public service. Article 223(5) sets out the necessary criteria to qualify as a member of the IG. Article 224 sets out the grounds for removal of a member of the IG by the president on the recommendation of the special tribunal constituted by Parliament, and these are inability to perform the functions of office, misconduct or incompetence.

It is clear that the aim of the IG is to promote an efficient, responsive government devoid of corruption. Again, such a body can only assist the media in performing its work through aiding in the promotion of transparency. This is particularly so given that the IG is required to submit reports to Parliament on the performance of its functions at least once every six months, in terms of article 231(1).

#### **2.6.4 The Judicial Service Commission**

The Judicial Service Commission (JSC) is important to the media because of its role in ensuring the independence and professionalism of the judiciary, which is itself an important institution for the media, as is more fully set out below.

Article 142(1) of the Ugandan Constitution provides that the key judicial appointments of the chief justice, the deputy chief justice, the principal judge, a justice of the Supreme Court, a justice of the Appeal Court and a judge of the High Court are all appointed by the president acting on the advice of the JSC and with the approval of Parliament. Article 143 of the Ugandan Constitution sets out the necessary qualifications for the appointment of judges in Uganda.

Consequently, the JSC is an extremely important institution for the independence and professionalism of the judiciary. It is established in terms of article 146(1) of the Ugandan Constitution. Importantly, the JSC is made up of persons appointed by the president with the approval of Parliament. In terms of article 146(2) and (3), the JSC consists of:

- A chairperson and deputy chairperson qualified to be appointed as justices of the Supreme Court
- One person nominated by the PSC
- Two advocates with at least 15 years' experience nominated by the Uganda Law Society
- A judge of the Supreme Court nominated by the president in consultation with the judges of the Supreme Court, the justices of Appeal and judges of the High Court
- Two members of the public, who shall not be lawyers, nominated by the president
- The attorney general shall be an *ex officio* member of the JSC.

In terms of article 146(4) of the Ugandan Constitution, the chief justice, deputy chief

justice and principal judge shall not be appointed to be chairperson, deputy chairperson or a member of the JSC. Further, in terms of article 146(5), a person is not qualified to be appointed a member of the JSC unless the person is of high moral character and proven integrity.

Article 147(1) read with article 148 of the Uganda Constitution sets out additional functions of the JSC and these include:

- Advising the president on the exercise of his or her power to appoint, exercise disciplinary control over and remove persons from particular positions
- Reviewing and making recommendations on the terms and conditions of service of judges
- Preparing and implementing educational programmes for judicial officers and the public about law and the administration of justice
- Receiving and processing complaints regarding the judiciary and the administration of justice, and generally acting as a link between the people and the judiciary
- Advising government on improving the administration of justice
- Appointing judicial officers of lower courts and exercising disciplinary control over persons holding such offices, including removing such persons from office.

Article 147(2) provides that in the performance of its functions, the JSC shall be independent and shall not be subject to the direction or control of any person or authority.

### **2.6.5 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.

Chapter 8 of the Constitution of Uganda is headed 'The Judiciary'. Article 126 set out generally applicable principles in regard to the exercise of judicial power in Uganda.

In terms of article 126(1), judicial power in Uganda ‘is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of the people’.

Article 128(1) provides that in the exercise of judicial power, ‘the courts shall be independent and shall not be subject to the control or direction of any person or authority’.

Article 129 of the Ugandan Constitution provides that judicial power of Uganda shall be exercised by the courts of judicature, which shall consist of:

- The Supreme Court of Uganda
- The Court of Appeal of Uganda
- The High Court of Uganda
- Such subordinate courts as Parliament may by law establish, including courts relating to family law.

## THE SUPREME COURT OF UGANDA

Article 130(1) provides that the Supreme Court of Uganda shall consist of the chief justice and at least six other justices of the Supreme Court as Parliament may by law prescribe.

In terms of article 131(1), the Supreme Court must have at least five judges sitting to consider a matter but may not consist of an even number of judges.

When hearing appeals from decisions of the Court of Appeal sitting as a constitutional court, the Supreme Court shall consist of a full bench of all members of the Supreme Court, in terms of article 131(2) of the Constitution.

In terms of article 132, the Supreme Court is the final court of appeal and is therefore the apex court in Uganda. In terms of article 132(4), all other courts are bound to follow the decisions of the Supreme Court on questions of law.

## THE COURT OF APPEAL OF UGANDA

In terms of article 134, the Court of Appeal of Uganda consists of the deputy chief justice and at least seven other justices of Appeal as Parliament may prescribe by law.

In terms of article 135(1), the Court of Appeal must have at least three judges sitting

to consider a matter but may not consist of an even number of judges. The Court of Appeal hears appeals from such decisions of the High Court as may be prescribed by law, in terms of article 134(2).

Further, in terms of article 137(1) of the Ugandan Constitution, any question as to the interpretation of the Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court. When sitting as the Constitutional Court, the Court of Appeal shall consist of a bench of five members of that court.

## HIGH COURT OF UGANDA

The High Court of Uganda consists of the principal judge and such number of judges of the High Court as may be prescribed by Parliament, in terms of article 138 of the Ugandan Constitution.

Article 139(1) of the Ugandan Constitution provides that the High Court shall have unlimited original jurisdiction in all matters, subject to the provisions of the Constitution. Further, article 139(2) provides that, subject to the Constitution and any other law, decisions of any court lower than the High Court shall be appealable to the High Court.

## **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.

The Ugandan Constitution contains a number of provisions dealing with the enforcement of rights and freedoms by the courts.

According to article 50(1), any person who claims that a fundamental right or freedom has been infringed or threatened is entitled to apply to a competent court for redress, which may include compensation. Importantly, article 50(2) provides that any person or group may bring an action against the violation of another person's or group's human rights. This is important because it enables a person or a non-governmental organisation (NGO), for example, to take action to protect a person when that person is incapable of doing so themselves, for example when they are in detention.

Further, article 137(3) of the Constitution of Uganda provides that a person (note that this would include a natural or juristic person – for example, a company or an

organisation) who alleges that an act of Parliament, or any other law or anything done in or under the authority of any law or any act or omission by any person or authority, is inconsistent with or in contravention of the Constitution may approach the Constitutional Court (that is, the Court of Appeal sitting as the Constitutional Court) for a declaration to that effect, and for redress where appropriate.

In this regard, article 137(4) makes provision for the kind of redress that may be awarded by the Constitutional Court, and this includes granting an order of redress or referring the matter to the High Court to investigate and determine the appropriate redress.

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 Ugandan Constitution does not contain any special protections to safeguard the Bill of Rights from constitutional amendments, except in respect of article 44, which deals with rights that are non-derogable during a state of emergency. In this regard, article 260(1) and (2) provides that where a bill seeks to amend article 44 of Chapter Four, it must be supported at the second and third readings by not less than two-thirds of all MPs and it must have been approved by the people in a referendum.

## **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**

Chapter Seven of the Constitution of Uganda deals with the executive, and article 99(1) provides that the executive authority of Uganda vests in the president and shall be exercised in accordance with the Constitution and the laws of Uganda. Article 99(4) empowers the president to exercise executive authority either directly or through subordinate officers. Note that such subordinate officers would include the vice president (article 108) and members of the Cabinet (article 111) who are ministers (article 113).

In terms of article 111(2), the functions of the Ugandan Cabinet are to determine, formulate and implement government policy and perform such other functions as may be conferred by the Constitution or any other law.

The exalted position of the president under the Ugandan Constitution is clear from the provisions of article 98(2), which provide that the president ‘shall take precedence over all persons in Uganda’. Further, in terms of article 98(4), the president shall not be liable to proceedings in any court while holding office.

Article 102 of the Ugandan Constitution requires a president to be a citizen of Uganda by birth, between the ages of 35 and 75, and qualified to be an MP.

Article 103 of the Ugandan Constitution sets out the process for the election of the president which is done, as a general rule, in a presidential election by universal adult suffrage through a secret ballot. Article 103(4) and (5) provides that where a candidate does not obtain more than 50% of valid votes cast in an election, a second election shall be held within 30 days between the two candidates who obtained the highest number of votes in the first election.

In terms of article 105(1), a president holds office for a term of five years. Note that as a result of constitutional amendments in 2005, the Ugandan Constitution no longer contains term limits for a president.

The Constitution of Uganda makes provision for a number of functions of the president, including to:

- Be head of state, head of government, commander-in-chief of the Uganda Peoples’ Defence Forces and ‘the Fountain of Honour’ – article 98
- Deliver the annual state of the nation address – article 101
- Declare a state of emergency (in consultation with the Cabinet) – article 110
- Appoint ambassadors (with the approval of Parliament) – article 122
- Make treaties, conventions, agreements or other arrangements between Uganda and any other country, or between Uganda and any international organisation or body – article 123
- Declare a state of war with another country (with the approval of two-thirds of the MPs) – article 124.

Article 107 contains the grounds for removing a president, and these are:

- Abuse of office or wilful violation of the oath of allegiance, presidential oath or any provision of the Constitution
- Misconduct
- Physical or mental incapacity.

The process for removing the president is complicated and is set out in article 107. It commences by a notice signed by not fewer than one-third of all of the MPs, includes the sitting of a tribunal constituted by the chief justice and comprising three justices of the Supreme Court to investigate the proposed removal and to determine whether there is a *prima facie* case for removal, and a parliamentary resolution supported by at least two-thirds of all MPs to remove the president.

In terms of article 109 of the Ugandan Constitution, the vice president shall assume the Office of President until fresh elections are held if the sitting president dies, resigns or is removed from office.

## THE LEGISLATURE

Legislative or law-making power in Uganda vests in Parliament, in terms of article 79(1). In terms of article 79(2), ‘except as provided for in the Constitution, no person or body other than Parliament shall have the power to make provisions having the force of law in Uganda except under authority conferred by an Act of Parliament’.

Article 78 deals with the composition of Parliament and provides that Parliament consists of:

- Members directly elected to represent constituencies on the basis of universal adult suffrage and by secret ballot
- One woman representative for every district
- Such numbers of representatives of the army, youth, workers, persons with disabilities and other groups as Parliament may determine
- The vice president and ministers who, if not already elected MPs, shall be *ex officio* MPs without the right to vote in Parliament.

Article 79 sets out the functions of Parliament. These include:

- The power to make laws on any matter for the peace, order, development and good governance of Uganda
- To protect the Constitution and promote democratic governance of Uganda.

Article 86 sets out the qualifications and disqualifications of MPs. A person is qualified to be an MP if he or she is a citizen of Uganda, is a registered voter, and has completed a minimum formal education of Advanced Level standard or its equivalent as prescribed by Parliament. A person is not qualified for election as an MP if that person is of unsound mind, is holding an office which involves conducting elections, is a traditional leader, bankrupt, under sentence of death or a sentence of imprisonment exceeding nine months without the option of a fine, or has been convicted of a crime involving dishonesty or moral turpitude or an electoral offence in the past seven years.

Article 89 provides that except as otherwise prescribed by the Constitution or any law consistent with the Constitution, any question proposed for decision of Parliament shall be determined by a majority of votes of the members present and voting in a manner prescribed by the rules of procedure made by Parliament under article 94.

Parliament also performs an oversight function in respect of the executive, as is clear from its powers to remove the president (article 107) and to censure and ultimately cause the removal of members of the Cabinet, in terms of article 118 of the Constitution of Uganda.

## 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 Uganda 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 others. 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 Uganda is weak. If these provisions were strengthened, there would be clear benefits for Uganda’s media and democratic credentials more broadly.

### **2.9.1 Remove internal constitutional qualifiers to certain rights**

The Constitution of Uganda, 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 Uganda. They deal specifically and only with the limitation or qualification of the particular right that is dealt with in that article. In other words, the article that contains the right also sets out the parameters or limitations allowable in respect of that right. As has been more fully discussed above, the right to access to information contains such an internal limitation.

The rights contained in the provisions dealing with fundamental human rights and freedoms, set out in Chapter Four of the Constitution of Uganda, would be strengthened if the rights were subject to a single generally applicable limitations clause rather than each having its own limitations clause. Indeed, such a general limitations clause already exists in article 43 of the Ugandan Constitution and so it is not clear why the internal limitations clauses are necessary.

### **2.9.2 Amending the provisions of article 110 dealing with the state of emergency**

The Ugandan Constitution, at article 110, empowers the president, in consultation with Cabinet, to declare a state of emergency. In so doing, a number of rights that protect the media can be derogated or departed from. Article 110 is problematic because it appears to be subjectively framed – that is, the president has to be ‘satisfied’ that the relevant circumstances exist. In our view it is important that the conditions for the declaration of a state of emergency must objectively exist and this ought not to be dependent on whether or not the president is satisfied that they do so exist.

### **2.9.3 Independent broadcasting regulator and public broadcaster**

There is no doubt that the broadcasting sector would be greatly strengthened if the Ugandan Constitution made provision for an 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 Uganda.

### **2.9.4 Reintroduce presidential term limits**

Uganda has been subject to criticism for amending the Constitution to do away with presidential term limits, with the result that the current incumbent has been in power since 1986, some 30 years as at the time of writing. Reintroducing term limits would assist in strengthening democratic practices in Uganda by ensuring that changes in presidents would become a routine democratic occurrence.

## **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 exhibition of films and the performance of plays and other public entertainments**
- Legislation governing the broadcasting media generally**
- Legislation that governs state media**
- Legislation that undermines a journalist's duty to protect sources**
- Legislation that prohibits the publication of certain kinds of information**
- Legislation that codifies and clarifies aspects of the crime of defamation**
- 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 and assented to by the president. As is set out above, legislative authority in Uganda vests in Parliament.

Article 91 of the Ugandan Constitution lays down the procedures for exercising legislative powers. Media practitioners should be aware that the Ugandan Constitution requires different types of legislation to be passed in accordance with particular procedures. These include:

- Legislation that amends the Constitution – articles 259–263
- Ordinary legislation – article 91.

### **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, according to article 91(1) of the Ugandan Constitution. It is important to note that article 91(3) gives the president the right to return a bill to Parliament for reconsideration. Where a bill is returned by the president to Parliament twice under article 91(3)(b), it shall then be laid before Parliament and only with the support of two-thirds of all MPs shall a bill become an act without consent of the president – article 91(6). An act must be published in the Gazette – article 91(8).

It is also important to be aware that some laws governing certain media-related issues came into force prior to the coming into effect the 1995 Constitution of Uganda. As they were passed by the governing authority of the time and have yet to be repealed, they are still good law.

## **3.2 Legislation governing the print media**

### **❖ The Press and Journalist Act of 2000, Chapter 105 (Press Act)**

The preamble to the Press Act states that it is, ‘[a]n Act to ensure the freedom of the press, to provide for a council responsible for the regulation of mass media and to establish an institute of journalists of Uganda’.

Section 2(1) of the Press Act provides for the right of a person to publish a newspaper. Section 2(2) provides a protection for the media in that no person or authority may take any action on grounds of the content of a publication to prevent the printing, publication or circulation among the public of a newspaper. However, as is articulated in section 3, ‘Nothing contained in section 2 absolves any person from compliance with any law:

- Prohibiting the publication of pornographic matters and obscene publications insofar as they tend to offend or corrupt public morals
- Prohibiting any publication which improperly infringes on the privacy of an individual or which contains false information’.

Section 8 of the Press Act establishes the Media Council and provides it with the authority to regulate aspects of the print media. These are laid out in section 9 of the Press Act and include:

- Regulating the conduct and promoting good ethical standards and discipline of journalists
- Promoting the flow of information
- Censoring media for public consumption, including the print media (but excluding pornography, which is dealt with by another body)
- Arbitrating disputes between the public or the state and the media.

According to section 5 of the Press Act, the appointment of an editor requires registration of that editor, which must include the editor’s name and address as well as certified copies of all ‘relevant testimonials as proof of his or her qualifications’. Section 5(1)(c) specifically requires the name and address of the newspaper for which the editor is being appointed.

Section 5(1)(d) of the Press Act empowers the Media Council to demand ‘additional particulars as may be prescribed by the council’.

Section 5(2) states that the proprietor of a media outlet shall inform the Media Council within ‘thirty days of its coming to his or her notice of any change in any of the particulars referred to in subsection (1)’. Failure to abide by any of the regulations laid down in section 5 constitutes an offence punishable by a fine, and in case of failure to pay the fine, a term of imprisonment – section 5(3).

Section 6 of the Press Act sets out the duties of an editor. These include:

- Ensuring what is published is not contrary to public morality
- Retaining a copy of each newspaper and a copy of each supplement to it for not less than ten years.

Section 7 is an interesting provision because it sets out grounds of disqualification of an editor. These include unremarkable grounds, such as insanity or insolvency, but also unusual grounds such as not being ordinarily resident in Uganda and not having the requisite qualifications prescribed by the Media Council.

