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**Media law in
the region**
Where to from here?

In this chapter, you will learn:

- ▷ what a bird's-eye view of the countries surveyed reveals about compliance with:
 - › ten key principles of democratic media regulation
 - › eight key principles of democratic broadcasting regulation
 - › seven key principles of democratic internet regulation
- ▷ what international organisations on the continent are doing to promote media freedom
- ▷ what key challenges to media freedom remain

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 18 instruments, charters, protocols or declarations adopted by international bodies (such as the African Union and the Southern African Development Community), 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 18 instruments, many of which have a particular focus on Africa, deal with various aspects of democratic media regulation, among other things. Ten key principles of general democratic media regulation and eight key principles of democratic broadcasting regulation have been identified from these instruments and are 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 in Volumes 1, 2 and 3 of the handbook.

2 A bird's-eye view of country compliance with 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. In some countries such as the Democratic Republic of the Congo (DRC), Malawi, Mozambique, Namibia, South Africa, eSwatini and Zimbabwe, 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 Zimbabwe, with a particular focus on the broadcast media.

However, there are instances where the constitution does not fully protect the right to freedom of expression because the right is effectively subject to legislation passed to regulate freedom of expression or the press. In the DRC, for example, the right to press freedom expressly states in section 24 of the constitution that: 'legislation is to govern the exercise of these rights'.

The constitutions of other countries are less explicit about subverting the right to press freedom. These constitutions contain broad limitations clauses (general limitations clauses or so-called internal limitations clauses that apply concerning a particular right) which give governments extensive powers to pass legislation to limit rights. Broad powers are not only given in wide grounds for restricting rights but by not having limitations requirements, such as necessity or proportionality. The DRC, Mauritius, Mozambique, Tanzania (and Zanzibar) have extremely broad limitations provisions.

Botswana, Lesotho, Malawi, Namibia, South Africa, Seychelles, eSwatini, Zambia and Zimbabwe have fairly carefully crafted limitations clauses which, in theory, allow for the appropriate limiting of rights. However, it is essential to note that certain of the internal limitations provisions to Zimbabwe's freedom of expression right are problematic (this is discussed more fully in Chapter 16).

Some countries have constitutional provisions that look extremely good on paper and appear to comply with international standards, only for the media environments to be extremely poor in reality. There is scope for the enforcement of constitutional rights to be significantly improved.

2.2 Principle 2: An independent media

In terms of an independent media environment, it is apparent from the country chapters that practice varies considerably among the different countries surveyed. South Africa and Namibia have a large number of independent media, while a

country such as Zimbabwe has almost no independent broadcasting media and a severely constrained independent print media landscape.

However, most countries do recognise the need for independent media sources and the establishment of independent (commercial or community) print and broadcast media houses. However, several countries including Mozambique, the Seychelles, eSwatini, and Zimbabwe have curtailed independent media environments and are dominated by the state media.

2.3 Principle 3: Diversity and pluralism in the media

It is also apparent from the country chapters that diversity and pluralism in the media vary significantly among the countries reviewed. South Africa has a great deal of diversity and pluralism while Zimbabwe and Mozambique, for example, have almost no independent broadcasting media and severely constrained independent print media landscapes.

One of the biggest obstacles to the creation and growth of a diverse media is the registration requirement imposed on the print media. Botswana, the DRC, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, eSwatini, Tanzania (including Zanzibar) and Zambia still require newspaper registration, and certain of these require the payment of a bond, a financial barrier to market entry by new competitors. Of the countries surveyed, only South Africa does not require the formal registration of print media publications. Even worse is that certain countries (for example, Botswana, and the DRC) also require the registration 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.

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, which could develop and equip journalists to practice journalism as a genuine profession. This is slowly changing; however, development is far from uniform.

