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Media law:

Pitfalls and protections
for the media

In this chapter, you will learn about:

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

1 Introduction

It is clear that freedom of the press is not absolute. This chapter looks in some detail at the internationally accepted standards for restricting the media. It outlines the legitimate grounds on which the media can be restricted and how such restrictions are implemented.

This chapter identifies fifteen instruments, charters or declarations adopted by international bodies such as the UN, the EU and the AU, or adopted at significant conferences held under the auspices of international bodies such as Unesco. Others have been established by NGOs with long-standing records of work in the area of freedom of expression and freedom of the press, such as the international NGO, Article 19. These instruments, many of which have a particular focus on Africa, deal with, among other things, legitimate grounds for regulating certain forms of expression.

Since this handbook is aimed at journalists and other media practitioners as opposed to lawyers, the content of the instruments, charters and declarations is not set out as a whole, as these typically deal with a wide range of topics other than the media. Instead, detail is given on the key grounds upon which expression, including by the media, may be regulated or restricted, as found in the media-related provisions thereof under the different headings for the grounds.

It is also important to note that the list of instruments referred to does not purport to contain every instrument, charter or declaration relevant to democratic media restriction. Rather it is a selection of the key instruments, charters or declarations made by bodies of international standing, some of which have particular (but not exclusive) relevance to Africa.

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

- ▶ **The Access to the Airwaves Principles:**¹ Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation is a set of standards on how to promote and protect independent broadcasting while ensuring that broadcasting serves the interests of the public. The principles were developed in 2002 by Article 19, an international NGO working on freedom of expression issues as part of its International Standards series.
- ▶ **The African Declaration on Internet Rights and Freedoms:**² The African Declaration on Internet Rights and Freedoms was developed by members of the African Declaration group, a Pan-African NGO initiative to promote human rights, standards and principles of openness in internet policy formulation on the continent, in 2015.
- ▶ **The African Principles on Freedom of Expression and Access to Information Declaration:**³ The Declaration of Principles on Freedom of Expression in Africa was adopted in 2002 by the African Commission on Human and Peoples' Rights (the ACHPR), a body established under the auspices of the AU. The ACHPR updated and replaced the Declaration in 2019 with the Declaration of Principles on Freedom of Expression and Access to Information in Africa.
- ▶ **The Camden Principles on Freedom of Expression and Equality:**⁴ The Camden Principles on Freedom of Expression and Equality were prepared by Article 19 on the basis of an international conference held in 2009 to discuss freedom of expression and equality issues. They aim to promote greater consensus about the proper relationship between freedom of expression and the promotion of equality.
- ▶ **The Dakar Declaration:**⁵ The Dakar Declaration was adopted in Senegal in 2005 by a Unesco-sponsored World Press Freedom Day conference.
- ▶ **The Declaration of Table Mountain:**⁶ The Declaration of Table Mountain was adopted in 2007 by the World Association of Newspapers and the World Editors Forum. It contains a number of important statements on African media issues made by a civil society forum of newspaper publishers and editors.
- ▶ **The European Convention for the Protection of Human Rights and Fundamental Freedoms:**⁷ The European Convention for the Protection of Human Rights and Fundamental Freedom was adopted in 1950 under the auspices of the Council of Europe and came into force in 1953. Although the European Convention has no direct application to any African country, it has significant precedent value because of the depth of human rights-related jurisprudence developed by the European Court of Human Rights. Consequently, its provisions and jurisprudence are often referred to by national and regional courts in Africa and by the African Court of Human and Peoples' Rights.
- ▶ **The International Convention on the Elimination of All Forms of Racial Discrimination:**⁸ The International Convention on the Elimination of All Forms of Racial Discrimination was adopted by the UN General Assembly in 1965 and came into force in 1969.