Section 13 of the Press Act establishes the National Institute of Journalists of Uganda (NIJU), the objectives of which include maintaining professional standards of journalism and ensuring proper training of journalists. The NIJU is discussed in detail later in this chapter.

Section 27(3) and (5) of the Press Act provides that no person shall practice journalism, including freelance journalism, unless in possession of a valid practising certificate issued by the Media Council. The practising certificate is valid for one year and is renewable upon payment of the prescribed fee – section 27(2). A practising certificate shall not be issued unless the journalist is able to present a certificate of enrolment with the NIJU, established under section 13 of the Press Act – section 27(1). There are a number of disqualifications from being a member of the NIJU, which include insanity, insolvency or having been convicted of an offence – section 17.

Section 29 of the Press Act requires that no employee of, or freelancer for, a foreign mass media organisation shall practise journalism in Uganda unless he or she is in possession of an accreditation card issued by the Media Council. It is an offence in terms of section 27(4) to practise journalism without a practising certificate, the punishment for which is a fine or, in the case of a failure to pay, a period of imprisonment.

Part VII of the Press Act establishes a disciplinary committee of the Media Council to deal with complaints against journalists and media houses. In terms of section 33 of the Press Act, the disciplinary committee may impose a number of sanctions, including:

- Admonishing the journalist
- Requiring the journalist to apologise in his or her newspaper with the same prominence as the original article
- Suspending the practising certificate of the journalist for up to six months
- Demanding payment of compensation by media organisations to aggrieved parties.

Appeals against decisions of the disciplinary committee are made to the High Court, in terms of section 34. Also, the Media Council may revoke the suspension of a journalist on receiving new facts relating to the case, in terms of section 36.

Section 40(1) of the Press Act requires journalists to comply with the Professional Code of Ethics (Code of Ethics), which is set out in the Fourth Schedule of the Press Act. Failure to comply with the Code of Ethics constitutes professional misconduct and is dealt with by the disciplinary committee, in terms of section 40(2) of the Press Act. The Code of Ethics includes the following:

- No journalist shall disseminate information or an allegation without establishing its correctness or truth.
- No journalist shall disclose the source of his or her information; he or she shall divulge the source only in the event of an overriding consideration of public interest and within the framework of the law of Uganda.
- No journalist shall solicit or accept bribes in an attempt to publish or suppress the publication of a story.
- A journalist shall not plagiarise the professional work of others or expropriate works or results of research by scholars without acknowledging their contribution and naming his or her sources of information.
- A journalist shall obtain his or her information through the skilful application of journalistic principles and shall never bribe or offer inducements to his or her source.
- No journalist shall deny any person with legitimate claim a right to reply to a statement. Corrections and rejoinders are to be published in appropriate form without delay and in a way that they will be noticed by those who received the original information.
- A journalist shall at all times strive to separate his or her own opinions from factual news. Where personal opinions are expressed, this shall be made clear to the public.
- A journalist shall take the necessary steps to correct any inaccurate report he or she has made on any individual or organisation.
- A journalist shall not originate or encourage the dissemination of information

designed to promote, or which may have the effect of promoting, tribalism, racism or any other form of discrimination.

### **3.3 Legislation governing the exhibition of films and the performance of plays and other public entertainments**

❖ **The Uganda Communications Act, 2013. Act No. 1 of 2013, (Communications Act)**

The Communications Act regulates matters relating to the exhibition of films. Section 4 of the act establishes of the Uganda Communications Commission (UCC). Section 37(4) makes it an offence to operate a cinematograph theatre or a video or film library without a licence issued by the UCC. The penalty for non-compliance is a fine, a period of imprisonment or both.

❖ **The Stage Plays and Public Entertainments Act, 1943, Chapter 49 (Stage Plays Act)**

The Stage Plays Act contains a number of provisions regarding the permissions and other requirements to present a play or public entertainment, which is defined as excluding sporting fixtures. Part III of the Stage Plays Act concerns permits for the presentation and performance of stage plays and public entertainment.

Section 4 of the Stage Plays Act makes it clear that no public performance or presentation may be undertaken without a permit obtained from the UCC. Posters depicting scenes, images or descriptions of public entertainment may not be displayed without approval by the UCC – section 9.

Scripts must be granted permits, and adjustments to scripts that have obtained permits must be approved and additional permits must be granted for each change – section 4(3). In order to obtain a permit, the complete script (and any adjustments) must be provided to the UCC – section 5(1). In the case of a script not written in English, a translation must be provided to the UCC for consideration – section 5(2).

The UCC may, at its discretion, choose to grant free permits in cases where they deem the performance to be for charitable, educational or public purposes – section 8.

Permits for a public presentation or performance may be refused by the UCC or the relevant minister at their absolute discretion and subject to any terms and conditions they deem fit.

❖ **The Press and Journalist Act, 2000, Chapter 105 (Press Act)**

The Press Act makes it a function of the Media Council to censor films, videotapes,

plays and so on for public consumption and it may refuse permission for a film, videotape or play to be exhibited – section 9.

### **3.4 Legislation governing the broadcast media generally**

#### **3.4.1 Legislation that regulates broadcasting media generally**

Broadcasting in Uganda is regulated by:

- The Uganda Communications Act, Act 1 of 2013 (Communications Act)
- The Anti-Pornography Act, 2014
- The Press and Journalist Act, Chapter 105 of 2000 (Press Act).

#### **3.4.2 Establishment of the UCC, the PCC, the Media Council, the NIJU and the UCT**

Uganda has more than one regulatory authority that deals with different aspects relating to broadcasting, namely the:

- Uganda Communication Commission (UCC), established in terms of section 4 of the Communications Act
- Pornography Control Committee (PCC), established in terms of section 3 of the Anti-Pornography Act
- Media Council, established in terms of section 8 of the Press Act
- National Institute of Journalists of Uganda (NIJU), established in section 13 of the Press Act
- Uganda Communications Tribunal (UCT), established in terms of section 60 of the Uganda Communications Act.

#### **3.4.3 Main functions of the UCC, the PCC, the Media Council, the NIJU and the UCT**

##### **THE UGANDA COMMUNICATION COMMISSION**

Section 5(1) of the Communications Act sets out the UCC's main functions, which include to:

- Monitor, inspect, licence, supervise, control and regulate communications services – note that these are defined in section 2 as including broadcasting

- Allocate, license, standardise and manage the use of the radio frequency spectrum resources to ensure the widest variety of programming and optimal utilisation of spectrum resources
- Regulate rates and charges for communications services
- Coordinate and collaborate with the relevant national and international organisations in matters relating to communications
- Receive, investigate and arbitrate complaints relating to communications services, and take necessary action
- Promote and safeguard the interests of consumers and operators as regards the quality of communications services and equipment
- Promote research into the development and use of new communications techniques and technologies
- Improve communications services and distribution throughout the country
- Promote competition
- Establish and administer a fund for the development of rural communications and information and communications technology (ICT) in the country
- Advise the minister on the administration of the Communications Act
- Set standards, monitor and enforce compliance relating to content
- Encourage and promote infrastructure sharing among licensees.

### THE PORNOGRAPHY CONTROL COMMITTEE

The functions of the PCC are laid out in section 7 of the Anti-Pornography Act and include:

- Taking all necessary measures to ensure the early detection and prohibition of pornography
- Ensuring all perpetrators of pornography are apprehended and prosecuted

- Collecting and destroying pornographic objects or materials with the assistance of the police
- Educating and sensitising the public about pornography
- Promoting the rehabilitation of individuals, groups, families and communities affected by pornography
- Expediting the development or acquisition and installation of effective protective software in electronic equipment such as computers, mobile phones and televisions for the detection and suppression of pornography
- Promoting educational material against pornography in the school curriculum in consultation with the government
- Promoting and coordinating local and international collaboration against pornography, in consultation with the government.

Section 11 of the Anti-Pornography Act gives authority to the PCC to, ‘at all reasonable times and without warrant’:

- Require the production, inspection and examination of records and other documentation relating to the enforcement of the Anti-Pornography Act
- Carry out inquiries or inspections to ensure compliance with the Anti-Pornography Act
- Carry out inspections of establishments that import, export, store, sell distribute or use any equipment that is likely to give the public access to pornography
- Seize any equipment, documentation ‘or any other thing which it believes has been used in the commission of an offence against this Act or regulations made under the Anti-Pornography Act’
- Close any internet service provider who promotes, publishes, sells or imports pornography
- Cause a police officer to arrest any person whom it believes has committed an offence under the Anti-Pornography Act.

## THE MEDIA COUNCIL

The functions of the Media Council are set out in section 9 of the Press Act and include, in relation to broadcasting:

- Regulating the conduct and promoting good ethical standards and discipline of journalists. Within the Press Act is the Professional Code of Ethics which is dealt with previously in this chapter in the section headed 'Legislation governing the print media', and is not repeated here
- Arbitrating disputes between the public and the media, and the state and the media
- Exercising disciplinary control over journalists, editors and publishers
- Promoting the flow of information
- Censoring of films, videotapes, plays and other related apparatuses for public consumption.

## THE NATIONAL INSTITUTE OF JOURNALISTS OF UGANDA

The functions of the NIJU are set out in section 14 of the Press Act and include, in relation to broadcasting:

- Establishing and maintaining professional standards for journalists
- Encouraging training, equipping and enabling journalists to play their part in society
- Establishing and maintaining a relationship with international journalists' organisations and other organisations with a view to enhancing the objectives of the institute.

Additional functions of the NIJU are set out in section 14(2) of the Press Act and include:

- Advising on courses of study, the conduct of qualifying examinations and generally on matters related to professional education for journalists in Uganda
- Ensuring the maintenance of professional education for journalists

- Promoting journalism that is not contrary to public morality
- Encouraging research in journalism for the advancement of professionalism.

Members of the NIJU are bound by the Professional Code of Ethics, which is discussed in detail earlier in this chapter under the section headed ‘Legislation governing the print media’, and is not repeated here.

## THE UGANDA COMMUNICATIONS TRIBUNAL

In terms of section 64 of the Communications Act, the UCT has jurisdiction to hear and determine all matters relating to communications services arising from decisions made by the UCC and the minister responsible for information and communications technology (ICT). The UCT’s jurisdiction does not include a trial of any criminal offence.

### 3.4.4 Appointment of UCC, PCC, Media Council, NIJU board and UCT members

#### THE UGANDA COMMUNICATIONS COMMISSION

In terms of section 9(2) of the Communications Act, all eight members of the UCC Board, who hold office for a period of three years, renewable once – section 9(5), are appointed by the minister responsible for ICT. They must include:

- A person with experience and knowledge in telecommunications, broadcasting or postal communications, as the chairperson
- A representative of professional engineers recommended by the Institute of Professional Engineers
- One lawyer who is a member of the Uganda Law Society
- A person knowledgeable in the field of economics, financial management and public administration
- A representative of the ministry responsible for ICT, who is an *ex-officio* member
- The executive director
- A representative of consumers recommended by the Uganda Consumers’ Association

- One person of good repute and proven integrity representing the public.

Section 10 outlines the attributes that would disqualify prospective board members. These include:

- Engagement in an organisation which operates or provides communications services, either directly or indirectly
- Engagement in the manufacture of communications equipment, either directly or indirectly
- Insolvency
- Inability to perform the functions of his or her office as a result of mental or physical disability.

### THE PORNOGRAPHY CONTROL COMMITTEE

Section 3 of the Anti-Pornography Act establishes the PCC, all of whose members are appointed by the minister responsible for ethics, with the approval of the Cabinet – section 3(3) – and is made up of nine members including:

- A chairperson
- An advocate nominated by the Uganda Law Society
- A representative for the media houses
- A representative for the publishing houses
- A representative for the arts and entertainment industry
- A representative for education professionals
- A representative for health professionals
- A representative for cultural leaders
- A representative for religious leaders.

Section 6 of the Anti-Pornography Act sets out criteria for the disqualification or removal of a committee member from the PCC, which include:

- Inability to perform the functions of his or her office as a result of mental or physical disability
- Misconduct, misbehaviour or incompetence
- Conviction of an offence involving moral turpitude.

Section 12 of the Anti-Pornography Act creates the position of secretariat in the

Directorate of Ethics and Integrity, which shall be headed by the director for ethics, who shall be the secretary of the PCC but not a member of the PCC. The secretary will be responsible for:

- Ensuring the implementation of the recommendations and decisions of the PCC
- Taking minutes of PCC meetings
- Keeping the records of all the transactions of the PCC
- Performing any function that may be assigned for the PCC.

## THE MEDIA COUNCIL

Section 8 of the Press Act establishes of the Media Council, whose membership consists of:

- The director of information or a senior member from the ministry responsible for information, who is secretary to the council
- Two scholars in mass communication, appointed by the minister of information in consultation with the NIJU
- A representative nominated by the Uganda Newspaper Editors and Proprietors Association
- Two representatives of electronic media
- Two representatives of the NIJU
- Two non-journalist members of the public, appointed by the minister
- One non-journalist member appointed by the Uganda Newspapers Editors and Proprietors Association
- One non-journalist member nominated by journalists
- A lawyer nominated by the Uganda Law Society.

Section 8(3) of the Press Act states that all members of the Media Council are appointed by the minister responsible for information. The chairperson of the Media Council is elected by the members of the council from among their number – section 8(4). Members of the council serve for a period of three years and are eligible for reappointment.

## THE NATIONAL INSTITUTE OF JOURNALISTS OF UGANDA

The NIJU executive committee consists of a president, a vice president, a general secretary, a treasurer, an assistant general secretary and three other members, all of whom are elected annually by the members of the NIJU at a general meeting, in terms of section 18 of the Press Act.

## THE UGANDA COMMUNICATIONS TRIBUNAL

The UCT is established in terms of section 60 of the Communications Act and consists of three members who will serve on the UCT for a period of four years, eligible for renewal. The members are:

- A judge appointed by the president on the recommendation of the JSC, who shall serve as the chairperson of the UCT
- Two other persons appointed by the president on the recommendation of the JSC.

In discharging its duties, the UCT may appoint up to four technical advisors from a group of technical people identified by the minister responsible for ICT. The appointment of a technical advisor is for a specific task only and lapses following the completion of that task.

Disqualification from appointment to the UCT is set out in section 62 of the Communications Act and includes:

- Engagement in a communications company or organisation which operates communications systems or provides services or is engaged in the manufacture or distribution of communications equipment in Uganda, as an owner, shareholder, partner or otherwise, whether directly or indirectly
- Financial or proprietary interest in an organisation referred to above, or in the manufacture or distribution of communications apparatus anywhere in Uganda
- Bankruptcy or financial arrangements with creditors
- Incapacitation by mental or physical illness
- Inability or unsuitability to discharge the functions of office of a member of the tribunal or technical adviser.

Section 63 of the Communications Act provides that a position on the UCT may fall vacant for a number of reasons, including:

- Continuous and persistent inability to perform the functions of the office
- Engagement in misbehaviour or abuse of office
- Disqualification from membership in accordance with section 62 of the Communications Act
- Failure to disclose to the UCT any interest in a contract or proposed contract or any other matter before the Tribunal
- Resignation in writing to the president.

A vacancy on the UCT under section 63(1)(a) shall be filled by the president on the recommendation of the minister responsible for ICT.

Section 63(4) provides that a technical adviser shall cease to be a technical adviser if he or she:

- Is disqualified from appointment in accordance with section 63(1)
- Fails to disclose to the UCT any interest in the communications sector or in a contract or other matter before the Commission or the Tribunal
- Acquires any material interest in the communications sector
- Has handed a resignation in writing to the minister responsible for ICT.

A vacancy for a technical advisor under section 63(4) shall be determined by the minister for responsible for ICT on the recommendation of the Commission.

### **3.4.5 Funding for the UCC, the PCC, the Media Council, the NIJU and the UCT THE UGANDA COMMUNICATIONS COMMISSION**

Section 67 of the Communications Act sets out the various sources of funding for the UCC. In brief, these include:

- Monies appropriated by Parliament from the national budget

- Licence fees and monies paid to the UCC for services rendered
- Revenue collected from the annual levy on a percentage of gross annual revenue of operators provided for in section 68
- Money borrowed by the UCC
- Loans, grants, gifts or donations from government and other sources made with the approval of the minister responsible for ICT, the minister responsible for finance, and Parliament.

### THE PORNOGRAPHY CONTROL COMMITTEE

Section 21 of the Anti-Pornography Act provides that funds for the PCC consists of:

- Monies approved by Parliament
- Monies donated for the performance of the functions of the PCC.