While South Africa, for example, has several excellent training courses and facilities run by various institutions, ranging from universities and colleges to in-house cadet courses operated by media houses, some countries battle to provide even basic training in journalism skills and ethics. On a positive note, the establishment of self-regulatory bodies, such as media councils, in most of the countries reviewed has had an impact on the professionalisation of the media in those countries. However, there are still far too many countries which lack self-regulatory bodies for content regulation, including the DRC, eSwatini, Lesotho, Mauritius, Mozambique and Seychelles.

2.5 Principle 5: Protecting the confidentiality of sources

It is interesting to note that certain of the constitutional limitation provisions of the countries surveyed allow for limitations on the right to freedom of expression to be limited to 'protect information received in confidence'. Botswana, Lesotho, eSwatini and Zambia have these kinds of provisions. It is unclear though whether such a provision can be used by the media, or only by the government when protecting its confidential sources.

Mozambique's constitution provides specifically for the protection of journalists' confidential sources.

All thirteen countries included in the handbook have laws that could be used to compel a journalist or media house to reveal confidential sources of information. However, it is not possible to state that the law is inherently problematic. This is because each case has to be determined on its merits when considering whether or not forcing a journalist to reveal a source will, in the particular circumstance concerned, violate constitutional, international, or both, standards for such compulsion.

2.6 Principle 6: Access to information

Sadly, only a few of the countries under review, the DRC, Malawi, Seychelles South Africa and Zimbabwe, explicitly protect the right of access to information (as a right separate from the right to freedom of expression) in the constitution.

These rights are formulated in different ways:

- ▶ The DRC has a general right of access to information.
- ▶ Malawi has a right of access to government-held information, where this is required for the exercise and protection of rights.
- ▶ Seychelles has a right of access to personal information held by a public authority and the right to have inaccurate personal information corrected. It also has a general right of access to information held by a public authority performing a public function.
- ▶ South Africa has a general right of access to government-held information and a right of access to privately-held information, where required for the exercise and protection of rights.
- ▶ Zimbabwe has a right of access to government-held information, where this is required for the exercise and protection of rights or is in the interests of public accountability.

However, all of the countries surveyed (with the notable exception of Namibia) include the right to receive and impart information and ideas as part of the constitutional right to freedom of expression. Although Namibia has tabled an Access to Information bill, it has yet to be enacted as law.

Besides the constitutional provisions, several countries have enacted access to information legislation, namely Malawi, Seychelles South Africa, Tanzania (but not Zanzibar) and Zimbabwe.

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 political culture rather than in specific legal provisions. However, there are several 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 even legal provisions regarding an accountability measure is not in itself indicative of a genuine political commitment to transparency or accountability.

A way that a commitment to transparency can be determined is from a country's commitment to access to information, as discussed above.

Only the constitutions of Malawi, South Africa, eSwatini, and Zimbabwe contain general provisions stating a commitment to transparency, accountability, or both.

The constitutions of Malawi, Namibia, eSwatini, South Africa and Zimbabwe also contain a right to administrative justice, which is a critical right for holding public power accountable. South Africa has also enacted administrative justice legislation. This legislation is extremely effective in forcing the government to engage in decision-making transparently and accountably.

Botswana, Mauritius, Namibia, South Africa, Tanzania (but not Zanzibar) and Zambia have passed whistleblower protection legislation, which is also effective in combatting corruption and other crimes that hinder transparent and accountable government. Malawi contains some legislative protections for whistleblowers in its access to information legislation.

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 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.

2.9 Principle 9: Availability of local content

Local content is available in the countries surveyed. In addition, Botswana, the DRC, Malawi, Mauritius, South Africa, Tanzania (but not Zanzibar) and Zimbabwe have specific local content requirements for broadcasting services.

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

This principle is not respected in the countries under review, and no statutory mechanisms have been enacted to deal with the problem. Interestingly, this practice has been successfully challenged in the courts of at least one country, Botswana, where a directive banning government advertising in two newspapers was ruled to contravene the right to freedom of expression of the newspapers. Further Tanzania (but not Zanzibar) does allow a right of appeal against a decision of the Director of Information Services concerning placing government advertising.