- ▶ **The International Covenant on Civil and Political Rights:**⁹ The ICCPR was adopted by the UN General Assembly in 1966 and came into force in 1976.
- ▶ **The Johannesburg Principles:**¹⁰ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information were adopted in October 1995 by a panel of experts in international law, national security and human rights. The panel was convened by Article 19, the International Centre against Censorship and the University of the Witwatersrand Centre for Applied Legal Studies. The Johannesburg Principles have been endorsed by the UN Committee on Human Rights and the UN Special Rapporteur on Freedom of Opinion and Expression.
- ▶ **Malabo Convention:**¹¹ The AU Convention on Cyber Security and Personal Data Protection (known as the Malabo Convention) was adopted by the heads of State of the African Union in 2014. It comes into force when 15 countries have ratified it. At the time of writing this chapter, only eight countries had done so. This means it is not yet legally binding and so its status is aspirational in nature.
- ▶ **Resolution 169:**¹² Resolution 169 on Repealing Criminal Defamation Laws in Africa was adopted by the African Commission on Human and Peoples' Rights (ACHPR) in 2010.
- ▶ **Unesco's Internet Universality Indicators:**¹³ In 2019 Unesco published a document entitled 'Internet Universality Indicators: A Framework for Assessing Internet Development' which contains a set of 303 indicators divided into six categories: The ROAM-X Principles (Rights, Openness, Accessibility, Multi-stakeholder participation and Cross-cutting).
- ▶ **Unesco's Media Development Indicators:**¹⁴ Unesco's International Programme for the Development of Communications in 2008 published a document entitled 'Media Development Indicators: A Framework for Assessing Media Development'.
- ▶ **The WSIS Geneva Principles:**¹⁵ The WSIS Geneva Principles were adopted in Geneva in 2003 at the World Summit on the Information Society (WSIS), held by the UN in conjunction with the International Telecommunications Union. While the WSIS Geneva Principles mainly covers issues concerning universal access to information and communication technologies (ICTs), they also contain some important statements on the media more generally.

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

2 Restricting freedom of expression

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

2.1 Relevant provisions in international instruments

- ▶ Principle 23.1 of the Access to the Airwaves Principles provides that broadcasting laws ‘should not impose content restrictions of a civil or criminal nature on broadcasters, over and above, or duplicating, those that apply to all forms of expression.’
- ▶ Paragraph 3 of principle 3 of the African Declaration on Internet Rights and Freedoms essentially provides that the right to freedom of expression on the internet should not be subject to any restrictions, except those which are:
 - ▶ provided by law
 - ▶ pursue a legitimate aim as expressly listed under international human rights law
 - ▶ necessary in pursuance of a legitimate aim
 - ▶ proportionate in pursuance of a legitimate aim.
- ▶ Principle 9.1 of the African Principles on Freedom of Expression and Access to Information Declaration essentially repeats what is in the bullet point immediate above and then Principle 9.3 goes on to state ‘A limitation shall serve a legitimate aim where the objective of the limitation is:
 - ▶ to preserve respect for the rights or reputations of others; or
 - ▶ to protect national security, public order or public health.
- ▶ Principle 9.4 of the African Principles on Freedom of Expression and Access to Information Declaration provides that ‘To to be necessary and proportionate, the limitation shall:
 - ▶ originate from a pressing and substantial need that is relevant and sufficient;
 - ▶ have a direct and immediate connection to the expression and disclosure of information, and be the least restrictive means of achieving the stated aim; and
 - ▶ be such that the benefit of protecting the stated interest outweighs the

harm to the expression and disclosure of information, including with respect to the sanctions authorised.'

- ▶ Principle 11 of the Camden Principles provides that states should not impose any restrictions on freedom of expression '... [unless these are] provided by law' and '[are] necessary in a democratic society to protect [legitimate] interests. This implies ... that restrictions [must be]':
 - ▶ clearly and narrowly defined and respond to a pressing social need
 - ▶ the least intrusive measure available in the sense that there is no other measure which would be effective and yet less restrictive of freedom of expression
 - ▶ not too broad, in the sense that they must not restrict speech in a wide or untargeted way or beyond the scope of harmful speech and rule out legitimate speech
 - ▶ proportionate, in the sense that the benefit to the protected interest outweighs the harm to freedom of expression, including in respect to the sanctions they authorise.
- ▶ The Dakar Declaration calls upon member states to 'repeal criminal defamation laws and laws that give special protections to officials and institutions.'
- ▶ The Dakar Declaration 'condemns all forms of repression of African media that allows for banning of newspapers and the use of other devices such as levying of import duties on newsprint and printing materials ...'
- ▶ In Resolution 169, the ACHPR called on states parties to 'refrain from imposing general restrictions that are in violation of the right to freedom of expression.'
- ▶ Unesco's Internet Development Indicators at (RB.2) asks: 'Are any restrictions on freedom of expression narrowly defined, transparent and implemented in accordance with international rights agreements, laws and standards?'
- ▶ The Unesco Media Development Indicators provide that 'restrictions upon freedom of expression ... should be clear and narrowly defined in law and justifiable as necessary in a democratic society in accordance with international law and that such laws should be subject to a public interest override where appropriate.'
- ▶ The Unesco Media Development Indicators provide that the state 'may not place unwarranted legal restrictions on the media such as legal provisions dictating who may practice journalism or requiring the licensing or registration of journalists.'
- ▶ The Unesco Media Development Indicators provide that neither broadcasting nor print content may be 'subject to prior censorship, either by government or by regulatory bodies', and require that 'sanctions for breaches of regulatory rules relating to content are applied only after the material has been broadcast or published.'