Finances for the PCC budget are budgeted for under the budget estimates of the ministry responsible for ethics.

### THE MEDIA COUNCIL

This is not dealt with in the Press Act and it is not clear how the Media Council is funded.

### THE NATIONAL INSTITUTE OF JOURNALISTS OF UGANDA

Sources of funding for the NIJU are outlined in section 21 of the Press Act and include:

- Grants from the government
- Annual subscription fees from members of the NIJU
- Fees and other monies paid for services rendered by the NIJU
- Grants, gifts or donations from sources acceptable to the NIJU
- Monies borrowed by the NIJU.

All funding for the NIJU is managed through a fund established by the general assembly of the NIJU – section 21(2).

## THE UGANDA COMMUNICATIONS TRIBUNAL

Section 61 of the Communications Act outlines the sources of funding for the UCT and include:

- Money appropriated by Parliament from time to time for enabling the UCT to perform its functions
- Grants, gifts or donations from the government or other sources acceptable to the minister responsible for ICT and the minister responsible for finance
- Funds provided to the UCT by the UCC under section 71 of the Communications Act.

### 3.4.6 Making broadcasting regulations

An independent regulatory authority usually has the power to make its own regulations; however, in Uganda all three bodies associated with broadcasting regulation – namely, the UCC, the PCC and the Media Council – are subject to the separate ministers under whose authority each of the regulatory bodies falls, in respect of making such regulations.

### BROADCASTING REGULATIONS MADE BY THE UCC

The Communications Act puts the authority for making regulations administered by the UCC in the hands of the minister responsible for ICT. The minister may, after consultation with the Commission and with the approval of Parliament, by statutory instrument, make regulations for better carrying into effect the provisions of the Communications Act – section 93. These include regulations relating to:

- Fees payable on the granting or renewal of a licence
- Categories of licences
- Use of any communications station, apparatus or licence, and compliance with related technical specifications
- Anti-competitive practices
- The quantity and quality criteria of communications services to be provided by a licensee

- Reserved and mandatory services to be provided by an operator
- Consumer information about the range of commercial services and the conditions under which they are provided
- Compensation for a licensee incurring losses as a result of obligations imposed by the UCC on operators in pursuance of the objectives of the Communications Act
- Retention of records relating to programmes or broadcasts
- Obligations of licensees in respect of public broadcasters
- Licensing and management of orbital slots
- Regulation of community broadcasting.

Contraventions of these regulations are punishable by a fine, imprisonment or both.

It should be noted that at the time of writing, the Uganda Communications (Amendment) Bill of 2016 was before Parliament. The purpose of this bill is the removal of the requirement for parliamentary approval of regulations in terms of section 93 of the Communications Act.

#### **BROADCASTING REGULATIONS MADE BY THE PCC**

The Anti-Pornography Act places authority for making regulations in the hands of the minister responsible for ethics. The regulations may deal with, among other things:

- Establishing programmes aimed at educating and sensitising the public about pornography and its consequences
- Providing for rehabilitation of persons affected by pornography
- Providing for the eradication of pornography
- Providing for a multi-sectoral approach against pornography involving government departments, agencies, institutions and civil society organisations to develop anti-pornography strategies.

Contravening such regulations is an offence, the penalty for which is a fine, imprisonment or both – section 27(2)(b).

## BROADCASTING REGULATIONS MADE BY THE MEDIA COUNCIL

Section 42 of the Press Act places authority for making regulations in the hands of the minister responsible for information, on the advice of the Media Council. These regulations include:

- Particulars and other matters to be entered in the register of the Media Council
- Fees to be paid under the Press Act
- Procedure of the disciplinary committee and the manner of lodging a complaint.

The minister may, with the approval of Parliament, by statutory instrument, increase any fines specified in the Press Act – section 42(3).

### **3.4.7 Licensing regime for broadcasters in Uganda**

#### **BROADCASTING LICENCE REQUIREMENT**

Section 27 of the Communications Act empowers the UCC, with exclusive authority, to issue broadcasting licences in Uganda. Contravention of this requirement is punishable with a fine, imprisonment or both.

Section 26 of the Communications Act outlines the requirements to operate a television or radio station. Section 26(1) states that no person may operate either a television station or a radio station without a licence issued by the UCC. Section 26(2) outlines what the UCC must take into account when issuing a broadcasting licence. This includes:

- Proof of the existence of adequate technical facilities
- The location of the station and geographical area to which broadcast is to be made
- The social, cultural and economic value of the service
- An environmental impact assessment.

Failure to comply with section 26(1) of the Communications Act is an offence, the penalty for which is a fine, imprisonment or both. Section 26(4) states that in the case of a corporate body, any or all the persons who are authorised to sign any documentation on behalf of the corporate body may be held liable for the contravention.

Section 23 of the Communications Act exempts certain bodies, including the police, the armed forces, or any other service used by the state in the performance of official functions, from requiring a licence.

## CATEGORIES OF BROADCASTING LICENCES

There are several categories for broadcasting licences outlined in the UCC's current application form for a broadcasting licence (UCC-BD/CSP/13/002), namely:

- Public broadcasting services
- Commercial broadcasting services
- Community broadcasting services
- Internet protocol television/radio (IPTV) service
- Cable television subscription service
- Terrestrial subscription broadcasting service
- Satellite subscription broadcasting service
- Broadcasting subscription management service
- Digital mobile television service
- Landing rights (satellite broadcasting cable, etc.).

## BROADCASTING LICENSING PROCESS

### **Application**

Section 38 of the Communication Act outlines the process for applying for a broadcasting licence. All applications must be made on a prescribed form to the UCC (the current prescribed form is UCC-BD/CSP/13/002). The UCC will then process the application, taking into account the considerations provided for in section 38(2) of the Communications Act. These include:

- The eligibility of the applicant
- The applicant's capability to operate a system or service for which a licence is sought
- The objectives of the Communication Act
- Whether granting the licence is in the public interest.

Once the UCC has evaluated the eligibility of the application it will then issue the licence upon the payment of the fees prescribed for the relevant licence. The licence will include:

- The terms and conditions upon which it is granted
- Specification of the services to be provided by the operator
- Where applicable, the network to be operated.

The UCC shall grant the licence within 60 days from the date of application. Where the UCC refuses to grant the licence, a written explanation for the refusal must be provided to the applicant within 14 days – section 38(5).

### **Licence terms and conditions**

The UCC prescribes the terms and conditions of all operators licensed under the Communications Act – section 39(1). These may include the provision of services to rural or sparsely populated areas or other specified areas, and other conditions specified in Schedule 6 of the Communications Act – section 39(2).

Schedule 6 of the Communications Act states that a licence issued under the Communications Act may include conditions such as:

- The payment of sums of money calculated as a proportion of the rate of the annual turnover of the operator's licensed system or otherwise
- The payment by the operator of a contribution toward any loss incurred by another operator as a result of such other operator's obligation imposed on the operator by the UCC regarding the provision of uneconomic service in pursuance of the objectives of the Communications Act
- The provision of services to disadvantaged persons
- Prohibiting an operator from giving undue preference to, or from exercising undue discrimination against, any particular person or class of persons, including any operator
- Furnishing the UCC with such documents, accounts, returns or such other information as the UCC may require for the performance of its functions under the Communications Act
- Requiring an operator to publish in such manner as may be specified in the licence a notice stating the charges and terms and conditions that are to be applicable to facilities and services (for example, a subscription broadcasting service) provided, and the conditions for specifying tariffs
- Provision of service on a priority basis to government or specified organisations
- Requiring an operator to ensure that an adequate and satisfactory information system, including billing information, is provided to customers
- Requiring an operator to comply with such technical standards or requirements, including service performance standards, as may be specified in the licence
- Any other condition the UCC may consider appropriate or expedient.

Schedule 6 also provides that it is a condition of every licence issued under the Communications Act that the licensee must:

- Comply with all relevant international conventions or instruments to which Uganda is a party
- In the case of a broadcaster, allocate time for the coverage of national events and functions.

A licensee must provide a service for which the licence was obtained – section 39(3).

### **Modification of licence**

Section 40(1) of the Communications Act authorises the UCC to modify the conditions of any licence if the UCC considers it necessary to achieve the objectives of the Communications Act or in the public interest, taking into account the justified interests of operators and the principles of fair competition and equality of treatment. Section 40(2) of the Communications Act provides that before modifying any condition of a licence, the UCC must give the operator notice of not less than 60 days, stating the reasons for the intended modification and giving the operator an opportunity to make representations thereon. Additionally, section 40(3) gives an operator a reasonable time within which to comply with the modification of the licence, determined by the UCC. A person aggrieved by a decision of the UCC may appeal to the UCT – section 40(4).

### **Suspension and revocation of licence**

The Communications Act provides for the suspension and revocation of a broadcasting licence outlined in section 41. The UCC may suspend or revoke a licence issued under the Communications Act on the grounds of:

- Serious and repeated breach of the licence conditions
- Fraud or intentional misrepresentation by the operator applying for the licence
- Treasonous offences under the Penal Code Act by the operator
- Cessation of eligibility of the person to whom the licence has been awarded.

After considering any representations by the operator, the UCC may also:

- Prescribe the time period by which the operator is required to remedy the offending act or conduct
- Require the operator to pay a fine not exceeding the equivalent of ten percent of its gross annual revenue.

The UCC must give the operator written notice of not less than 60 days specifying the reasons for the intended suspension or revocation, during which the operator may make representations to the UCC. Where the UCC determines that the operator's representations under section 41(3) are not sufficient, the UCC may suspend or revoke the operator's broadcasting licence.

### **Transfer of licence**

Section 42 of the Communications Act provides for the transfer of a licence issued by the UCC. A licence issued by the UCC may not be transferred without the prior written consent of the UCC. An application for a transfer of licence may be made by the operator to the UCC in terms of section 42(3) of the Communications Act, and must be accompanied by an application to grant a broadcasting licence to the person to whom the operator intends to transfer the licence. The UCC must then consider the application for the transfer of the broadcasting licence, taking into account the same considerations outlined in section 38 of the Communications Act when awarding a licence to a broadcasting operator. The UCC may, at its discretion, refuse to grant the application to transfer a broadcasting licence, in terms of section 38.

The UCC must give its decision on an application to transfer a licence within 45 days from the date of application – section 42(6). Where the UCC refuses consent, it must, within 14 days of the refusal, provide a written explanation giving reasons for the refusal – section 42(7).

### **Lapse and renewal of a licence**

Section 43 of the Communications Act requires broadcasting licence holders to apply for a renewal of the broadcasting licence at least two months before the expiration of the licence. When considering an application for a renewal of a licence, the UCC must take into account the performance of the operator during the preceding period under which the licence was valid. A decision on the renewal of a broadcasting licence must be made within 30 days of the application for renewal. In situations where a licence is not renewed under section 43 of the Communications Act, the UCC must provide written explanation for the refusal within 14 days of the refusal.

### **Frequency spectrum licensing**

This is an important aspect of broadcasting because all terrestrial and satellite broadcasting signals are distributed through radio waves, and consequently make use of the radio frequency spectrum.

Frequency spectrum licensing in Uganda is dealt with in section 24 of the Uganda Communications Act. Section 24 provides that the UCC is the exclusive issuer of licences for:

- Radio broadcasting, or communications apparatus and spectrum use
- Possession and operation of radio broadcasting or communication apparatus
- Broadcasting and communications as the UCC may consider appropriate.

The UCC may, through spectrum refarming, withdraw spectrum where the UCC is satisfied that it is not being used optimally – section 25(2).

## RESPONSIBILITIES OF BROADCASTERS UNDER THE COMMUNICATIONS ACT

Section 28 of the Communications Act outlines the responsibilities of a broadcaster. While section 28(1) prohibits unauthorised prevention of the broadcasting of a programme on account of its content, section 28(2), however, makes it clear that prohibited content may not be aired. Prohibited content includes:

- Pornographic material
- Material which infringes upon the privacy of any individual.

Additional responsibilities for a licensed broadcaster are outlined in section 29 of the Communications Act and include:

- Ensuring that what is broadcast is not contrary to public morality
- Retaining a record of all that is broadcast, for not less than 60 days.

Section 30 of the Communications Act sets out the grounds upon which a person may be disqualified from becoming a producer of a broadcasting station, and these include:

- Being under 18 years of age
- Being of unsound mind
- Not ordinarily being resident in Uganda
- Not possessing the requisite qualifications prescribed by the Media Council.

All broadcasters must follow the minimum broadcasting standards outlined in Schedule 4 of the Communications Act and may only broadcast programmes that comply therewith. According to Schedule 4(a), these standards include:

- Not being contrary to public morality
- Not promoting a culture of violence or ethnic prejudice, especially among children and youth
- News broadcasts that are factual
- Not being likely to create public insecurity or violence

- Being compliant with existing law.

Schedule 4(b) requires all programmes that are broadcast to be balanced to ‘ensure harmony’. Schedule 4(c) stipulates that adult-oriented programming must be appropriately scheduled. Any broadcaster that provides programming for a contender for public office must afford equal opportunity to all contenders seeking election – schedule 4(d). Schedule 4(e) stipulates that any broadcast that relates to national security must have the contents verified by the UCC before broadcasting.

It is also the responsibility of the broadcaster to ensure that any programming complies with the ethical broadcasting standards – section 32. The ethical broadcasting standards which apply to broadcasters are the professional code of ethics specified in the Fourth Schedule of the Press and Journalist Act. These are dealt with previously in the section titled ‘Legislation governing print media’ and are not repeated here.

The ethical standards in the Press and Journalist Act referred to in section 32(1) may be modified by the UCC to accord with the Communications Act.

## ANNUAL REPORT ON OPERATIONS OF LICENSEE

Section 44 of the Communications Act requires that every licensee must, at the end of each year of business, prepare and submit an annual report on the extent to which the conditions of the licence were followed. The annual report must be provided to the UCC in the prescribed form.

### **3.4.8 Are the UCC, the PCC, the Media Council, the NIJU and the UCT independent regulators?**

An independent regulatory authority generally has the right to create its own regulations regarding their sphere of influence. This is not the case in Uganda as all five regulatory bodies, namely the UCC (regulated under section 93 of the Communications Act), the PCC (regulated under section 27 of the Anti-Pornography Act), the Media Council (regulated under section 42 of the Press Act), the NIJU (regulated under section 15 and section 18 of the Press Act), and the UCT (regulated under section 60 of the Communications Act), are not able to make regulations without the involvement of other bodies. In particular, the government controls the regulation-making processes of all of these bodies through the ministers under whose authority they fall.

The lack of independence of these regulatory bodies is further emphasised through

their lack of control over the appointment of their executive staff, as this is also controlled by the ministers under whose authority they fall.

Lastly, none of these bodies is appointed via a public nominations process involving a multi-party body such as Parliament. In each case, except in respect of the NIJU, the executive is essentially responsible for the appointment and removal of the members governing structures of the institutions, rendering them not independent of the executive branch of government.

### INDEPENDENCE OF THE UCC

The UCC cannot be said to be independent for, while section 8 of the Communications Act states that the UCC ‘shall exercise its functions independently of any other person or body’, this is subject to section 7 of the Communications Act, which states that the minister responsible for ICT may give policy guidelines to the UCC regarding the performance of its duties and functions, and that the UCC must comply with policy guidelines given by the minister responsible for ICT. Additionally, while the appointments process does give a ratification role to Cabinet, all appointments to the board of the UCC are made by the minister responsible for ICT without any public nominations process or involvement of a multi-party body such as Parliament – section 9(3). Independent regulation-making is also denied to the UCC, as pointed out above, by the provisions of section 93 of the Communications Act, which give the minister responsible for ICT the authority to make regulations for the UCC’s industry sector.

### INDEPENDENCE OF THE PCC

The PCC cannot be said to be an independent regulatory authority as the authority for the appointment of members to the PCC is held by minister responsible for ethics without any form of public nominations process or involvement of a multi-party body such as Parliament – section 3(3). The independence of the PCC is further inhibited by section 27 of the Anti-Pornography Act, which places the authority for regulating the functions of the PCC in the hands of the minister responsible for ethics, who may make regulations ‘to provide for the better carrying into effect, the purposes of this Act’. Section 26 of the Anti-Pornography Act gives the minister responsible for ethics the authority to amend fees and fines payable and the processes of the PCC, with the approval of Cabinet.

### INDEPENDENCE OF THE MEDIA COUNCIL

The Media Council cannot be said to be an independent regulatory authority as the

Press Act gives the authority to appoint council members to the minister responsible for information without any form of public nominations process or involvement of a multi-party body such as Parliament. The chairperson of the Media Council is, however, elected by the members of the Media Council from among their number – section 8. Section 42 of the Press Act places the authority for making regulations in the hands of the minister responsible for information, with advice from the Media Council.