3 A bird's-eye view of country compliance with 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 the broadcasting sector as a whole, except eSwatini, as discussed in Chapter 6.

3.2 Principle 2: Independent regulation of broadcasting

Given the increasing levels of convergence between traditional broadcast and telecommunications 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' who are responsible for electronic communications (and in some instances postal regulation) as a whole. This is not contrary to international requirements. However, what is required is that these converged regulators are independent in terms of appointments and removals processes. Converged regulators should not be accountable to the executive branch of government. They should have the authority to regulate the sector, including granting licences and making regulations, without commercial or government interference.

Countries which have converged regulators are Botswana, eSwatini (but as there isn't proper broadcasting legislation for it to regulate, this is a misnomer), Lesotho (but with the Broadcasting Disputes Resolution Panel acting as a broadcasting-specific arm of the LCA), Malawi, Namibia and Tanzania (but not Zanzibar). Countries which have broadcasting regulators are the DRC, Mauritius, Zambia, Zanzibar (but not the rest of Tanzania) and Zimbabwe.

Only the DRC and South Africa provide a level of constitutional protection for a broadcasting regulator. Other countries, including Mozambique and Zimbabwe, refer to media-related bodies in their constitutions but, in the case of Zimbabwe, this refers to a content-regulatory body only and not to a general broadcasting regulator, that is, one that grants licences and performs other regulatory functions. However, one should be aware that there is a distinction between what is provided for in a constitution and the actual practice. The cases of the DRC, Mozambique and Zimbabwe are instructive in this regard.

Of the countries reviewed, only Mauritius and South Africa could be said to have independent regulation of broadcasting. For example, the Independent Communications Authority of South Africa is:

- ▶ appointed following international best practice, namely, a public nominations process, short-listing by a multi-party body such as parliament, appointment by the president;
- ▶ generally able to regulate the sector without ministerial involvement in licensing or making regulations

Mozambique and Seychelles are particularly problematic when it comes to an independent regulator. Although Mozambique has established several media-related bodies, the actual regulator is GABINFO, effectively an arm of the relevant minister. Similarly, broadcasting in Seychelles is effectively regulated by the relevant minister.

3.3 Principle 3: Pluralistic broadcasting environment with a three-tier system for broadcasting: public, commercial and community

Most of the countries surveyed have a legislative, regulatory or both, environment that specifically provides for community, commercial and public broadcasting as three separate tiers of available broadcasting services; however, implementation is uneven.

Because eSwatini does not have legislation applicable to the broadcasting sector as a whole, it lacks the appropriate tiers of broadcasting as a matter of law or practice.

Neither the DRC nor Seychelles provides specifically for the three tiers in law.

3.4 Principle 4: Public as opposed to state broadcasting services

Most of the countries reviewed have 'state' as opposed to 'public' broadcasting services and do not provide for genuine public broadcasting in legislation:

- ▶ Some countries do not have legislation establishing a public broadcaster and operate out of the relevant ministry. These include: Botswana, Lesotho and eSwatini
- ▶ Some countries do have legislation establishing a public or national broadcaster, but these do not operate as public broadcasters because the boards of all of them are appointed by members of the Executive. These include: the DRC, Mauritius, Mozambique, Namibia Tanzania (including Zanzibar) and Zimbabwe
- ▶ Malawi's public broadcaster does have several board members who are not Executive appointees. It appears to be a hybrid state/public broadcaster due to its appointments processes on paper but operates as a state broadcaster in practice. In some ways, this is similar to the Zambian public broadcaster where the minister makes the Board appointments, but the National Assembly ratifies them. However, the Zambian national broadcaster operates as a state as opposed to a public broadcaster
- ▶ Although the Seychelles Constitution ostensibly protects the independence of the public broadcaster, the reality is somewhat different. The president has an enormous say over board appointments to the public broadcaster, and the relevant minister makes regulations and rules for the public broadcaster

Of the countries surveyed, only the South African Broadcasting Corporation is:

- ▶ appointed following international best practice, namely, a public nominations process, short-listing by a multi-party body such as parliament, appointment by the president;
- ▶ required to broadcast in the public interest in accordance with a statutory mandate.