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

2.2 Summary

- ▶ Broadcasting laws should not impose content restrictions of a civil or criminal nature which are in addition to, or duplicate, those that apply to all forms of expression.
- ▶ The right to freedom of expression may not be restricted by indirect methods, in particular by:
 - ▶ the abuse of control over access to media-related materials such as newsprint, printing materials, printing facilities, distribution networks, radio broadcasting frequencies and equipment, including through the imposition of import duties and other means
 - ▶ requiring the licensing or registration of journalists.
- ▶ Legitimate restrictions on freedom of expression must be clearly set down in law and must:
 - ▶ be narrowly defined and targeted
 - ▶ serve a legitimate interest. In other words, serve a pressing social need (these legitimate interests or social needs are dealt with in the next section)
 - ▶ be necessary in a democratic society
 - ▶ be the least intrusive measure available
 - ▶ be proportionate
 - ▶ be in accordance with international law
 - ▶ be subject to a public interest override where appropriate.
- ▶ Illegitimate legal restrictions on freedom of expression include those that:
 - ▶ require prior censorship. In other words, a process of approval of content by a government or regulatory body prior to publication. Although, as will be dealt with in more detail in the next section, there are certain limited circumstances when prior censorship would be acceptable, for example, during a state of emergency
 - ▶ give special protections to officials and institutions.

2.3 Comment

- ▶ One of the most important aspects to bear in mind is that the tests for determining whether or not a media restriction is legitimate are objective. This

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

- ▶ Sadly, many African countries, including in southern Africa, do have provisions that provide for the registration of journalists and for the licensing of media houses. These are often extremely onerous and, essentially, act as barriers to entry to the journalism profession and to the operation of the media.
- ▶ The abuse of control over access to media-related materials must also be considered with regard to the abuse of control over the internet. There are a number of ways in which this is being done in southern Africa:
 - ▶ First, there are general internet-blackouts — where the internet is simply 'turned off' by government so that it is unavailable to citizens. This has happened recently in both Zimbabwe¹⁶ and the Democratic Republic of Congo (DRC).¹⁷
 - ▶ Second, there are specific internet site- or social media platform-blackouts — where particular websites or applications (such as Twitter, Facebook, WhatsApp and Instagram) are disabled and become unavailable to citizens. This has happened in a number of countries.¹⁸
 - ▶ Third, there is so-called internet throttling or brownouts. This is when government forces telecommunications or internet service providers 'to lower the quality of their cell signals or internet speed'. This makes the internet too slow to use. Throttling can also target particular online destinations such as social media sites'.¹⁹
 - ▶ Fourth, there is the imposition of taxes, licence fees or excise duties by governments which are imposed in such a way as to make using the internet unaffordable for ordinary people. This is a recent trend in a number of African countries, including in Tanzania.²⁰
- ▶ It is important to bear in mind that the cumulative tests for a legitimate restriction on the media's right to publish or broadcast information are that the restriction must be clearly set down in law and must:
 - ▶ be narrowly defined and targeted
 - ▶ serve a legitimate interest, that is, serve a pressing social need
 - ▶ be necessary in a democratic society

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

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

3 Regulating and prohibiting the dissemination of certain forms of expression by the media

It was noted in the previous section that states must have legitimate grounds for regulating and restricting freedom of expression, including by the media. This section looks at the 14 internationally accepted specific grounds for such regulations or restrictions. These are the 14 grounds upon which there is broad international agreement on the legitimacy of restricting the media's publication of such content or otherwise regulating the media. Each one is dealt with, setting out the relevant provisions of the applicable international instruments, statements and declarations. A summary and/or comment are provided where necessary.

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

- ▶ licensing and regulation of broadcasting and cinema
- ▶ protection of reputations
- ▶ protection of rights of others generally
- ▶ protection of privacy
- ▶ obscenity and the protection of children and morals, particularly child abuse images
- ▶ propaganda for war
- ▶ hate or discriminatory speech, including xenophobic expression, hate crime incitement and genocide denialism
- ▶ national security or territorial integrity
- ▶ war or state of emergency

- ▶ protection of public order or safety
- ▶ protection of public health
- ▶ maintaining the authority and impartiality of the judiciary
- ▶ for the prevention of crime
- ▶ preventing the disclosure of information received in confidence.