### INDEPENDENCE OF THE NIJU

The NIJU cannot be said to be independent due to the fact that, in terms of section 40(3), amendments to its Professional Code of Ethics set out in Schedule 4 of the Press Act are made by the minister responsible for information after consultation with the Media Council. This Code of Ethics must be followed by members of the NIJU, and failure to do so can result in disciplinary action.

### INDEPENDENCE OF THE UCT

The UCT cannot be said to be independent for, while the members of the UCT are appointed by the president on the recommendation of the JSC, in terms of section 60(2) of the Communications Act, the technical advisors that assist the UCT, in terms of section 60(5), are selected from a group identified by the minister responsible for ICT. This means that decisions made by the UCT can be strongly influenced by the technical advisors identified by the minister.

### **3.4.9 Amending the legislation to strengthen the broadcast media generally**

There are a number of weaknesses in the legislative framework for the regulation of broadcasting generally in Uganda:

- The UCC should be able to make regulations without reference to the minister responsible for ICT.
- The UCC should be able to appoint or dismiss the executive general of the UCC without reference to the minister.
- Appointments of the UCC board members ought to be made by the president on the recommendation of Parliament following a public nominations, interview and shortlisting process.
- There ought to be more public participation in the broadcasting service licensing

process. There is no public notice or comment required when issuing, amending, renewing or transferring broadcasting licences.

- Appointment to the PCC should be made by the president on the recommendation of Parliament after a public nominations, interview and shortlisting process.
- The PCC should be empowered to make regulations in respect of matters set out in the Anti-Pornography Act without the involvement of the minister responsible for ethics.
- Members of the Media Council should be appointed by the president on the recommendation of Parliament following a public nominations, interview and shortlisting process.
- The Media Council should be empowered to make regulations on its own without the involvement of the minister responsible for information, as is currently provided for in terms of the Press Act.
- Section 60(5) of the Uganda Communications Act should be amended to remove the ability of the minister responsible for ICT to pre-select eligible technical advisors for the UCT as this power should rest entirely with the UCT.

### **3.5 Legislation that governs state media**

#### **3.5.1 State newspapers**

- ❖ **New Vision Printing and Publishing Corporation Act, Chapter 320, 1987 (New Vision Act)**

Section 2 of the New Vision Act establishes the New Vision Printing and Publishing Corporation (New Vision).

##### ***New Vision's mandate***

Section 3 of the New Vision Act establishes the mandate for New Vision, which includes:

- Publishing government-owned newspapers in English and vernacular languages
- Publishing booklets or other publications which project the good name of Uganda and enhance the welfare and unity of its people
- Government stationary and forms, for example, licence applications and annual reports

- Commercial work ranging from stationary and book printing to text and exercise books, or any other books for general reading, advertising and other forms of posters, technical drawings and architectural plans, and carrying out any other activity that may be carried out by a printing press or publishing house.

#### *Appointment of the New Vision Board*

Section 5 of the New Vision Act outlines the composition of the board of New Vision. The board consists of a managing director and not fewer than four, and not more than eight, other directors, one of whom shall be the chairperson. Section 5(2) provides that the directors are appointed by the minister responsible for information. A director's term is three years – section 5(3) – and directors are eligible for re-appointment – section 5(7).

A director may resign his or her office in writing addressed to the minister, and the minister may remove any member from office for an inability to perform the functions of his or her office, or for any other sufficient reason – section 5(4). Should the office of a director become vacant for any reason other than the completion of his or her term of appointment, the minister responsible for information may appoint another person to hold office to complete the term – section 5(5). Appointments made under section 5(5) will complete their terms of office on the date when the person in whose place he or she holds office would have ceased to hold office in accordance with the New Vision Act.

#### *Function of the New Vision Board*

The New Vision Board is responsible for ensuring that the government newspapers are published in accordance with the New Vision editorial policy, which is outlined in section 19 of the New Vision Act. The New Vision editorial policy includes to:

- Provide wide coverage of events all over the world and in Uganda in particular
- Voice public opinion and criticisms of a given government policy in a fair and objective manner without becoming an institutional opponent to the government or its interests
- Uphold the integrity of the Republic of Uganda and promote harmonious relationships among its people, its neighbours and the world at large
- Propagate news and comment truthfully, honestly and fairly without jeopardising peace and harmony in the country
- Respect and uphold the sovereignty and unity of Uganda and to come out firmly

on its side on matters affecting such sovereignty and unity without affecting the truth, which must at all times be the guiding line and governing principle of the newspapers.

### ***Funding for New Vision***

Section 12 of the New Vision Act sets out sources of funding of New Vision, which include:

- Any grant of a capital nature from the government
- Any loan from the government, organisations or any person
- Any monies that may become payable to New Vision in the discharge of its functions
- Donations that may be made to New Vision.

### ***New Vision: Public or state corporation?***

New Vision is a state publishing house. This is evident from section 5 of the New Vision Act, which states that directors to the board of New Vision are appointed by the minister responsible for information and may be removed by the minister. The appointment and removal of a director appears to be at the discretion of the minister.

Another factor indicating that New Vision is a state publishing house rather than a public one is the editorial policy which is laid down in section 19 of the New Vision Act. Section 19(b) provides that while New Vision may publish criticism of the government, it may not become an institutional opponent to the government or its interests. What constitutes institutional opposition of the government is determined by the board, which is appointed by the minister responsible for information.

## **3.5.2 State broadcaster**

### **❖ Uganda Broadcasting Corporation Act, 2005 (UBC Act)**

Section 3 of the UBC Act establishes the Uganda Broadcasting Corporation (UBC) as the state broadcaster and successor to Uganda Television and Radio Uganda. Section 4 of the UBC Act highlights the objectives of the UBC, most notably to provide electronic media to the Ugandan public and to sustain comprehensive national radio and television coverage across Uganda.

### ***The UBC's mandate***

Section 5(1) of the UBC Act sets out the functions of the UBC. In brief, these include:

- Providing radio and television broadcasting services with an emphasis on national unity and cultural diversity

- Reflecting the government's vision regarding the objectives, composition and overall management of the broadcasting services
- Ensuring a sustainable system for gathering, analysing, storing and disseminating information
- Carrying out signal distribution as a common carrier (this makes the UBC both a competitor and service provider in the broadcasting signal distribution field)
- Ensuring indigenous programming and adapting foreign programmes to suit indigenous needs
- Maintaining editorial independence and setting national broadcasting standards
- Ensuring protection of the public interest in rendering broadcasting services
- Providing electronic media and consultancy services to educate the public
- Maintaining self-sustainability
- Achieving and sustaining comprehensive radio and television coverage throughout Uganda
- Achieving and sustaining reliable signals
- Ensuring accurate, reliable and timely reporting of events and presentation of programmes.

#### *Appointment of the UBC Board*

The UBC is governed by a board of directors – section 7 – which includes a managing director, plus five to seven directors, one of whom is the chairperson. Section 7(2) gives the power of appointment of the board of the UBC to the minister responsible for information and broadcasting. The directors are appointed for a period of four years – section 7(3). Any director may hold office for two terms only – section 7(7). The minister responsible for information and broadcasting may remove a director from office if it is determined that he or she is unable to perform the function of his or her office or is guilty of misbehaviour, misconduct or incompetence – section 7(4). Should a director's position become vacant other than by the expiry of their term, the minister responsible for information and broadcasting may appoint another person to hold office in his or her place – section 7(5) – to complete the original term – section 7(6).

Section 8 of the UBC Act provides for the appointment of a managing director to serve as the executive officer of the UBC. The managing director is appointed by the minister responsible for information and broadcasting.

### *Functions of the UBC Board*

The functions of the UBC Board are outlined in Section 8 of the UBC Act. These include:

- Reviewing the policy of the UBC with regard to the UBC's objectives as set out in the UBC Act
- Approving the annual budget
- Appointing and disciplining staff members
- Determining the UBC structure, number of employees and terms and conditions of service
- Establishing the rules and procedures for appointing, developing and disciplining staff
- Managing the UBC's finances and assets
- Any other functions approved by the minister responsible for information and broadcasting.

### *Funding for the UBC*

Section 27 of the UBC Act authorises the minister responsible for information and broadcasting to transfer all property, rights and liabilities belonging to both Uganda Television and Uganda Radio to the UBC. Section 14 of the UBC Act sets out the allowable sources of funding for the UBC. These are:

- Any capital grants from government
- Loans from government, organisations and persons
- Income payable to the UBC in performance of its functions and commercial activities
- Donations made to the corporation
- Television viewing licence fees
- Advertising revenue.

### *The UBC: Public or state broadcaster?*

The UBC is a state broadcaster. Section 3(3) of the UBC Act states that the UBC is

wholly owned by the government. Section 5 further indicates the UBC is a state broadcaster. The UBC is required to reflect government's vision regarding the objectives, composition and overall management of broadcasting services – section 5(1)(b).

The UBC's status as a state broadcaster rather than a public broadcaster is further emphasised in section 7, in terms of which all board members are appointed by the minister responsible for information and broadcasting, who also has the ability to remove a director and replace him or her without consultation with Parliament or the board of the UBC.

### **3.5.3 Weaknesses in the provisions of the UBC Act which should be amended**

A number of important weaknesses ought to be addressed through legislative amendments.

- Appointments of UBC board members ought to be made by the president on the recommendation of Parliament following a public nominations, interview and short-listing process.
- The UBC Board ought to be able to appoint and dismiss the managing director of the UBC without any involvement from the minister responsible for information and broadcasting.
- The UBC ought to be specifically stated to be an independent public broadcaster providing broadcasting services in the public interest.

### **3.6 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 this confidentiality 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 Penal Code Act, Chapter 120 of 1950**

The Penal Code of Uganda establishes a code of criminal law. Surprisingly, the

interpretation of this law is still to be done in accordance with the principles of legal interpretation obtaining in England – section 1. Section 103(c) of the Penal Code makes it an offence to obstruct in any way the execution of civil or criminal legal processes. While this is not overtly aimed at journalists or the media, it can be interpreted that should a journalist fail to expose his or her source when ordered to do so in a legal proceeding, the journalist can be held to have committed an offence. The penalty for obstructing a legal process is a period of imprisonment.

Additionally, section 107(b) makes it an offence when called upon to give evidence in a judicial proceeding to:

- Fail to attend such proceedings, or
- Refuse to answer a question or produce a document without lawful excuse.

Punishment is a period of imprisonment or a fine – section 107(2).

❖ **The Anti-Terrorism Act, 2002**

The effect of paragraph 8 of the Third Schedule to the Anti-Terrorism Act is that it empowers an investigating officer in a terrorist investigation to apply to a magistrate for an order requiring a person who is in possession of, among other things, journalistic material, to produce it to the investigating officer or to give the investigating officer access thereto. Journalistic material is defined in paragraph 5(1) of the Third Schedule to the Anti-Terrorism Act as material ‘acquired or created for the purposes of journalism’.

Surprisingly, the Anti-Terrorism Act does not appear to contain specific provisions detailing the consequences of non-compliance with a magistrate’s order. We assume that the provisions of section 103(c) of the Penal Code, which makes it an offence to obstruct criminal legal processes, would apply, and the penalty therefore is a period of imprisonment.

❖ **Parliament (Powers and Privileges) Act, 1955, Chapter 258 (Parliament Act)**

Section 8 of the Parliament Act empowers Parliament, any sessional committee or other committee specially authorised by Parliament, to order any person to attend before Parliament or a committee and give evidence or to produce any paper, book, record or document in the possession or under the control of that person.

If a person does not comply with section 8, section 10 of the Parliament Act empowers the speaker of Parliament to direct the clerk of Parliament to issue a warrant (executed by a police officer) to apprehend a person and bring him or her before Parliament or the committee.

It is, however, important to note that whether or not requiring a journalist to reveal a source is in fact an unconstitutional violation of the right to freedom of expression will depend on the particular circumstances in each case, particularly on whether or not the information is available from any other source. It is therefore extremely difficult to state that these provisions are, by themselves, a violation of the right to freedom of expression under the Constitution.

### **3.7 Legislation that prohibits the publication of certain kinds of information**

A number of pieces of legislation contain provisions which, looked at closely, undermine the public's right to receive information and the media's right to publish information. Such legislation is targeted and generally prohibits the publication of certain kinds of information, including:

- Prohibition of the importation of publications prohibited by the attorney general
- Prohibition of publications that are prejudicial to the security of Uganda
- Prohibition of publications that promote sectarianism
- Prohibition of publications that are obscene or pornographic
- Prohibition of publications relating to legal proceedings
- Prohibition of publications relating to terrorist investigations
- Prohibition of publications that incite violence
- Prohibition of publications that further wrongful boycotts
- Prohibition of publications that incite the refusal of or delay in the payment of tax
- Prohibition of publications intended to disturb foreign relations

#### **3.7.1 Prohibition of the importation of publications prohibited by the attorney general**

##### **❖ The Penal Code Act, 2002**

While section 34 of the Penal Code Act does not make specific reference to the publication of material in Uganda, it does give the attorney general authority at his or her absolute discretion, by statutory order, to prohibit the importation of any or all publications or periodicals. Where the publication is a periodical, the order may relate to any past or future publications. The attorney general may, in writing, exempt any publication that has been prohibited under this section of the Penal Code. Section 35 makes it an offence to import any publication that has been prohibited under section 34 of this act, the penalty for which is two years' imprisonment, a fine or both. The penalty for subsequent offences is three years' imprisonment and the forfeiture of any such publication to the government.

Section 36 of the Penal Code states that any person to whom prohibited material is

delivered in response to a request made, or who is in possession of a publication prior to the prohibition of any publication, must deliver the prohibited material to an administrative officer or the officer in charge of the nearest police station, as soon as the nature of the material or the prohibition thereof becomes known to him or her. The penalty for failing to do so is a term of imprisonment, a fine or both, and the prohibited material will be forfeited to the government.

### **3.7.2 Prohibition of publications that are prejudicial to the security of Uganda**

#### **❖ The Penal Code Act, 1950**

Section 37 of the Penal Code makes it an offence to publish information considered prejudicial to the security of Uganda. This includes information relating to military operations, strategies or troop locations, locations of supplies or equipment of the armed forces or of the enemy which is likely to result in the endangerment of military installations, equipment, supplies and personnel. Additionally, the publication of material that may assist the enemy or else disrupt public order and security is an offence. The penalty for both is a term of imprisonment.

#### **❖ The Official Secrets Act, 1964**

The Official Secrets Act prohibits the production or publication of any material (sketch, note, plan or model) that is determined to be or might be, either directly or indirectly, useful to foreign powers – section 2(1)(b). Section 2(2) indicates that it is not necessary upon prosecution to show that the accused is guilty of any particular act tending to show a purpose prejudicial to the interests of Uganda. The person can in fact be convicted if, from the circumstances of the case, or from the accused's character or purpose, 'it appears' that he or she may have had a purpose prejudicial to the safety of Uganda.

Section 4 of the Official Secrets Act deals with the wrongful communication of information deemed to be subject to the Official Secrets Act. It states that any person who has been entrusted with information that relates to any information regulated under the Official Secrets Act, and allows any other person other than an authorised person to gain access to said information, commits an offence, and the punishment upon conviction is a term of imprisonment.

### **3.7.3 Prohibition of publications that promote sectarianism**

#### **❖ The Penal Code Act, 1950**

Section 41 of the Penal Code prohibits the publication of material viewed to promote sectarianism. This includes material that is likely to degrade, revile or expose to hatred or contempt, create alienation or despondency, raise discontent or disaffection

or promote in any other way feelings of ill will or hostility among or against any group on account of religion, tribe, ethnicity or regional origin. The penalty for this offence is a term of imprisonment.

Section 42 of the Penal Code authorises the confiscation of printing machines that have been used to print sectarian material under the following circumstances:

- When a person is convicted of printing a sectarian publication, the machine on which it was printed may be confiscated for up to one year regardless of whether the person convicted of printing the seditious material was the owner of the machine or not – section 42(1). Any person who uses a machine confiscated in relation to section 42(1) commits an offence and is liable to imprisonment – section 42(8).
- When the proprietor, publisher, printer or editor of a newspaper as defined in the Press Act is convicted of printing or publishing sectarian material, the court may confiscate the printing machine and additionally prohibit any further publication of the newspaper for up to one year – section 42(2). Any person who prints or publishes a newspaper in contravention of an order made under section 42(2) commits an offence and is liable to imprisonment – section 42(9).

In any case where a printing machine has been ordered confiscated, the inspector general of the police may, at his discretion, cause the machine or any part of it to be removed or sealed to prevent its use. However, the owner of the machine or his agents may have access to the machine to maintain it in proper working order – section 42(6).