3.5 Principle 5: Availability of community broadcasting services

Most of the countries reviewed have a legislative, regulatory or both, environment that specifically provides for community broadcasting as a separate tier of available broadcasting services, although the implementation is uneven. Countries that do not provide specifically for community broadcasting in law are the DRC, eSwatini and Seychelles, although the DRC does have licensed community broadcasters.

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

International best practice requires that an independent regulatory authority license broadcasting services and associated frequencies. As already discussed, few of the countries surveyed have genuinely independent broadcasting regulatory authorities. Very few countries allow for a genuine public notice and comment process on licensing issues for interested parties (such as competitors) or the public. It is also a feature of many countries that service licensing is carried out by a broadcasting regulator, and a separate telecommunications regulator licenses spectrum.

Of the countries surveyed, South Africa has the most transparent and independent licensing system concerning both services and frequencies. However, no invitations to apply for an individual infrastructure licence (required to provide broadcasting signal distribution) can be issued by the South African regulator in the absence of a ministerial policy direction. Theoretically, this undermines the independence of the licensing process concerning the broader landscape, even though it is limited to signal distribution.

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. However, the actual realisation of universal access is still far from being achieved.

One of the biggest reasons for the lack of universal access to broadcasting services is the poor quality of electricity infrastructure.

Electricity access in southern Africa reflects vast disparities. As of 2019:¹

- ▶ four countries dealt with in this handbook had less than 25% electricity penetration: DRC, Malawi, Mozambique and Tanzania
- ▶ four countries had between 25% and 50% electricity penetration: Lesotho, Namibia, Zambia and Zimbabwe
- ▶ two countries had between 50% and 75% electricity penetration: Botswana and eSwatini
- ▶ three countries had more than 75% electricity penetration: Mauritius, Seychelles and South Africa.

Given that so many 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, although some of the restrictions or requirements are following international norms and standards, there are far too many content restrictions which fall below these standards.

Many of the countries studied regulate content (including broadcasting content) concerning legislation, some of which is extremely outdated from the colonial-era, which does not comply with international standards for limiting or prohibiting the right to freedom of expression. These are dealt with in the general content prohibitions below.

Only a few countries have a commitment to self-regulation of broadcasting content by the broadcasters themselves. South Africa and Namibia are the only countries reviewed where a commitment to self-regulation is enshrined in the governing broadcasting legislation.

However, there are still far too many countries which lack self-regulatory bodies for content regulation, including the DRC, eSwatini, Lesotho, Mauritius, Mozambique, and Seychelles.

4 A bird's-eye view of country compliance with seven key principles of democratic internet regulation

4.1 Principle 1: Internet access and affordability

Internet penetration statistics² in the different countries dealt with in this handbook vary significantly:

- ▶ The DRC, Malawi, Mozambique have less than 25% internet penetration
- ▶ Botswana, Lesotho, Tanzania (including Zanzibar) have between 25-50% internet penetration
- ▶ eSwatini, Mauritius, Namibia, Seychelles, South Africa, Zambia, and Zimbabwe have between 50% – 75% internet penetration.

For comparison, the country with the highest internet penetration is Kenya at 87%, and the African average is 39%, which means that over half of the countries surveyed in the handbook have internet penetration rates that are higher than the African average.

However, universal internet access is a long way off for every country reviewed. While some of the problems relate to general infrastructure issues such as a lack of electricity or telecommunications services generally, data costs remain stubbornly high.

A 2018 study³ comparing data costs in the SADC region found that countries with high prices include Botswana, eSwatini, Seychelles, Zambia and Zimbabwe. Countries with relatively low data costs include Mozambique, Malawi and Lesotho. South Africa and Tanzania have relatively average costs.