3.1 Legitimate licensing and regulation of broadcasting and cinema

3.1.1 Relevant provisions in international instruments

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

3.1.2 Comment

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

3.2 Protecting reputations

3.2.1 Relevant provisions in international instruments

- ▶ In its relevant part, paragraph 3 of principle 3 of the African Declaration on Internet Rights and Freedoms provides that the right to freedom of expression on the internet 'should not be subject to any restrictions, except those which ... pursue a legitimate aim as expressly listed under international human rights law (namely the ... reputations of others ...) ...'
- ▶ Principle 21.1 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall ensure that laws relating to defamation conform with the following standards':
 - ▶ No one shall be found liable for true statements, expressions of opinions

or statements which are reasonable to make in the circumstances.

- ▶ Public figures shall be required to tolerate a greater degree of criticism.
- ▶ Sanctions shall never be so severe as to inhibit the right to freedom of expression.
- ▶ Principle 22.3 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall amend criminal laws on defamation and libel in favour of civil sanctions which must themselves be necessary and proportionate.'
- ▶ Principle 22.4 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'The imposition of custodial sentences for the offences of defamation and libel is a violation of the right to freedom of expression.'
- ▶ The Dakar Declaration provides, in its relevant part, that it calls on member states to 'repeal criminal defamation laws and laws that give special protections to officials and institutions.'
- ▶ Article 10(2) of the European Convention on Human Rights specifically provides, in its relevant part, that freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation ... of others ...'
- ▶ Article 19(3)(a) of the ICCPR specifically provides, in its relevant part, that the exercise of the right to freedom of expression 'may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of the ... reputations of others.'
- ▶ In Resolution 169, the ACHPR called on states parties to 'repeal criminal defamation laws or insult laws which impede freedom of speech and to adhere to the provisions of freedom of expression.'
- ▶ The Table Mountain Declaration provides that African states must abolish 'insult and criminal defamation laws.'
- ▶ Unesco's Media Development Indicators provide that defamation laws must 'impose the narrowest restrictions necessary to protect the reputation of individuals'. In this regard, Unesco's Media Development Indicators set out the characteristics of appropriate defamation laws, including that:
 - ▶ they do not inhibit public debate about the conduct of officials or official entities
 - ▶ they provide for sufficient legal defences such as:
 - › the statement was an opinion not an allegation of fact
 - › the publication/broadcast was reasonable or in the public interest

- › that it occurred during a live transmission
- › that it occurred before a court or elected body
- ▶ they provide for a regime of remedies that allow for proportionate responses to the publication or broadcasting of defamatory statements
- ▶ the scope of defamation laws is defined as narrowly as possible, including as to who may sue
- ▶ defamation law suits cannot be brought by public bodies, whether legislative, executive or judicial
- ▶ the burden of proof falls upon the plaintiff in cases involving the conduct of public officials and other matters of public interest
- ▶ there is a reasonable cut-off date, after which plaintiffs can no longer sue for an alleged defamation.

3.2.2 Summary

- ▶ While protecting the reputations of others is a legitimate ground for regulating, or even prohibiting, expression by the media (print, broadcasting or online), laws relating to defamation:
 - ▶ must not:
 - › criminalise defamation but ought instead to impose post-publication civil sanctions, such as damages awards
 - › inhibit public debate about the conduct of officials or official entities who are required to tolerate a greater degree of criticism than ordinary members of the public
 - › allow defamation law suits to be brought by public bodies, whether legislative, executive or judicial
 - ▶ must:
 - › provide for legal defences to a defamation suit including that:
 - › the statement was true and was made in the public interest
 - › the statement was an opinion not an allegation of fact
 - › publication/broadcasting was reasonable or in the public interest
 - › it occurred during a live transmission
 - › it occurred before a court or elected body
 - › provide for a range of appropriate and proportionate remedies for the publication of defamatory material
 - › ensure the burden of proof falls upon the plaintiff in cases involving the conduct of public officials and other matters of public interest
 - › ensure there is a reasonable cut-off period, after which plaintiffs can no longer sue for an alleged defamation.