### **3.7.4 Prohibition of publications that are obscene or pornographic**

#### **❖ The Anti-Pornography Act, 2014**

Section 13 of the Anti-Pornography Act makes it an offence to participate in the production, publication, broadcasting, procurement, import or export of, or in any way abet, any form of pornography. The penalty for this offence is a fine or imprisonment. Publishing child pornography is punished by a larger fine, longer imprisonment or both – section 14.

Section 17 of the Anti-Pornography Act regulates internet service providers. Section 17(1) of the act makes it an offence for any internet service provider which, by not using a method of content enforcement recommended by the PCC established under this act, permits the upload or download of pornographic material. The penalty for this offence is a fine, imprisonment or both – section 17(2). In the event of

subsequent offences, the court may suspend the business's operations. Continuing to operate after suspension is an offence, the penalty for which is a fine, imprisonment or both – section 17(3).

❖ **The Press and Journalist Act, 2000 (Press Act)**

Section 6 of the Press Act requires that editors of a mass media organisation ensure that what is published is not contrary to public morality, and this would apply similarly to internet content.

❖ **The Computer Misuse Act, No. 2, 2011 (Computer Act)**

Section 23 of the Computer Act regulates the production, distribution or transmission of child pornography – all these actions are determined to be an offence under the law. While this is not directly linked there is correlation between this section of the Computer Act and the Anti-Pornography Act mentioned above. The penalty for committing offences under section 23 is a fine, a term of imprisonment or both.

### **3.7.5 Prohibition of publications relating to legal proceedings**

❖ **The Inspectorate of Government Act, 2002 (Inspectorate Act)**

The Inspectorate Act states that no person who is not an official may divulge information relating to an investigation except with the approval of the Inspectorate of Government or when ordered to do so by a court or required by law. The penalty for doing so is a fine, a term of imprisonment or both – section 20(3).

❖ **The Penal Code Act, 1950**

Section 184(b) of the Penal Code allows a court to prohibit the publication of anything said or shown before it on the ground that it is seditious, immoral or blasphemous and commits a misdemeanour offence, the penalty for which is a term of imprisonment.

### **3.7.6 Prohibition of publications relating to terrorist investigations**

❖ **The Anti-Terrorism Act, 2002**

Section 17(2) of the Anti-Terrorism Act makes it an offence to disclose information that is likely to prejudice a terrorist investigation. Any person who commits an offence under section 17(2) of the act is liable to a fine, imprisonment or both – section 17(4).

### **3.7.7 Prohibition of publications that incite violence**

❖ **The Penal Code Act, 1950**

Section 51 of the Penal Code makes it an offence to print or publish any statement

indicating or implying that it would be desirable to perform any acts calculated to bring death or physical injury to any person, class or community. The penalty for this offence is imprisonment. It should be noted that no person can be prosecuted under section 51 without written consent from the director of public prosecutions.

### **3.7.8 Prohibition of publications that further wrongful boycotts**

#### **❖ The Penal Code Act, 1950**

Publication of material deemed to further a boycott that the attorney general has deemed wrongful is prohibited. Charges under section 49 of the Penal Code Act must be approved by the director of public prosecutions. The penalty for furthering a wrongful boycott is a term of imprisonment.

### **3.7.9 Prohibition of publications that incite the refusal of or delay in the payment of tax**

#### **❖ The Penal Code Act, 1950**

Section 52 of the Penal Code makes it an offence to publish any material that incites any person to refuse or threaten to refuse to pay any lawful tax. Additionally, any material inciting a person to delay, obstruct, threaten to delay or obstruct the collection or assessment of any lawful tax commits an offence and is liable to a term of imprisonment. Prosecution under this section of the Penal Code may not go ahead without written consent of the director of public prosecutions.

### **3.7.10 Prohibition of publications intended to disturb foreign relations**

#### **❖ The Penal Code Act, 2002**

Section 53 of the Penal Code states that any person who, without justification, publishes anything intended to degrade, revile or expose to contempt, a foreign prince, potentate, ambassador or other foreign dignitary with the intent to disturb the peace and friendship between Uganda and the country to which that person belongs, commits a misdemeanour offence.

## **3.8 Legislation that codifies and clarifies aspects of the crime of defamation**

### **3.8.1 Introduction**

Uganda codifies and clarifies libel and defamation in the Penal Code Act, Chapter 120, providing definitions for each in sections 179 and 180 respectively.

In terms of section 179 of the Penal Code, '[a]ny person who, by print, writing, painting, effigy or by any means otherwise than solely by gestures, spoken words or

other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, commits the misdemeanour termed ‘libel’.

Section 181 of the Penal Code Act defines the publication of libel as causing the print, writing, painting, effigy, exhibition, recitation, reading, description, delivery or otherwise of defamatory material such that it becomes known to either the person being defamed or any other person. It is not necessary for libel that a defamatory meaning be directly or completely expressed.

Section 180 of the Penal Code Acts defines defamatory matter as:

- Material likely to injure the reputation of a person by exposing that person to hatred, contempt or ridicule, or
- Material likely to damage a person in his or her profession or trade by damage to his or her reputation.

It is immaterial whether at the time of publication the person concerning whom the defamatory material is published is living or dead – section 180(2); however, no prosecution will be instituted in a case of libel concerning a deceased person without the approval of the director of public prosecutions – section 180(3).

### **3.8.2 Justifications for libel or slander**

#### **ABSOLUTE PRIVILEGE**

In certain cases, the publication of defamatory material is privileged and no person is liable to punishment or prosecution, in terms of section 183 of the Penal Code. These cases include:

- Material published by the president, the government or Parliament
- Material published in Parliament by the government or by any member of that Parliament or by the speaker
- Material published by order of the president or the government
- Material published concerning a person subject to military, naval or air force discipline for the time being, which relates to his or her conduct as a person subject to such discipline, and is published by some person having authority over

him or her in respect of such conduct, and to some person having authority over him or her in respect of such conduct

- Material published in the course of any judicial proceedings by a person taking part in them as a judge, magistrate, commissioner, advocate, assessor, juror, witness or party to the proceedings
- Material which is a fair report of anything said, done or published in Parliament
- If the person publishing the matter is legally bound to publish it.

In cases where publications are absolutely privileged it is immaterial whether the matter is true or false, or whether a publication is made in good faith – no person shall be liable to punishment – section 183(2).

### CONDITIONAL PRIVILEGE

In terms of section 184 of the Penal Code, defamatory material is conditionally privileged if the person publishing the material does so in good faith and meets certain other criteria including:

- Having a legal, moral or social duty to do so
- Having a legitimate personal interest in publishing it
- If the material published is in fact a fair report of anything said, done or shown in a civil or criminal inquiry or proceeding before any court; except if the court prohibits the publication of anything said or shown before it on the ground that it is seditious, immoral or blasphemous
- If the material published is a copy or reproduction, or a fair abstract, of any matter which has been previously published, and the previous publication was or would have been privileged under section 183
- If the material published is an expression of opinion in good faith as to the conduct of a person in a judicial, official or other public capacity or as to his or her personal character so far as it appears in such conduct
- If the material published is an expression of opinion in good faith as to the conduct of a person in relation to any public question or matter, or as to his or her personal character so far as it appears in such conduct

- If the material published is an expression of opinion in good faith as to the conduct of any person as disclosed by evidence given in a public legal proceeding, whether civil or criminal, or as to the conduct of any person as a party, witness or otherwise in any such proceeding, or as to the character of any person so far as it appears in any such conduct
- If the material published is an expression of opinion in good faith as to the merits of any book, writing, painting, speech or other work, performance or act published or publicly done or made, or submitted by a person to the judgment of the public or as to the character of the person so far as it appears therein
- If the material published is a censure passed by a person in good faith on the conduct of another person in any matter in respect of which he or she has authority, by contract or otherwise, over the other person or on the character of the other person, so far as it appears in such conduct
- If the material published is a complaint or accusation made by a person in good faith against another person in respect of his or her conduct in any matter, or in respect of his or her character so far as it appears in such conduct, to any person having authority, by contract or otherwise, over that other person in respect of such conduct or matter, or having authority by law to inquire into or receive complaints respecting such conduct or matter
- If the material is published in good faith for the protection of the rights or interests of the person who publishes it, or of the person to whom it is published, or of some person in whom the person to whom it is published is interested.

In terms of section 185 of the Penal Code, publication of a defamatory matter shall not be deemed to have been made in good faith in cases where:

- The matter was untrue and the person publishing it did not believe it to be true
- The matter was untrue and the person publishing it did not take reasonable care to discover whether it was true or not
- The intention in publishing the matter was to injure the defamed person to a greater degree than required for the interest of the public.

If it is proved on behalf of the accused person that the defamatory matter was published under such circumstances that the publication would have been justified if made in good faith, the publication shall be presumed to have been made in good

faith until the contrary is made to appear, either from the libel itself or from the evidence given on behalf of the accused person or from evidence given on the part of the prosecution – section 186.

### **3.9 Legislation that specifically assists the media in performing its functions**

#### **3.9.1 Introduction**

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.

#### **3.9.2 Access to information**

Access to information was guaranteed in the 1995 Constitution under article 41(1):

[E]very citizen has a right to information in the possession of the State or any other organ or agency of the state except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to privacy of any other person.

The Access to Information Act, 2005 was created in accordance with article 41(2) of the Constitution: ‘Parliament shall make laws prescribing the classes of information, referred to in clause (1) of this article and the procedure for obtaining access to that information.’

##### **❖ Access to Information Act, 2005**

Section 2(1) of the Access to Information Act sets out the entities to which the act applies. These include:

- Government ministries
- Government departments
- Local government
- Statutory corporations and bodies
- Commissions
- Government organs and agencies.

It should be noted that sections 2(2) excludes the following records:

- Cabinet records and those of its committees
- Records of court proceedings before the conclusion of a case.

Section 5(1) of the Access to Information Act states that every citizen has the right of access to information and records held by the state or any public body, except where the release of information is likely to prejudice the security or sovereignty of Uganda. This information must be up to date so far as is practical – section 5(2).

A request for the right of access to information is not subject to any reason given by the person requesting the information, nor is it subject to the belief of the information officer as to the reason the request has been made – section 6.

A request for access to information must be made in writing on a prescribed form and should include sufficient information to identify:

- The records being requested
- The person requesting the information
- The address of the person requesting the information.

In terms of section 16, read with section 18, in cases where an information officer fails to make a decision on a request for access to information within 21 days of the request being made, it will be determined that the information officer has refused the request.

Part III of the Access to Information Act provides for the exemption of access to information. Where it is mandatory to refuse access to information, the word ‘shall’ (meaning ‘must’) is used. Legislation where refusal to provide information is discretionary is indicated by the word ‘may’ in the legislation. This is set out in section 23 of the Access to Information Act.

#### *Mandatory grounds for refusing access to information*

Section 25(1) of the Access to Information Act relates to Cabinet minutes and those of its committees, and provides that Cabinet minutes must not be accessible to any person other than an authorised public officer.

Section 27 provides that an information officer must refuse a request for commercial information of a third party should the requested information contain:

- Proprietary information
- Scientific or technical information if the disclosure is likely to harm the interests or proper functions of a public body

- Information provided by a third party in confidence that would put the third party at a disadvantage in contractual or commercial negotiations or else prejudice the third party in a commercial competition.

Section 27(2) provides that access to information about a third party may not be refused under section 27(1) when it relates to:

- Information that is already publicly available
- Information about a third party who has consented in writing to its disclosure to the person requesting the information
- The results of product, environmental or other investigation supplied to or carried out by a public body and where the disclosure would reveal serious public safety, health or environmental risks.

Section 28(1)(a) of the Access to Information Act provides that a request for access to information must be refused if the disclosure would constitute a breach of a duty of confidence owed to the person supplying the information in terms of an agreement.

Section 28(2) provides that information may not be refused under section 28(1) when it relates to:

- Information that is already publicly available
- Information about a third party who has consented in writing to its disclosure to the person requesting the information.

Section 29(1)(a) of the Access to Information Act provides that an information officer must refuse a request for information if the disclosure could reasonably be expected to endanger the life or physical safety of a person.

Section 30(1)(a) provides that an information officer must refuse access to information relating to court and legal proceedings if it would prejudice a person's right to a fair trial.

Section 31 provides that an information officer must refuse a request for privileged information from production in legal proceedings unless the person entitled to that privilege has waived the privilege.

Section 34(a) makes it mandatory for an information officer to disclose information in the public interest if the disclosure would reveal:

- A failure to comply with the law
- An imminent or serious public safety, health or environmental risk.

It should be noted that section 34(b) of the Access to Information Act creates an internal limitation to the public interest disclosure provided for in section 34(a) in that the disclosure in relation to public interest must be deemed greater than the potential harm such a disclosure could cause.

#### *Discretionary grounds for refusing access to information*

Section 26(1) of the Access to Information Act relates to information concerning the privacy of a person. It provides that an information officer may refuse a request for access to information if the disclosure would involve the unreasonable disclosure of personal information. Section 26(2) provides that access to the refused information must be made available in the following circumstances:

- Written consent by the person whom the information concerns
- The information was given to a public body and the supplier of that information was informed that the information may be made available to the public
- The information is already publicly available
- The person to whom the information relates is deceased and the information is being requested by or on behalf of, by written consent, the deceased's next of kin
- The person to whom the information relates is or was an official of a public body and the information relates to the position or function of that person.

Section 28(1)(b) of the Access to Information Act provides that an information officer may refuse a request for access to information if the information consists of information supplied in confidence by a third party if:

- The disclosure could reasonably be expected to prejudice the future supply of similar information, or information from the same source
- It is in the public interest that similar information, or information from the same source, should continue to be supplied.

Section 28(2) of the Access to Information Act provides that information may not be refused under section 28(1) when it relates to:

- Information that is already publicly available
- Information about a third party who has consented in writing to its disclosure to the person requesting the information.

Section 29(1)(b) of the Access to Information Act provides that an information officer may refuse a request for information if the disclosure is likely to prejudice the security of:

- Buildings, structures or systems including but not limited to computer and communication systems
- Means of transport
- Any other property
- A person in witness protection
- The safety of the public.

Section 30(1)(b)(i) of the Access to Information Act provides that an information officer may refuse access to information if the record contains techniques, procedures or guidelines:

- For the prosecution of alleged offenders and the disclosure of those methods
- Expected to prejudice the effectiveness of those methods
- Lead to the circumvention of the law or facilitate the commission of an offence.

Section 30(b)(ii) of the Access to Information Act provides that an information officer may refuse access to information if the prosecution of an alleged offender is being prepared or about to commence or pending, and the disclosure of the record could reasonably be expected to:

- Impede the prosecution
- Result in a miscarriage of justice.

Section 30(b)(iii) of the Access to Information Act provides that an information officer may refuse access to information if the disclosure is likely to:

- Prejudice an investigation of a contravention or possible contravention of the law which is about to, or is in the process of occurring, or has been terminated and is likely to be resumed

- Reveal or enable a person to ascertain the identity of a confidential source of information in relation to the enforcement or administration of law
- Result in the intimidation or coercion or a witness in legal proceedings
- Facilitate the contravention of the law
- Prejudice or impair the fairness of a trial.

Section 32(1) of the Access to Information Act provides that an information officer may refuse a request for information if the disclosure is likely to:

- Prejudice the defence, security and sovereignty of Uganda
- Prejudice international relations
- Reveal information provided by another state.

Section 32(2) of the Access to Information Act provides that an information officer may not refuse access to information requested under section 32(1) and relating to international relations, if the information is 20 years old or older.

Section 33(1) provides that an information officer may refuse a request for information if:

- The disclosure contains an opinion, advice, report or a recommendation
- The disclosure contains an account of a discussion or deliberation that includes, but is not limited to, meeting minutes.

Section 33(2) of the Access to Information Act provides that any information 10 years old or older may not be refused in terms of section 33(1).

#### *Legal recourse for applicants refused access to information*

Section 37 of the Access to Information Act makes provision for a person to lodge a complaint with the chief magistrate against a decision to refuse a request for information.

Section 38 provides for a person aggrieved by a decision made by the chief magistrate to appeal to the High Court against the decision. The appeal must be made within 21 days of the chief magistrate's decision.

### ***Offences committed under the Access to Information Act***

Section 46 makes it an offence for a person, with the intent to deny right of access to information under the act, to:

- Destroy, damage or alter any records
- Conceal any records
- Falsify or make false records.

The penalty for this offence is a fine, a term of imprisonment or both.