4.2 Principle 2: Freedom of expression and information online

None of the constitutions of the countries reviewed in this handbook specifically provide for protecting freedom of expression and access to information online or on the internet. But the rights protecting freedom of expression are sufficiently broad to cover the internet. All the constitutions reviewed protect freedom of expression, including the rights to receive information and ideas, as part of that freedom.

4.3 Principle 3: Freedom of assembly and association online

None of the constitutions of the countries reviewed in this handbook specifically provide for protecting freedom of association online or on the internet, but the rights protecting freedom of association are sufficiently broad to cover the internet.

Most of the constitutions reviewed protect freedom of assembly.

4.4 Principle 4: The right to privacy, anonymity, personal data protection and freedom from surveillance online

None of the constitutions of the countries reviewed in this handbook specifically provide for protecting the right to privacy online or on the internet. However, the rights protecting the right to privacy often specify that the right includes the privacy of communications. This is sufficiently broadly framed to include electronic communications, including those sent via the internet.

However, constitutional protections are not the end of the enquiry. Many countries have attempted to regulate internet content providers. Although many of these laws contain draconian provisions, it is very unclear to what extent they are enforced. Malawi, for example, ostensibly requires every content provider (a person who supplies content for use on a website) to have a raft of personal information (such as name, telephone, number, physical address) on their webpage. This isn't happening in practice, but the legal provisions are there, and so the threat of enforcement action is too.

4.5 Principle 5: Security, stability and resilience of the internet

There are several different aspects to internet stability and resilience. One is the technical stability, ensuring that the internet can remain accessible. All countries covered in the handbook have experienced unintentional technical blackouts or brownouts when the internet is extremely slow.

Besides these, several countries have experienced intentionally state-induced internet, social media or both, blackouts, which are designed to prevent people organising and communicating for political ends, particularly during elections and periods of sustained political protest. Countries, where the internet has been intentionally shut down, whether in whole or in part, are Malawi, Mozambique, Tanzania, Zambia and Zimbabwe.

4.6 Principle 6: democratic multi-stakeholder internet governance

No countries adhere to this principle. Very few of the countries that are attempting to regulate the internet are ensuring that it is being done by even an independent regulator, much less one that has multi-stakeholder representation. This is true from relatively low-level issues such as domain name regulation to much broader internet freedom or content regulation governance structures.

4.7 Principle 7: Equitable distribution of internet revenues.

No country has begun to grapple with how to ensure an equitable distribution of internet revenues properly. This is a significant problem on the continent, and all traditional media (print and broadcasting) are feeling the negative effects of the move to online advertising. The effect is simple; less advertising money is available for traditional print and broadcast media.⁴

Only South Africa has mooted the possibility of ensuring that the online behemoths of Amazon, Google, Netflix and the like begin to contribute to meeting social goods such as paying licence fees and contributing to local content production.⁵ But it remains to be seen if draft policy proposals will find their way into law, and, perhaps importantly, into implementable laws.

5 What are international organisations on the continent doing to promote media freedom?

In 2001, the African Commission on Human and People's Rights (ACHPR) passed Resolution 54⁶ on Freedom of Expression. The resolution expressed concern at the widespread violation of the right to freedom of expression by state parties to the African Charter on Human and People's Rights, including by:

- ▶ harassing journalists
- ▶ victimising 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 in 2002.

In 2004, the ACHPR established the Special Rapporteur on Freedom of Expression with a mandate to:

- ▶ analyse national media legislation, policies and practices in member states
- ▶ monitor 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 African Commission
- ▶ 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 their attention
- ▶ keep a proper record of violations of the right to freedom of expression and publish this in reports submitted to the African Commission
- ▶ submit reports at each ordinary session of the African Commission on the status of the enjoyment of the right to freedom of expression in Africa.