3.2.3 Comment

- ▶ A summary of the contours of internationally accepted standards for defamation law clearly lays out a progressive vision which puts the public interest ahead of the reputations of, particularly, public figures. The reality, however, is that most southern African countries' defamation laws fall far short of these standards, as will be seen in the country chapters.
- ▶ One of the most important developments since the publication of the first edition of this handbook has been the judgment of the African Court of Human and Peoples' Rights in the case of *Konate v Burkina Faso*.²¹ In this critically important case for the development of African defamation law, the Court held that 'apart from serious and very exceptional circumstances ... violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences ...'.²² The effect of this is that, in most cases, a jail sentence would be an inappropriate sentence for a violation of a law limiting freedom of expression. Further, the court noted that 'other criminal sanctions, be they fines, civil or administrative, are subject to the criteria of necessity and proportionality; which therefore implies that if such sanctions are disproportionate, or excessive, they are incompatible with ... relevant human rights instruments.'²³

3.3 Protecting the rights of others generally

3.3.1 Relevant provisions in international instruments

- ▶ Principle 23.3 of the African Principles on Freedom of Expression and Access to Information Declaration provides that 'States shall not prohibit speech that merely lacks civility or which offends or disturbs.'
- ▶ Article 10(2) of the European Convention on Human Rights specifically provides, in its relevant part, that freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the ... rights of others ...'
- ▶ Article 19(3)(a) of the ICCPR specifically provides, in its relevant part, that the exercise of the right to freedom of expression 'may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of the rights ... of others.'
- ▶ Article 58 of the WSIS Geneva Principles provides that 'The use of ICTs and content creation should respect human rights and fundamental freedoms of others, including ... the right to freedom of thought, conscience and religion in conformity with relevant international instruments.'

3.3.2 Summary

Protecting the rights of others does not mean outlawing offensive or disturbing expression.

3.3.3 Comment

- ▶ The wording of this ground is extremely vague and will usually be subsumed under other more specific grounds, such as reputation, privacy or morality. It is included here because it features in at least three international instruments.
- ▶ However, it is important to note that no one has the right not to be offended or disturbed by expression — that is recognized as going to far in protecting the rights of others.

3.4 Protecting privacy

3.4.1 Relevant provisions in international instruments

- ▶ Principle 22.3 of the African Principles on Freedom of Expression and Access to Information Declaration provides that ‘Privacy ... laws ‘shall not inhibit the dissemination of information of public interest.’
- ▶ The Unesco Media Development Indicators provide that ‘restrictions upon freedom of expression ... based on ... privacy ... should be clear and narrowly defined in law and justifiable as necessary in a democratic society in accordance with international law and that such laws should be subject to a public interest override where appropriate.’
- ▶ Article 58 of the WSIS Geneva Principles provides that ‘the use of ICTs and content creation should respect human rights and fundamental freedoms of others, including personal privacy ... in conformity with relevant international instruments.’

3.4.2 Summary

The right to privacy must be capable of being overridden in the public interest.

3.4.3 Comment

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

3.5 Regulating obscenity and protecting children and morals

3.5.1 Relevant provisions in international instruments

- ▶ In its relevant part, paragraph 3 of principle 3 of the African Declaration on Internet Rights and Freedoms essentially provides that ‘the right to freedom of expression on the internet should not be subject to any restrictions, except those which ... pursue a legitimate aim as expressly listed under international human rights law (namely ... the protection of ... public ... morals) ...’
- ▶ Article 10(2) of the European Convention on Human Rights specifically

provides, in its relevant part, that freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of ... morals ...'

- ▶ Article 19(3)(b) of the ICCPR specifically provides, in its relevant part, that the exercise of the right to freedom of expression 'may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for the protection of ... morals ...'
- ▶ Article 29(3)(a) of the Malabo Convention deals with 'content related offences' specific to Information and Communication Technologies and it requires states parties to 'take the necessary legislative and/or regulatory measures to make it a criminal offence to: ... disseminate ... an image or a representation of child pornography through a computer system.'
- ▶ The Unesco Media Development Indicators provide that 'restrictions upon freedom of expression ... based on ... obscenity should be clear and narrowly defined in law and justifiable as necessary in a democratic society in accordance with international law and that such laws should be subject to a public interest override, where appropriate.'
- ▶ Article 59 of the WSIS Geneva Principles provides that 'All actors in the Information Society should take appropriate actions and preventive measures as determined by law, against abusive uses of ICTs such as ... all forms of child abuse, including paedophilia and child pornography and trafficking in, and exploitation of, human beings.'