### **3.9.3 Protection of sources**

#### **❖ Press and Journalist Act, 1995 (Press Act)**

The Fourth Schedule of the Press Act outlines the Professional Code of Ethics (Code of Ethics) for journalists in Uganda. Clause 2 of the Code of Ethics states that no journalist shall disclose the source of his or her information. However, it goes on to state that sources may be revealed in overriding circumstances considering the public interest and within the framework of the law of Uganda, so caution should be exercised in this respect.

#### **❖ Access to Information Act, 2005**

Section 44 of the Access to Information Act provides protection from any legal, administrative or employment-related sanctions, regardless of any breach of legal or employment obligation for releasing information about wrongdoing, or information that would disclose a serious threat to health, safety and the environment, as long as the person disclosing the information acted in good faith.

#### **❖ Whistleblowers Protection Act, 2010 (Whistleblowers Act)**

The Whistleblowers Act provides procedures by which individuals in both the private and public sectors may, in the public interest, disclose information that relates to irregular, illegal or corrupt practices.

### ***Protected disclosures***

Section 2 of the Whistleblowers Act provides for the disclosure of information that tends to show impropriety in that:

- Corrupt, criminal or unlawful acts have been committed, are being committed or are likely to be committed
- A public officer or employee has failed, refused or neglected to comply with any legal obligation to which that officer or employee is subject

- A miscarriage of justice has occurred, is occurring or is likely to occur
- Any matter referred to above is being deliberately concealed.

Section 2(2) provides that a whistleblower is protected provided the disclosure is made:

- In good faith
- With reasonable belief that the disclosure and allegations are substantially true
- To an authorised officer.

The whistleblower is required to maintain the confidentiality of the disclosure, and must take reasonable steps to maintain the confidentiality of his or her identity as well. The protection afforded to whistleblowers under the act will not cease should his or her identity be revealed where the whistleblower was not responsible for the revelation – section 2(3).

#### ***Who is protected under the Whistleblowers Act?***

In terms of section 3(1), disclosures of impropriety may be made under the Whistleblowers Act by:

- An employee in the public or private sector in respect of their employer
- An employee in respect of another employee
- A person in respect of another person
- A person in respect of a private or public institution.

Nothing in this act prohibits the making of anonymous disclosures – section 3(2), however anonymous disclosures are not entitled to protection under this act – section 3(3). Section 9 provides that a person shall not be subjected to any form of victimisation by his or her employer or by any other person on account of having made a protected disclosure.

#### ***Who are public interest disclosures made to?***

Section 4 of the Whistleblowers Act states that disclosures of impropriety may be made internally to an employer in cases where the whistleblower's complaint pertains to his or her place of employment.

External disclosures may be made in instances:

- Where the complaint does not pertain to the whistleblower's employment

- Where the whistleblower reasonably believes that he or she will be subjected to occupational detriment if he or she makes a disclosure to his or her employer
- Where the whistleblower reasonably believes or fears that evidence relating to the impropriety will be concealed or destroyed if he or she makes the disclosure to his or her employer
- Where the complaint has already been made and no action has been taken or the whistleblower reasonably believes or fears that the employer will take no action.

External disclosures of impropriety may be made to any of the following institutions:

- The Inspectorate of Government
- The Directorate of Public Prosecutions
- The Uganda Human Rights Commission
- The Directorate for Ethics and Integrity
- The Office of the Resident District Commissioner
- The Parliament of Uganda
- The National Environment Management Authority
- The Uganda Police Force.

#### *Investigations relating to whistleblowers' disclosures*

There are no grounds in Ugandan law whereby an officer to whom a public interest disclosure has been made may refuse to investigate or cause an investigation not to be undertaken. Section 8 of the Whistleblowers Act states that in the case of a disclosure of impropriety under section 4, the authorised person must investigate or cause an investigation into the matter. Where the authorised person to whom the disclosure is made is incapable of undertaking an investigation, he or she must refer the disclosure to the relevant authority.

Section 18 states that an authorised officer who does not take action upon receipt of a disclosure made to him or her commits an offence and is liable on conviction to imprisonment, a fine or both.

#### *Provisions relating to the protection of whistleblowers*

Section 9 of the Whistleblowers Act provides for the protection of whistleblowers from victimisation. These protections ensure that a whistleblower, in the case where the disclosure has been made against an employer, shall not be:

- Dismissed
- Suspended

- Denied promotion
- Demoted
- Made redundant
- Harassed
- Intimidated
- Threatened
- Subjected to a discriminatory or other adverse measure by the employer or a fellow employee.

In the case where the whistleblower is not an employee, the person or organisation who made the disclosure shall not be subjected to intimidation or discrimination by any person or establishment affected by the disclosure – section 9(2)(b). A whistleblower who honestly and reasonably believes that he or she has been victimised as a result of his or her disclosure may make a complaint to either the IG or the UHRC – section 9(3).

A whistleblower is protected against court action under section 10 of the Whistleblowers Act, which states a whistleblower shall not be held liable in either civil or criminal proceedings in respect of disclosures that contravene the duty of confidentiality or official secrecy laws made in good faith.

Section 11 of the Whistleblower Act provides for state protection of a whistleblower in cases where he or she may feel that their life or property, or the life and property of a family member, is endangered or is likely to be endangered.

Section 14 provides that a person who unlawfully discloses, directly or indirectly, the identity of a whistleblower, commits an offence and is liable on conviction to imprisonment, a fine or both.

Section 15 provides that where a person to whom the disclosure is made fails to keep the disclosure confidential, that person commits an offence and is liable on conviction to imprisonment, a fine or both.

Section 16 provides that a person who, either by him or herself or through another person, victimises a whistleblower for making a disclosure commits an offence and is liable on conviction to imprisonment, a fine or both.

#### ***Provisions relating to false disclosures***

In terms of section 17 of the Whistleblowers Act, a person who knowingly makes a disclosure containing information he or she knows to be false and intending that information to be acted upon as a disclosed matter, commits an offence and is liable on conviction to imprisonment, a fine or both.

## 4 REGULATIONS AFFECTING THE MEDIA

In this section you will learn:

- What regulations are
- Key regulations that affect 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 that affect the media

#### ❖ The Copyright and Neighbouring Rights Regulations, 2010 (Copyright Regulations)

The Copyright Regulations are made by the minister responsible for justice after consultation with the collecting societies. The regulations affect broadcasters in particular as the nature of their business is the distribution of audio and audio-visual material produced by other people and organisations.

Regulation 18 prohibits the unauthorised production, distribution or broadcasting of any sound or audio-visual recordings except under licence issued by the owner of the neighbouring rights or a collecting society.

The importation of pre-recorded sound recordings or audio visual recordings may only be done following the application and clearance from the owner of the material or else a collecting society representing the interests of the owner – regulation 23.

Regulation 24 specifies that no person may, without the consent of the performer or a collecting society representing the performer:

- Fix a performer's live performance not previously fixed on a physical medium
- Broadcast to the public a performer's unfixed performance
- Directly or indirectly reproduce a fixation of a performance
- Distribute to the public the original or copies of a performer's performance
- Conduct a public performance.

Consent to do any of these things must be by contractual agreement with either the

performer or representing collecting society setting out the terms and conditions in line with the performer's wishes.

Broadcasters themselves are also protected under regulation 25 of the Copyright Regulations, which provide that without contractual consent, no person may:

- Broadcast a broadcaster's broadcast
- Fix a broadcast
- Reproduce a fixation of a broadcast.

Any person who contravenes these regulations commits an offence and is liable to a fine, a term of imprisonment or both in terms of regulation 33 of the Copyright Regulations.

❖ **The Press and Journalist (Fees) Regulations, 2014 (Fees Regulations)**

The Fees Regulations are made by the minister responsible for information under section 42 of the Press Act after consultation with the UCC. The regulations relate directly to the press and outline the fees payable under the Press Act. These include:

- Registration of editors
- Enrolment of journalists
- Registration of journalists
- Accreditation of foreign journalists
- Fees in relation to disciplinary proceedings
- Classification of films, video material, plays and related apparatus.

## **5 MEDIA SELF-REGULATION**

In this section you will learn:

- What self-regulation is**
- Key self-regulatory provisions intended to govern the media in Uganda**

### **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 Key self-regulatory provisions intended to govern the media in Uganda

The Independent Media Council of Uganda (IMCU) was formed in February 2006 by 42 media houses. One of the objectives of the IMCU is to promote the growth of a responsible, free media adhering to the highest standards of journalism. The IMCU also deals with complaints concerning the conduct of the media. The IMCU was registered as an NGO in July 2006 and as a body corporate in January of 2007. It is also a member of the World Association of Press Councils.<sup>21</sup>

In order to ensure that journalists meet the standards the IMCU expects from its members, it introduced a Journalism Code of Ethics, the main aspects of which are summarised as follows:

- A journalist must maintain the highest levels of journalistic standards, integrity and independence.
- A journalist must always identify himself or herself as a journalist and the organisation for which he or she works.
- A journalist must not accept bribes or any other form of inducement meant to influence his or her professional performance.
- A journalist must always declare any conflicts of interest.
- A journalist has a responsibility to remain accurate, balanced and fair in the execution of his or her duties.
- Media houses and journalists must give aggrieved parties the right of reply to materials broadcast or published about them.
- Journalists have a moral responsibility to monitor government and other centres of influence and power on behalf of the public.
- Journalists have a social responsibility to educate the public regarding matters affecting them.
- Journalists must respect privacy and human dignity and weigh such matters against the public's right to know.
- No media practitioner shall engage in plagiarism.

- Journalists must protect the confidentiality of their sources and divulge them only as required by a court of law.
- Journalists may not intrude into grief and shall take utmost care and behave with discretion and sympathy when reporting matters relating to the dead and gravely ill.
- Media houses may not profiteer from deliberate exploitation of the misfortune of those afflicted by grief.
- The media must generally avoid identifying the innocent relatives or friends of persons accused or convicted of a crime.
- Media houses and journalists have a responsibility to protect both the victims of sex crimes and children.
- The media must take extra care when dealing with the publication of adults-only material.
- The media must use due caution when publishing pictures in order not to do unnecessary harm.
- The media may not publish or broadcast material intended or likely to cause hostility or hatred towards a person or group of people in relation to their race, ethnic origin, nationality, religion or political affiliation.
- The media must exercise a high level of individual and corporate citizen responsibility and in a manner that is conducive to an atmosphere that is congenial to national harmony.
- All news, views and comments must be backed by facts and measured in language and tone.
- It is the responsibility of the media to highlight potential conflicts before they explode, and help society heal wounds after conflicts have concluded.

While the IMCU ostensibly deals with complaints concerning the conduct of the media, there is no publicly available information that we have been able to find that deals with actual examples of enforcement by the IMCU. This is problematic because the effectiveness of self-regulation and the public's faith in self-regulation is only as good as the self-regulatory body's ability to enforce compliance with its codes of ethics. It is not clear if the IMCU is in fact an effective self-regulatory body.

## 6 COMMON LAW AND THE MEDIA

In this section you will learn:

- The definition of common law
- How Uganda's courts have dealt with a number of media-related common law issues, including:
  - Criminal libel and freedom of expression
  - The unconstitutionality of the prohibition on the publication of false news
  - The validity of an *in camera* ruling
  - The unconstitutionality of the prohibition on sedition
  - The illegality of a refusal of access to information

### 6.1 Definition of common law

The common law is judge-made law. It is made up of judgments handed down in cases adjudicating upon disputes brought by people, whether natural (individuals) or juristic (for example, companies). In common law legal systems such as Uganda's, judges are bound by the decisions of higher courts and also by the rules of precedent. This requires that rules laid down by the court in previous cases be followed, unless they were clearly wrongly decided. Legal rules and principles are therefore decided on an incremental, case-by-case basis.

This section focuses on a number of judgments that have a bearing on the media.

### 6.2 Criminal libel and freedom of expression

The Constitutional Court heard the case between *Joachim Buwembo and Others v Attorney General (Constitutional reference No. 1 of 2008)*, which arose out of a criminal case in the chief magistrate's court. A statutory interpretation was required as to:

- Whether or not the criminal libel provisions of section 179 of the Penal Code Act (Cap 120) were inconsistent with article 29(1)(a) of the Constitution (the right to freedom of expression)
- Whether or not section 179 of the Penal Code Act was a restriction permitted under article 43 of the Constitution (the general limitations clause) as being demonstrably justifiable in a free and democratic society.

In the criminal case in the magistrate's court, the applicants had been jointly charged

with libel under sections 179 and 22 of the Penal Code Act. The applicants were journalists with the *Monitor* newspaper and published articles in two consecutive Sunday editions titled, ‘IG in salary scandal’ and ‘God’s warrior Faith Mwondha stumbles’. A complaint was laid by the Hon. Lady Justice Faith Mwondha, at the time the IG, and the applicants were investigated and later charged with unlawful publication of defamatory matter. At trial, defence counsel contended that there was a point of law for interpretation by the Constitutional Court, and thus this application was brought to the Constitutional Court.

The court held that freedom of expression does not fall within the non-derogable rights enshrined in article 44 of the Constitution, and, in the light of article 43, it can be restricted in public interest. Although the Constitution does not expressly protect the reputation of individuals, reputations are, by necessary implication, protected by article 45 (additional human rights and freedoms) as well as article 43, which places public interest as a limitation on the rights to freedom of speech and expression, which include freedom of the press and other media.

According to the court, reputation has two rights embedded in it, namely the right of an individual to have his or her reputation protected by law, and the public interest embedded in the individual’s reputation by virtue of the fact that the individual is a member of the public and renders a service to the public. Protection of reputation is thus a matter of public interest as well as protecting the right of the individual concerned. The continued existence of the parallel but distinct criminal and civil sanctions mean that while the victims of such wrongs may well deserve to be compensated, perpetrators who wilfully and knowingly publish lies calculated to damage the public reputation of a member of a democratic society ought to be punished, and this serves the objectives of criminal law. Section 179 of the Penal Code was thus regarded by the court as a safeguard against the infringement of a person’s reputation. Criminal libel, unlike theft, affects the general public, and criminal law treats all crimes as offences against the state.

The court was of the view that it was in the interest of the public that the reputation of individual members of the public be protected. Freedom of expression was protected to enhance public knowledge and development, according to the court, and statements which defamed members of the public did not enhance public knowledge and development. The court held that defamatory libel was thus far from the core values of freedom of expression, press and other media, and the press would be doing a disservice to the public by publishing such.

According to the court, freedom of expression in Uganda should be enjoyed within the restriction imposed by section 179 of the Penal Code. It held that should section

179 be unconstitutional, the right of freedom of expression was unlimited and thus would contravene article 43 of the Constitution. The application was dismissed with each party bearing its own costs.

### **6.3 The unconstitutionality of the prohibition of the publication on false news**

The Constitutional Court of Uganda heard the case of *Charles Onyango & Anor v Attorney General (Constitutional Appeal No. 2 of 2002)*, which was brought under article 137 (questions as to the interpretation of the Constitution) of the Constitution. The petition arose out of a case brought in a magistrate's court against the petitioners. The charges arose out of a story that the petitioners, an editor and a senior reporter of the *Monitor* newspaper, extracted from a foreign paper called *The Indian Ocean Newsletter*, and published under the headline 'Kabila paid Uganda in gold, say report'.

The petitioners sought a declaration that the action of the director of public prosecutions in prosecuting them was inconsistent with provisions of articles 29(1)(a), (b) and (e) (protection of freedom of conscience, expression, movement, religion, assembly and association), 40(2) (economic rights) and 43(2)(e) (general limitations on fundamental and other human rights and freedoms) of the Constitution. They further sought an order releasing them from the criminal prosecution, and a declaration that they were entitled to damages for unconstitutional prosecution in the case brought against them under section 50(1) of the Penal Code Act for the publication of false news. They also requested that the Constitutional Court refer the matter to the High Court to investigate and determine the quantum of damages.

The court held that the justice of appeal had omitted to consider if section 50 of the Penal Code was a justified limitation within the parameters of article 43(2)(c) and had been content to hold that section 50 was a necessary legal limitation. This was not the issue in the appellants' original petition, said the court. Their contention was that section 50 was inconsistent with the Constitution because it went beyond what is permitted under article 43.

The court held that section 50 of the Penal Code criminalised conduct that was otherwise a legitimate exercise of the constitutionally protected right to freedom of expression. It stated that applying the constitutional protections to false expressions was not to 'uphold falsity' as implied in the majority judgment – the purpose was to avoid the greater danger of smothering alternative views of fact or opinion. Further, the limitation on the right of freedom of expression in defence of public interest was itself limited, said the court, in that it is not valid unless its restriction is demonstrably justifiable in a free and democratic society.