In 2007 this mandate was expanded, and the title of the Special Rapporteur was expanded to include Access to Information in Africa.⁷

In 2010, the ACHPR adopted Resolution 169 on Repealing Criminal Defamation Laws in Africa.⁸ The resolution calls on state parties to, among other things:

- ▶ repeal criminal defamation 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 violate the right to freedom of expression.

At the time of writing, no country dealt with in this handbook had yet responded directly to the call to repeal criminal defamation or insult laws, which are extremely common on the continent. While South Africa's ruling party⁹ had promised to introduce a bill to do this, it was never introduced and criminal defamation, included in the common law crime of *crimen injuria*, remains a criminal offence under common law in South Africa. However, the 2014 landmark case of *Konate v Burkina Faso*¹⁰ in the African Court of Human and Peoples' Rights has fundamentally changed the impact of criminal defamation laws. This is because the court held that custodial sentences, that is imprisonment, for criminal defamation is a violation of article 9 of the African Charter on Human and Peoples' rights.

In 2013, the African Commission launched its Model Law on Access to Information,¹¹ and later that year, the Pan-African Parliament (PAP) adopted the Midrand Declaration on Press Freedom in Africa,¹² in which the PAP resolved to, among other things:

- ▶ launch a campaign titled '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 on African Union member states to use the ACHPR Model Law on Access to Information in adopting or reviewing access to information laws.

In 2017, the African Commission launched its Guidelines on Access to Information and Elections,¹³ helping to guide countries to ensure access to information necessary to hold democratic elections.

In 2019, the African Commission adopted a revised and updated set of principles, the Declaration of Principles on Freedom of Expression and Access to Information in Africa,¹⁴ which are dealt with extensively in Chapters 2 and 3 of this handbook.

Access to Information legislation is increasingly vital as we move into the information age and it is encouraging to see how many countries have now introduced or improved access to information laws since the publication of the first edition of the handbook. These are Malawi, Tanzania (but not Zanzibar), Seychelles, South Africa

and Zimbabwe; Namibia has developed an Access to Information Bill although it has yet to be passed into law.

Looking to the future, the African Continental Free Trade Agreement (AfCFTA)¹⁵ which came into force on 30 May 2019¹⁶ has five priority sectors, one of which is communications.¹⁷ Regulatory harmonisation concerning the communications sector (including broadcasting and online or OTT services) will be vital to facilitate free trade to implement a continent-wide free trade area for Africa. This will be a real opportunity for all countries on the continent to commit to a set of regulatory ground rules for broadcasting and online or OTT services that respect democratic norms and freedoms, following international best practice standards set out in Chapter 2 of this handbook.

These are exciting developments because they are inter-governmental and are likely to have a far more significant impact than declarations on press freedom from countries or organisations outside Africa or from statements and declarations from the NGO sector.

However, the initiatives are new, and it will take years, if not decades, to rid a country of laws and practices that run contrary to the right to freedom of expression.

6 What key challenges remain to media freedom?

6.1 Introduction — the censorship legacy of colonialism

The PAP, in a statement on its Press Freedom for Development and Governance: Need for Reform campaign, believes 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.¹⁸

This is harsh criticism, but it is not unfair. The Media Law Handbook for Southern Africa focuses on media law rather than on general governmental practice to 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. This press 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 African person. However, 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, almost all of which are colonial-era laws that need to be repealed, amended or updated to enable a professional, free African press to flourish for the benefit of all.

6.2 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.

Botswana, the DRC, Lesotho, Malawi, Namibia, eSwatini, Tanzania, Zambia and Zimbabwe still require such publication registration. Furthermore, Botswana, the DRC and Zimbabwe also require the registration of working journalists.

6.3 Broadcasting laws

As already discussed, almost 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 following international best practices, and who are free to regulate the sector without commercial or political interference
- ▶ a broadcasting regulator who regulates in the public interest
- ▶ a broadcasting sector that is made up of three distinct tiers of broadcasting, public, community and commercial services
- ▶ a genuinely independent public broadcaster whose board members are appointed and removed following international best practice
- ▶ a public broadcaster that provides radio and television broadcasting services in the public interest and which does so without commercial or political interference
- ▶ a public broadcaster that provides public broadcasting services following a public mandate developed by parliament.