The court held that article 43(1) (general limitation on fundamental and other human rights and freedoms) of the Constitution allows for the limitation of rights, where the enjoyment of ones right ‘prejudices’ either the personal rights of others or the public interest. The court held that the clause did not extend to a scenario where the enjoyment of one’s right is ‘likely to cause prejudice’. However, in the court’s view, section 50 of the Penal Code relates precisely to that scenario, and was directed at preempting danger in the public interest even though that danger may be remote or uncertain. Because of its broad applicability, the court held that section 50 of the Penal Code lacked sufficient guidance on what is and what is not safe to publish, and thus left the determination thereof to the unfettered discretion of the state prosecutor.

Consequently, the Supreme Court unanimously declared section 50 of the Penal Code Act (prohibition on the publication of false news) to be inconsistent with article 29(1)(a) (right to freedom of expression) of the Constitution, and was declared void. It was struck out of the Penal Code.

#### **6.4 Validity of an *in camera* ruling**

The Civil Division of the High Court of Uganda heard the case of *Uganda Court Reporters Association Ltd (UCRA) v Attorney General (Miscellaneous Cause No. 87 of 2014)*, an application for judicial review. The case for which the review was requested was Criminal Case No. 303 of 2014, in which Poteri Ronald was charged with wrongful communication and leaking of information contrary to section 4(1)(a) of the Official Secrets Act. At the beginning of the hearing the state attorney leading the prosecution, without prior warning to the defence, applied orally to have the matter heard *in camera*. In support of his application the state attorney submitted that the magistrate could grant the application for reasons of morality, public order and national security. Further, the state attorney submitted that the accused was charged with disclosure of official secrets and that the evidence would include classified information, secrets of police investigative tactics and the calling of informants whose identities should not be revealed.

Counsel for the accused expressed reservations relating to trampling of the rights of the accused and argued that the application was not brought in good faith. He requested an adjournment to prepare argument of the issue if the court was inclined to accept the application.

The chief magistrate ruled that the application to hear the case *in camera* was allowed in the public interest and for protection of witnesses. She disagreed with defence counsel’s submission that the information was already before a public wider than the

court. Accordingly, journalists and any other persons with recording equipment were ordered to vacate the court for the duration of the case. The applications for an adjournment by the counsel were rejected by the magistrate.

The application to the High Court for judicial review of the decision of the trial magistrate was brought by the chairman and executive director of the UCRA along with a senior court reporter.

The High Court held that in reaching her decision, the trial magistrate was duty bound to:

- Enquire into the evidence concerning the alleged secrecy of the audio recordings and communications that were the subject of the application, in order to satisfy herself that the limitation requested was objectively verified, justified and necessary
- Ask for this evidence in order to make an informed and evidence-based analysis in determining whether or not to proceed in camera
- Evaluate the nature, extent and importance of the limitations sought by the state and the relationship between the limitation and its intended purpose, especially where the purpose could be achieved through less restrictive means
- Caution herself of the importance of open hearings and the dangers of in camera proceedings before allowing the limitation
- Evaluate whether the limitation sought by the state was necessary in a free and democratic society.

The court stated that the cumulative effect of the trial magistrate's failures in these duties was that she reached her decision without taking into account several relevant considerations, and therefore acted unreasonably and unfairly. For this she committed an illegality, was irrational and her decision was clothed in procedural impropriety. In the view of the court, the trial magistrate indulged in procedural unfairness to the applicant when she reached her decision concerning the rights of members of the UCRA without hearing from any member of the organisation. The court further stated that it was not demonstrably clear that the trial magistrate properly took the public interest into account when making her decision.

The court quashed the order of the trial magistrate ordering in camera proceedings, as well as any proceedings carried out under that order.

## **6.5 Unconstitutionality of the prohibition on sedition**

The Constitutional Court of Uganda heard the petition of *Andrew Mujuni Mwenda and The Eastern African Media Institute (U) LTD (EAMI) v Attorney General (Consolidated Constitutional Petitions No. 12 of 2005 and No. 3 of 2006)*.

The petition was brought by Andrew Mwenda under section 39(1)(a) (seditious intention) of the Penal Code, which provides that seditious intention is the intention to bring hatred, contempt or disaffection against the president, the government and the Constitution, and section 40(1)(a) (seditious offences) of the Penal Code, which states a seditious offence is committed by any person who does, attempts, prepares or conspires to perform an action with seditious intent. Andrew Mwenda was charged before the chief magistrate at Nakawa for words spoken on his radio programmes, which were alleged to have been said with the intention of bringing hatred or contempt or to excite disaffection against the person of the president, the government as by law established or the Constitution. Mr Mwenda petitioned the court that his prosecution was inconsistent with the Constitution.

As part of his petition Mr Mwenda cited articles 29(1)(a) (right to freedom of expression) and article 43(1) (general limitations on fundamental and other human rights and freedoms) of the Constitution. Article 29(1)(a) reads: ‘Every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media.’

Article 43(2)(c), which relates to general limitations on fundamental human rights and other freedoms, reads: ‘Public interest under this article shall not permit any limitation of the enjoyment of the rights and freedoms prescribed by this chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this constitution.’

The judgment of the court took account of article 29(1)(a) and article 43(2)(c) of the Constitution and found sections 39 and 40 of the Penal Code to be inconsistent with provisions of the articles 29(1)(a) and 43(2)(c) of the Constitution, and declared these null and void. They were struck out of the Penal Code.

## **6.6 Illegality of a refusal of access to information**

In 2014, the Chief Magistrates Court of Mengo at Mengo heard the petition of *Edward Ronald Sekyewa t/a Hub for Investigative Media v National Forestry Authority in the Matter of Access to Information Act 2005, An Application for Access to Information*.

An application was made for access to information held by the National Forestry Authority (NFA) in terms of article 41 of the Constitution, which guarantees every citizen the ‘right to information in the possession of the State or any other organ or agency of the state except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to privacy of any other person’. The request for access to information was refused by the NFA. The applicant approached the magistrate’s court for an order granting access to the information and preventing the NFA from destroying any relevant information held by it.

The court found that the applicant (Mr Sekyewa) was unjustifiably denied the information requested and that the respondent (the NFA) had acted with blatant disregard for the law. The court directed the executive director of the NFA to grant the applicant access to any and all records or information that the applicant requested in accordance with the act. The court also restrained the executive director of the NFA from concealing information pertaining to the subject matter of the applicant’s request.

## NOTES

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In this chapter you will learn:

- What a bird's-eye view of the countries surveyed reveals about compliance with the:
  - Ten key principles of democratic media regulation
  - Eight key principles of democratic broadcasting regulation
- What international organisations on the continent are doing to promote media freedom
- What key challenges to media freedom remain
- About key instances of internet censorship in the region

## 1 INTRODUCTION

Chapter 2 (found in Volume 1 of this handbook) examined the internationally accepted hallmarks of democratic media regulation – in other words, the legal regime that establishes a democratic media environment. It identified 13 instruments, charters, protocols or declarations adopted by international bodies (such as the United Nations, the African Union and the Common Market for Eastern and Southern Africa), civil society organisations focusing on the media (such as Article 19), and at significant conferences held under the auspices of international bodies (such as the United Nations Education, Scientific and Cultural Organisation).

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, as is set out more fully in Chapter 2. 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.

The information contained in this concluding chapter is derived from the country-specific chapters featured in volumes 1 and 2 of the handbook.

## **2 A BIRD'S-EYE VIEW OF COUNTRY COMPLIANCE WITH THE TEN KEY PRINCIPLES OF DEMOCRATIC MEDIA REGULATION**

### **2.1 Principle 1: Freedom of the press and other media**

In all the countries surveyed, the right to freedom of expression – the foundational right to a free press – is provided for in the constitution of that country. However, it is important to be aware that the Constitution of Eritrea has never been implemented, so the right to freedom of expression in that country is not of any practical effect. In all but one (Burundi being the exception) of the countries surveyed, namely, Eritrea (although note that the Constitution of Eritrea has never been implemented so the right to freedom of the press in that country is not of any practical effect), Ethiopia, Kenya, Rwanda and Uganda, the constitutions also expressly mention and protect the right to freedom of the press or the media; in some cases generally and, in the case of Kenya, with a particular mention of the electronic media. However, as no right is absolute, it is important to have regard to limitations or restrictions that are imposed on the right to freedom of expression and of the press and other media.

First, where the constitution has never in fact been implemented, as is the case in Eritrea, it is clear that rights to freedom of the press and the media are meaningless.

Second, it is important to have regard to the restrictions or limitations to the right to press freedom. All of these constitutions contain broad limitations clauses (whether these are general limitations clauses or so-called internal limitations clauses that apply only in respect of a particular right) which give their respective governments extensive powers to pass legislation to limit rights to expression and to a free press and other media.

Almost all of the countries surveyed, with the exception of Ethiopia, had constitutions with general limitations clauses therein (again note the non-implementation of the constitution in the case of Eritrea). While broad powers are given in the wide grounds for restricting rights in the general limitations clauses, most of the countries surveyed, namely, Burundi, Eritrea, Kenya and Uganda also had requirements on such general limitations such as necessity, justifiability or proportionality, with the exception being Rwanda. In our view, Burundi, Kenya and Uganda have in force fairly carefully crafted limitations clauses which, in theory, allow for the appropriate limiting of rights.

Besides these generally applicable limitations clauses, half of the countries surveyed also have expression or media rights-specific internal limitations in their constitutions, namely, Ethiopia, Kenya and Rwanda. Of these, Rwanda's is particularly broadly framed, allowing for a wide range of expression to be limited without falling

foul of the constitutional right to freedom of expression ostensibly provided for. Countries which do not have such internal limitations clauses applicable to the rights to freedom of expression and of the press and other media include Burundi, Eritrea (again note that the constitution has not been implemented) and Uganda.

## **2.2 Principle 2: Independent media**

In terms of an independent media environment, it is clear from the country chapters that practice varies considerably among the different countries surveyed. Both Kenya and Uganda have a number of independent media sources, while Eritrea has no independent media.

With the exception of Eritrea, the countries surveyed do ostensibly recognise the need for independent media sources and for the establishment of independent (commercial or community) print and broadcast media houses, although in a country such as Ethiopia, the independent media, particularly broadcast media, is still in its infancy.

## **2.3 Principle 3: Diversity and pluralism in the media**

Again, it is clear from the country chapters that diversity and pluralism in the media vary significantly among the countries reviewed. Kenya and Uganda have a great deal of diversity and pluralism while Eritrea has no independent broadcasting or print media of any kind, despite the legislation of that country appearing to envisage that independent media can exist.

One of the biggest obstacles to the creation and growth of a diverse media is the registration requirement imposed on the print media. All of the countries surveyed still require newspaper registration. Worse is that all countries (with the exception, it appears, of Ethiopia) also require the registration or accreditation of working journalists. While not legally preventing the functioning of an independent media, these registration mechanisms discourage the development of a thriving pluralistic media environment.

One of the most worrying developments in Eastern Africa is the rise of real constraints upon those who would publish information online. Eritrea, for example, requires that anyone wishing to publish a press product (which is defined broadly enough to include blogs, etc. published online) requires a permit to do so.

## **2.4 Principle 4: Professional media**

There is little doubt that the development of a professional corps of reporters,

investigative journalists and editors has been slow in most of the countries surveyed. Until recently, many of the countries lacked tertiary educational courses or training facilities dedicated to journalism and the media, able to develop journalism as a genuine profession. While this is slowly changing, development is far from uniform.

While Kenya and Uganda have a number of excellent training courses and facilities run by various institutions, including universities and colleges, some countries battle to provide even basic training in journalism skills and ethics, and Burundi has no journalism programmes offered at college and university level.<sup>1</sup> All other countries canvassed offer at least one tertiary level journalism course.<sup>2</sup>

On a positive note, the establishment of self-regulatory bodies, such as media councils, in most of the countries reviewed (with the notable exceptions being Eritrea and Ethiopia) appears to have had an impact on the professionalisation of the media in those countries.

## **2.5 Principle 5: Protecting confidentiality of sources**

It is interesting to note that Burundi has legislative provisions that actually protect the right of journalists to keep their sources confidential. However, all six countries included in the handbook also have laws that could be used to compel a journalist or media house to reveal confidential sources of information. It is not possible to state that each of these laws is inherently problematic because each case has to be determined on its own merits when considering whether or not forcing a journalist to reveal a source will, in the particular circumstance concerned, violate international standards for such compulsion.

## **2.6 Principle 6: Access to information**

Two of the countries under review – Kenya and Uganda – explicitly protect the right of access to information (as a right separate from the right to freedom of expression) in the constitution.

Constitutional rights of access to information are formulated in different ways:

- The Kenyan Constitution provides that every citizen has the right to access government-held information and to access privately held information where this is required for the exercise or protection of any right or fundamental freedom.
- The Ugandan Constitution provides that every citizen has the right to information

in the possession of the state. It does not grant access to privately held information.

- Eritrea (but note that the constitution is not implemented so the right is effectively meaningless), Ethiopia and Rwanda include the right to access or receive information as part of the constitutional right to freedom of expression.
- Burundi does not have a right of access to information in its constitution.

Besides the constitutional provisions, Ethiopia, Kenya, Rwanda and Uganda have passed some form of access to information legislation.

## **2.7 Principle 7: Commitment to transparency and accountability**

Transparency and accountability are very difficult to measure as these issues are more often than not reflected in a political culture rather than in specific legal provisions. There are, however, a number of legal mechanisms which infer a commitment to accountability and transparency, some of which are dealt with below.

It is important to note that the mere fact that a country has constitutional or other legal provisions regarding accountability measures is not in itself indicative of a genuine political commitment to transparency and/or accountability. A clear way that a commitment to transparency can be determined is from a country's commitment to access to information, as discussed above.

The constitutions of Burundi, Ethiopia, Kenya and Uganda contain general provisions stating a commitment to transparency and/or accountability.

The constitutions of Eritrea (but note that the constitution is not in force), Kenya and Uganda also contain a right to administrative justice, which is a critical right for holding public power accountable.

Further, Kenya has established a Commission on Administrative Justice and the governing legislation specifically provides for remedies for improper administrative action. This legislation aims to force the government to engage in decision-making in a transparent and accountable manner.

While Ethiopia, Rwanda and Uganda have all passed specific whistleblower protection legislation, Kenya has passed a law which contains whistleblower protection mechanisms therein. These kinds of laws are important in combatting corruption and other crimes that hinder transparent and accountable government.

## **2.8 Principle 8: Commitment to public debate and discussion**

A commitment to public debate and discussion is also difficult to measure as these issues are more often than not reflected in the political culture rather than in specific legal provisions. However, legal provisions dealing with freedom of expression, a free press, access to information and the establishment of a genuine public broadcaster, as opposed to a state broadcaster (all issues dealt with elsewhere in the chapter), indicate at least an ostensible commitment to public debate and discussion.

The constitutions of Eritrea (but note this has not been implemented), Kenya and Uganda contain specific provisions promoting public participation in the life of the nation.

## **2.9 Principle 9: Availability of local content**

Local content is available in the countries surveyed. In addition, Ethiopia, Kenya and Rwanda have specific local content requirements for broadcasting services. As all broadcasting in Eritrea is provided by the government, we presume that local content features heavily; but there are no laws or regulations dealing specifically with the issue. We were not provided with any provisions specifically requiring local content in respect of Burundi, while in respect of Uganda, the only local content-related provisions are a general statement in the functions of the state broadcaster and do not appear to apply to all broadcasters.

## **2.10 Principle 10: Ensuring that states do not use their advertising power to influence content**

This principle does not appear to be respected in the countries under review and no statutory mechanisms have been enacted to deal with the problem.

# **3 A BIRD'S-EYE VIEW OF COUNTRY COMPLIANCE WITH THE EIGHT KEY PRINCIPLES OF DEMOCRATIC BROADCASTING REGULATION**

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

All the countries studied have enacted national frameworks in the form of legislation to regulate broadcasting.

## **3.2 Principle 2: Independent regulation of broadcasting**

Given the increasing levels of convergence between traditional broadcast and tele-

communications infrastructure and services, in terms of which content is available to audiences over a range of platforms, it is not unusual to find ‘converged regulators’ – that is, regulators who are responsible for electronic communications as a whole (and in some instances postal regulation too). This is not contrary to international requirements. What is required, however, is that these converged regulators are independent in terms of appointments and removals processes. Converged regulators should also not be beholden to the executive branch of government. Lastly, they should have the authority to regulate the sector, including granting licences and making regulations, without commercial or government interference.

All but one of the countries surveyed do not have an independent broadcasting or communications sector regulator. Further, in almost all of the countries surveyed, there is no single regulator for the communications or broadcasting sector; so even if one of the bodies appears to be independent in certain respects, the overall regulatory position of the country is that the regulators, taken as a whole, are not independent.