6.4 Criminal defamation laws

The ACHPR has taken up the issue of criminal defamation. The Commission, in Resolution 169, has requested member states to repeal all criminal defamation laws.

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 dignity and reputation are appropriately balanced.

Botswana, eSwatini, Malawi, Mauritius, Mozambique, Tanzania (excluding Zanzibar), Seychelles, South Africa, Tanzania, and Zambia still have criminal defamation on the statute books or as a common law crime.

6.5 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 at insults levelled at specific people, usually the head of state, such as the president, but also foreign dignitaries not at defamation in general. 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 above criticism, due to his or her political position. 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 concerning corruption, cronyism and other barriers to development.

Unfortunately, these laws are extremely common on the continent. Botswana, the DRC, eSwatini, Malawi, Mauritius, Mozambique, Seychelles, Tanzania (excluding Zanzibar), Zambia and Zimbabwe all have insult laws.

6.6 Obscenity laws

With the notable exceptions of Seychelles, Mauritius and South Africa, all the countries surveyed have obscenity laws that are very outdated and problematic from the point of view of freedom of expression.

- ▶ Obscenity laws are often framed subjectively. In other words, they are dependent on the viewpoint of a particular official rather than on any objective grounds that can be tested in a court of law.

- ▶ Control of obscene publications is 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 a comprehensive range of material when adults have a right to receive publications of their choice other than those that are 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 given that many countries' obscenity laws date from the early decades of the last century and predate even the Universal Declaration of Human Rights.

6.7 Sedition laws

International norms on security legislation allow for restrictions on freedom of the press where a country's existence or territorial integrity is threatened. However, many of the countries surveyed have sedition or incitement laws that are overbroad and which do not relate to threats to the country itself. Furthermore, overbroad sedition laws have a chilling effect. They silence legitimate comment or reporting on maladministration, corruption and the like.

Botswana, DRC, eSwatini, Lesotho, Mauritius, Seychelles and Zambia have overbroad sedition laws.

It is important to note that many countries' sedition laws are a carryover from their colonial pasts, and a revision of these laws, in line with democratic norms and standards, is long overdue.

6.8 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 threatened. However, many of the countries reviewed have security, public order and related security laws that are overbroad and which do not relate to 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. It is also important to note that many countries' security laws are a carryover from their colonial pasts, and a revision of these laws, in line with democratic norms and standards, is long overdue.

However, updating security laws is not an easy or smooth process. An example is South Africa. Its Protection of Information Act, 1982, is a statute from the height of Apartheid and is unconstitutional. The government is aware of this and of the

need to bring it in line with the South African Constitution. However, the Protection of State Information Bill, which is meant to repeal and replace the Protection of Information Act, has been subject to significant political protest and criticism because of draconian provisions that could be used to silence legitimate reporting. It has yet to be passed into law.

7 Conclusion

There is no doubt that democracy is deepening in post-independence Africa, and that more and more countries are at least paying lip service to a free press, access to information, a pluralistic media environment and the independent regulation of broadcasting. However, much remains to be done.

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 judgments from continental and regional courts 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 Africa.

It is perhaps instructive to consider the 2020 Reporters Without Borders Press Freedom Rankings¹⁹ cross-referenced with the 2020 Freedom House Freedom Report²⁰ on political freedom for the thirteen countries included in the handbook:

- ▶ Botswana is ranked 39th in the world (up from 44th globally in 2019) in media freedom rankings and is rated 'free' by Freedom House.
- ▶ DRC is ranked 150th in the world (up from 154th in 2019) in media freedom rankings and is rated 'not free' by Freedom House.
- ▶ eSwatini is ranked 141st in the world (up from 147th in 2019) and is rated 'not free' by Freedom House.
- ▶ Lesotho is ranked 86th in the world (down from 78th in 2019) and is rated 'partly free' by Freedom House.
- ▶ Malawi is ranked 69th in the world (down from 68th in 2019) and is rated 'partly free' by Freedom House.
- ▶ Mauritius is ranked 56th in the world (up from 58th in 2019) and is rated 'free' by Freedom House.
- ▶ Mozambique is ranked 104th in the world (down from 103rd in 2019) and is rated 'partly free' by Freedom House.
- ▶ Namibia is ranked 23rd in the world (the same position it held in 2019), it is the highest-ranked African country and is rated 'free' by Freedom House.