While both Kenya and Burundi make provision for constitutionally mandated media regulation bodies, only the Kenyan Constitution provides for a level of constitutional protection for an independent media standards body. The Media Council in Kenya, which is just one of several regulatory bodies, has a measure of constitutional protection in that it is required to be independent and is generally independent. Indeed, of the countries reviewed, only Kenya can be said to have relatively independent regulation of broadcasting. The Communications Authority of Kenya is:

- Appointed in accordance with a semblance of international best practice, namely: a public nominations process, short-listing by a selection panel (note that this ought to be done by Parliament) and appointment by the president or Cabinet secretary
- Generally able to regulate the sector without executive involvement in licensing and/or making regulations, and has veto powers over regulations made by the Cabinet secretary.

Eritrea’s regulatory position, on the other hand, is extremely poor as the Ministry of Transport and Communications is the only government agency vested with regulatory authority over the communications sector, and broadcasting may be provided only by the government.

### **3.3 Principle 3: Pluralistic broadcasting environment with a three-tier system for broadcasting: public, commercial and community**

Ethiopia, Kenya, Rwanda and Uganda have legislative and/or regulatory environ-

ments that specifically provide for public, commercial and community broadcasting as three separate tiers of available broadcasting services. However, note that in all cases the public broadcaster is, in fact, a state broadcaster.

In Eritrea, only the government may provide broadcasting services and so it does not provide for public, commercial or community broadcasting in its laws.

Burundi also does not provide specifically for the three tiers in law.

### **3.4 Principle 4: Public as opposed to state broadcasting services**

None of the countries reviewed have ‘public’ as opposed to ‘state’ broadcasting services, and no country provides for genuine public broadcasting in legislation.

Eritrea is worthy of particular mention as all broadcasting services are provided by the government.

### **3.5 Principle 5: Availability of community broadcasting services**

Most of the countries reviewed have a legislative and/or regulatory environment that specifically provides for community broadcasting as a separate tier of available broadcasting services, although implementation thereof is uneven.

Eritrea does not allow any broadcasting services other than those provided by the state.

Burundi does not provide for community broadcasting in its legal frameworks and does not appear to have any community broadcasting stations.

### **3.6 Principle 6: Equitable, fair, transparent and participatory licensing processes, including of frequencies**

International best practice requires that broadcasting services and, where these use frequencies, associated frequencies, be licensed by an independent regulatory authority. As already discussed, almost none of the countries surveyed have genuinely independent broadcasting regulatory authorities. Furthermore, the legal environment for licensing in some of the countries studied is problematic. For example:

- In Burundi the minister has the power to approach a court to have a licence granted by the regulator revoked if he or she is of the opinion that the granting of the licence was contrary to law or the public interest.

- In Eritrea, only the government may provide broadcasting services – so effectively no one else can be licensed.

### **3.7 Principle 7: Universal access to broadcasting services, and equitable access to signal distribution and other infrastructure**

Most of the countries included in the handbook have provisions promoting universal access to broadcasting services and equitable access to signal distribution, but the actual realisation of universal access is still far from achieved. One of the biggest reasons for the lack of universal access to broadcasting services is the low level of access to electricity infrastructure. Africa has experienced falling electricity access rates since the 1970s.<sup>3</sup> Indeed, of the countries surveyed in this work, the percentage of the population with access to electricity ranged from 6.5% in Burundi to 36.1%<sup>4</sup> in Eritrea.<sup>5</sup> Of the countries surveyed, only one country had an electricity access rate of over 30%.

Given that people do not have access to reliable electricity, radio (which can easily be accessed on battery operated devices) still plays a critical role in meeting the communication needs of the populations of the countries surveyed.

### **3.8 Principle 8: Regulating broadcasting content in the public interest**

All the countries surveyed regulate broadcasting-specific content, and many of the restrictions or requirements are in accordance with international norms and standards. However, only a few countries have a commitment to self-regulation of broadcasting content by the broadcasters themselves. Indeed, Kenya is the only country reviewed where a commitment to self-regulation is enshrined in the governing broadcasting legislation.

In addition, many of the countries studied regulate all content (including broadcasting content) in terms of extremely outdated colonial-era legislation, which does not comply with international standards for limiting or prohibiting the right to freedom of expression.

## **4 WHAT ARE INTERNATIONAL ORGANISATIONS ON THE CONTINENT DOING TO PROMOTE MEDIA FREEDOM?**

In 2001, the African Commission on Human and Peoples' Rights (ACHPR) passed Resolution 54 on Freedom of Expression.<sup>6</sup> The resolution expressed the ACHPR's concern at the widespread violation of the right to freedom of expression by state parties to the African Charter on Human and Peoples' Rights, including through:

- The harassment of journalists
- The victimisation of media houses deemed critical of the establishment
- Inadequate legal frameworks for regulating electronic media, especially broadcasting
- Criminal and civil laws that inhibit the right to freedom of expression.

The ACHPR, in Resolution 54, decided to develop a Declaration on Principles of Freedom of Expression, which it duly adopted<sup>7</sup> and which is dealt with in detail in Chapter 2 of this handbook.

In 2004, the ACHPR established the Special Rapporteur on Freedom of Expression with a mandate to:<sup>8</sup>

- Analyse national media legislation, policies and practices within member states
- Monitor their compliance with freedom of expression standards and advise member states accordingly
- Undertake investigative missions to member states where reports of massive violations of the right to freedom of expression are made, and make appropriate recommendations to the ACHPR
- Undertake country missions and any other promotional activity that would strengthen the full enjoyment of the right to freedom of expression in Africa
- Make public interventions where violations of the right to freedom of expression have been brought to his or her attention
- Keep a proper record of violations of the right to freedom of expression and publish this in his or her reports submitted to the ACHPR
- Submit reports at each ordinary session of the ACHPR on the status of the enjoyment of the right to freedom of expression in Africa.

In 2010, the ACHPR adopted Resolution 169 on Repealing Criminal Defamation Laws in Africa.<sup>9</sup> The resolution calls on state parties to, among other things:

- Repeal criminal defamation laws or insult laws which impede freedom of speech,

and to adhere to the provisions of freedom of expression articulated in the African Charter, the Declaration, and other regional and international instruments

- Refrain from imposing general restrictions that are in violation of the right to freedom of expression.

At the time of writing, no country canvassed in this handbook had yet responded directly to the call to repeal criminal defamation or insult laws, which are extremely common on the continent. Indeed, all of the countries surveyed have criminal defamation and/or insult laws.

In May 2013, the Pan African Parliament (PAP) adopted the Midrand Declaration on Press Freedom in Africa,<sup>10</sup> by which the PAP resolved to, among other things:

- Launch a campaign entitled Press Freedom for Development and Governance: Need for Reform in all five regions of Africa
- Establish an annual PAP Award on Media Freedom in Africa for individuals, organisations and member states
- Establish an annual PAP Index on Media Freedom in Africa
- Call upon African Union member states to use the ACHPR Model Law on Access to Information in adopting or reviewing access to information laws.

In 2014, the African Court of Human and Peoples' Rights handed down the Konate judgment,<sup>11</sup> in which it ruled that violations of laws on freedom of speech 'cannot be sanctioned by custodial sentences'.<sup>12</sup>

These are exciting developments and are likely to have far greater impact than declarations on press freedom from countries or organisations outside of Africa.

However, the initiatives are relatively new and it will take years, if not decades, to rid a country of laws and practices that are contrary to the right to freedom of expression.

## 5 WHAT KEY CHALLENGES REMAIN TO MEDIA FREEDOM?

### 5.1 Introduction – the censorship legacy of colonialism

The PAP, in a statement on its Press Freedom for Development and Governance: Need for Reform campaign, stated that:

The right to freedom of the press is one of the most important human rights. It is indeed an integral part of the right to freedom of expression. It is also seen as one of the cornerstones of democracy. Unfortunately, Africa does not fare very well when it comes to press freedom. In many African countries, authorities have little or no tolerance for press freedom. The media legislation which is in place in many African countries is either inherited from the colonial times, or was instituted by former military and civilian dictatorships to clamp down on criticism and dissenting voices.<sup>13</sup>

This is harsh criticism, but it is not unfair. The *Media Handbook for Eastern Africa* focuses on media law rather than general governmental practice towards journalists and media houses. Such practice has included instances of repression, threats, intimidation, arrest, torture and even murder, as numerous indices on press freedom and alerts from non-governmental organisations that support journalists indicate.

Governments and intergovernmental organisations must begin (as indeed some are starting to) the hard work of creating a genuinely free press across the continent – a press that can and does champion good governance, development and the inherent dignity of African people, as well as the importance of protecting the human rights of each individual African person. But this cannot happen without a wholesale updating of the continent's media laws in every country.

Seven types of media laws are dealt with below, many of which are colonial era laws or, worse, were directly adapted from colonial era laws, and that need to be repealed, amended or updated to enable a professional free African press to flourish for the benefit of all.

## **5.2 Media registration laws**

As has been set out elsewhere in this chapter, media registration laws (whether applicable to publications or journalists) discourage the development of a thriving pluralistic media environment and ought to be abolished. They are purely mechanisms for government control and are not necessary in a democratic country.

All of the countries featured in this handbook still require such publication registration and, with the exception of Ethiopia, also require the registration of working journalists.

## **5.3 Broadcasting laws**

As already discussed, every country surveyed ought to review its broadcasting laws to provide for a:

- Genuinely independent broadcasting regulator (whether or not this regulator also regulates other communications services too), whose members are appointed and removed in accordance with international best practices, and who are free to regulate the sector without commercial or political interference
- Broadcasting regulator that regulates in the public interest
- Broadcasting sector that is made up of three distinct tiers of broadcasting: public, community and commercial broadcasting services
- Genuinely independent public broadcaster whose board members are appointed and removed in accordance with international best practice
- Public broadcaster that provides radio and television broadcasting services in the public interest and which does so without commercial or political interference
- Public broadcaster that provides public broadcasting services in accordance with a public mandate developed by parliament.

#### **5.4 Criminal defamation laws**

The issue of criminal defamation has been taken up by the ACHPR. The Commission, in Resolution 169, has requested member states to repeal all criminal defamation laws and the African Court of Human and Peoples' Rights has held that a custodial sentence therefor is inappropriate.

Defamation is an issue that can and should be dealt with as a civil matter. In other words, damages, or in extreme cases prior restraints on publication, can be obtained to deal with the unlawful publication of defamatory material. To criminalise speech – that is, to make defamation a crime punishable by, potentially, stiff prison sentences – has an unjustifiable chilling effect on journalists and media houses across the continent.

Criminal defamation laws should be repealed in their entirety and replaced with a civil action in which the rights to free speech and to dignity and reputation are appropriately balanced.

All of the countries considered in this work still have criminal defamation on the statute books with imprisonment as a potential punishment. This is out of step with the recent critically important ruling by the African Court of Human and Peoples' Rights which held that a custodial sentence therefor is inappropriate.<sup>14</sup>

## 5.5 Insult laws

The issue of insult laws is another that the ACHPR has taken up. In Resolution 169, it has requested member states to repeal all insult laws.

Insult laws are a particular type of law aimed not at defamation in general but at insults or defamation levelled at particular people, usually the head of state, such as the president, but also foreign dignitaries. The publication of material which insults these types of people is criminalised. These laws fundamentally undermine the concept of equality before the law, placing a person, due to his or her political position, above criticism. While there is no doubt that politicians have a right not to be defamed, they have access to ordinary civil remedies to defamation. Furthermore, insult laws are often abused by governments to silence legitimate criticism of political leaders in relation to corruption, cronyism and other barriers to development. Unfortunately, these laws are extremely common on the continent. All of the countries considered in this work still have insult laws on the statute books, with the notable exception of Uganda.

## 5.6 Obscenity laws

All the countries surveyed have obscenity laws that are extremely outdated and problematic from a freedom of expression point of view. In this regard:

- Control of obscene publications are often simple prohibitions rather than so-called time, manner and place restrictions, which would make certain content available to adults only but during times, and in a manner (opaque packaging for publications, for example) and in particular places (adult shops, for example) that does not impact unduly on the general public
- The grounds for prohibiting publications are often far too wide, allowing for the prohibition of an extremely broad range of material when in fact adults have a right to receive publications of their choice other than those that are clearly harmful, such as child pornography and degrading or inhumane portrayals of explicit sex accompanied by extreme violence.

A revision of these laws is long overdue.

## 5.7 Sedition laws

International norms on security legislation allow for restrictions on freedom of the press where a country's existence or territorial integrity is actually threatened.

However, some of the countries surveyed, namely Kenya and Uganda, have sedition laws that are overbroad and which do not relate to clear threats to the country itself. Overbroad sedition laws have a chilling effect: they silence legitimate comment or reporting on maladministration, corruption and the like.

It is important to note that a country's sedition laws are often a holdover from their colonial pasts, and a revision of these laws, in line with democratic norms and standards, is long overdue.

## **5.8 Other security laws**

International norms on security legislation allow for restrictions on freedom of the press where a country's existence or territorial integrity is actually threatened. However, many of the countries reviewed have security, public order and terrorism laws that are overbroad and which do not relate to clear threats to the country itself. Furthermore, overbroad security laws have a chilling effect: they silence legitimate comment or reporting on maladministration, corruption and the like.

Every country researched for the handbook has such overbroad security laws, many with exceptionally harsh penalties for publication. It is also important to note that many countries' security laws are a holdover of their colonial pasts, and a revision of these laws, in line with democratic norms and standards, is long overdue.

## **5.9 Censorship laws**

Many of the countries surveyed have an excessively large number of grounds for prohibiting publications: 32 separate grounds in the case of Burundi, 13 separate grounds (but with many additional sub-grounds) in the cases of Eritrea and Ethiopia, 20 separate grounds in the cases of Kenya and Rwanda, and 10 separate grounds in the case of Uganda.

Many of these are governed by the types of laws set out above. The overall impression, however, is of a region that is heavily censored and where censorship is accompanied by harsh criminal penalties. The fact that so many Eastern African countries have a plethora of censorship offences with criminal sanctions ranging from the death penalty to fines is testimony to the overall lack of press freedom that characterises this region.

# **6 INTERNET CENSORSHIP**

One of the most interesting aspects of the overall Eastern Africa environment has

been the development of citizen-journalism through the use of social media, including Twitter, Facebook, YouTube, WhatsApp and other platforms, to communicate with other citizens, the media and the outside world on political developments within these countries. This has been met with repression: in 2016, governments in at least three of the countries featured in this handbook which generally have internet access (Burundi, Ethiopia and Uganda) shut down the whole internet on occasion.<sup>15</sup> This is, of course, in addition to the general non-availability of the internet in Eritrea.<sup>16</sup>

## 7 CONCLUSION

There is no doubt that democracy is taking root in post-independence Africa, and that more and more countries are at least paying lip service to a free press, a pluralistic media environment and the independent regulation of broadcasting; however, much remains to be done, particularly in Eastern Africa which lags behind other African regions with respect to levels of press freedom.

Indeed, two of the six countries featured in this handbook unfortunately also feature in the List of the 10 Most Censored Countries published annually by the Committee to Protect Journalists, namely, Eritrea, which ranks as the most censored country in the world, and Ethiopia, which ranks as the sixth most censored country in the world.<sup>17</sup>

Media owners, editors and journalists as well as media activists must use the opportunities that have arisen as a result of the PAP's and the ACHPR's campaigns for media freedom and for the removal of insult and criminal defamation laws. They must challenge these and other laws in court, as well as push for wholesale amendments to pernicious censorship laws that still exist across Eastern Africa and against the government practice of simply shutting down the internet or targeting social media platforms that are used by activists, journalists and others to communicate political information and ideas.

It is perhaps instructive to consider the 2015 Freedom House 'Press Freedom Report: Harsh Laws and Violence Drive Global Decline',<sup>18</sup> in which it gives press freedom ratings for, among other countries, the six countries included in this handbook. Not a single country surveyed in this handbook had a media freedom rating of 'free'. Only two countries, namely Kenya and Uganda, were 'partly free' while the rest were 'not free':

- Burundi – 'not free'
- Eritrea – 'not free'
- Ethiopia – 'not free'
- Kenya – 'partly free'

- Rwanda – ‘not free’
- Uganda – ‘partly free’.

## NOTES

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- 12 Ibid. At paragraph 165.
- 13 <http://www.polity.org.za/article/pap-statement-by-the-pan-african-parliament-on-world-press-freedom-day-03042011-2011-05-03> last accessed 26 October 2016.
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- 18 [https://freedomhouse.org/sites/default/files/FreedomofthePress\\_2015\\_FINAL.pdf](https://freedomhouse.org/sites/default/files/FreedomofthePress_2015_FINAL.pdf), last accessed 27 October 2016.