- ▶ Seychelles is ranked 63rd in the world (up from 69th in 2019) and is rated 'partly free' by Freedom House.
- ▶ South Africa is ranked 31st in the world (the same position it held in 2019). It is ranked the third-highest country in Africa after Namibia and Ghana) and is rated 'free' by Freedom House.
- ▶ Tanzania is ranked 124th globally (down from 118th in 2019) and is rated 'partly free' by Freedom House.
- ▶ Zambia is ranked 120th globally (down from 119th in 2019) and is rated 'partly free' by Freedom House.
- ▶ Zimbabwe is ranked 126th (up from 127th in 2019) and is rated 'partly free' by Freedom House.

Notes

- 1 <https://openknowledge.worldbank.org/bitstream/handle/10986/31333/9781464813610.pdf?seq> [accessed 20 December 2020]
- 2 <https://www.internetworldstats.com/stats1.htm> [accessed 20 December 2020]
- 3 <https://www.icasa.org.za/legislation-and-regulations/retail-tariffs-report-quarter-4-2017> [accessed 20 December 2020]
- 4 https://ap-st01.ext.exlibrisgroup.com/61USC_INST/upload/1608492846616_PDF%20-%20Published%20Version.pdf?Expires=1608492966&Signature=WGoN9aE1BqeXfbCLaH [accessed 20 December 2020]
- 5 <https://www.gov.za/documents/constitution-republic-south-africa-draft-white-paper-audio-and-audiovisual-content> [accessed 20 December 2020]
- 6 <https://www.refworld.org/docid/51949e854.html> [accessed 20 December 2020]
- 7 <https://www.achpr.org/sessions/resolutions?id=174> [accessed 20 December 2020]
- 8 <https://www.achpr.org/sessions/resolutions?id=343> [accessed 20 December 2020]
- 9 <https://www.enca.com/south-africa/criminal-defamation-unconstitutional-anc> [accessed 20 December 2020]
- 10 <https://en.african-court.org/images/Cases/Judgment/Judgment%20Appl.004-2013%20Lohe%20Issa%20Konate%20v%20Burkina%20Faso%20-English.pdf> [accessed 20 December 2020]
- 11 <https://www.achpr.org/presspublic/publication?id=82> [accessed 20 December 2020]
- 12 http://www.africanplatform.org/fileadmin/Content/PDF/Resources/Standards-and-Principles/Midrand-Declaration-on-Press-Freedom_FINAL_English.pdf [accessed 20 December 2020]
- 13 <https://www.achpr.org/presspublic/publication?id=4> [accessed 20 December 2020]
- 14 <https://www.achpr.org/presspublic/publication?id=80> [accessed 20 December 2020]
- 15 https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf [accessed 20 December 2020]
- 16 <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html> [accessed 20 December 2020]

- 17 <https://www.bilaterals.org/?trade-in-services-in-the-afcfta#:~:text=This%20newsletter%20focuses%20on%20trade,to%20make%20specific%20sector%20commitments.> [accessed 20 December 2020]
- 18 <https://www.polity.org.za/article/pap-statement-by-the-pan-african-parliament-on-world-press-freedom-day-03042011-2011-05-03> [accessed 20 December 2020]
- 19 https://rsf.org/en/ranking_table [accessed 20 December 2020]
- 20 <https://freedomhouse.org/report/freedom-world> [accessed 20 December 2020]