3.5.2 Summary

- ▶ While protecting children and morality are both legitimate grounds for regulating or even prohibiting expression, particularly of obscene materials, by the media, this cannot prevent the publication of information in the public interest.
- ▶ Regulating access to public entertainments (such as films, whether to be shown in cinemas or broadcast) to prevent access for the moral protection of children and adolescents, is a legitimate ground for prior censorship. In other words, a government or regulatory body can rule on whether or not and, if so, how, the publication or exhibition of public entertainments is to take place — for example, by imposing age restrictions on films.

3.5.3 Comment

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

broadcasting of materials based on the ground of ‘morality’ due to the difficulty of setting a national standard for morality. This is often a highly subjective matter, particularly in multicultural societies.

3.6 Propaganda for war

3.6.1 Relevant provisions in international instruments

Article 20(1) of the ICCPR provides that ‘Any propaganda for war shall be prohibited by law.’

3.6.2 Summary

Propaganda for war is prohibited and engaging in it is an offence.

3.6.3 Comment

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

3.7 Hate speech or discriminatory speech

3.7.1 Relevant provisions in international instruments

- ▶ Principle 23.1 of the African Principles on Freedom of Expression and Access to Information Declaration states that ‘States shall prohibit any speech that advocates from national, racial, religious or other forms of discriminatory hatred which constitutes incitement to discrimination, hostility or violence.’
- ▶ Principle 12 of the Camden Principles provides that states ‘should adopt legislation prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.’
- ▶ Article 4(a) of the Convention on the Elimination of Racial Discrimination provides, in its relevant part, ‘states parties condemn all propaganda ... which ... [is] based on ideas or theories of superiority of one race or group of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to ... such discrimination and to this end ... Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin ...’
- ▶ Article 20(2) of the ICCPR provides that ‘Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.’

- ▶ Article 29(3) of the Malabo Convention deals with 'content related offences' specific to Information and Communication Technologies:
 - ▶ Sub-article (e) requires states parties to 'take the necessary legislative and/or regulatory measures to make it a criminal offence to ... disseminate ... ideas or theories of [a] racist or xenophobic nature through a computer system.'
 - ▶ Sub-article (g) requires states parties to 'take the necessary legislative and/or regulatory measures to make it a criminal offence to: assault, through a computer system, persons for the reason that they belong to a group distinguished by race, colour, descent, national or ethnic origin, or religion or political opinion ... or against a group of persons distinguished by any of these characteristics.'
 - ▶ Sub-article (h) requires states parties to 'take the necessary legislative and/or regulatory measures to make it a criminal offence to: 'deliberately deny, approve or justify acts constituting genocide or crimes against humanity through a computer system.'
- ▶ The Unesco Media Development Indicators provide that 'restrictions upon freedom of expression ... based on ... hate speech ... should be clear and narrowly defined in law and justifiable as necessary in a democratic society in accordance with international law and that such laws should be subject to a public interest override, where appropriate.'
- ▶ Article 59 of the WSIS Geneva Principles provides that 'All actors in the Information Society should take appropriate actions and preventive measures, as determined by law, against abusive uses of ICTs, such as illegal and other acts motivated by racism, racial discrimination, xenophobia and related intolerance, hatred, violence ...'

3.7.2 Summary

- ▶ Hate speech is the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.
- ▶ Discriminatory speech is propagating the idea of the superiority of one race or group or one colour or ethnic or national origin.
- ▶ Dissemination of hate or discriminatory speech or of the denial or justification of genocidal crimes against humanity should be an offence.
- ▶ Preventing hate or discriminatory speech are both legitimate grounds for regulating, or even prohibiting, expression by the media.

3.7.3 Comment

- ▶ As was the case for propaganda for war, the international community uses particularly strong language in relation to hate or discriminatory speech, or speech which denies or justifies genocide or crimes against humanity, and it

requires that the dissemination of these be made an offence under national law.

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

3.8 Protection of national security or territorial integrity

3.8.1 Relevant provisions in international instruments

- ▶ In its relevant part, paragraph 3 of principle 3 of the African Declaration on Internet Rights and Freedoms provides that the right to freedom of expression on the internet 'should not be subject to any restrictions, except those which ... pursue a legitimate aim as expressly listed under international human rights law (namely ... the protection of national security ...) ...'
- ▶ Principle 22.4 of the African Principles on Freedom of Expression and Access to Information Declaration states that 'Freedom of expression shall not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.'
- ▶ Article 10(2) of the European Convention on Human Rights specifically provides, in its relevant part, that freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security [and] territorial integrity ...'
- ▶ Article 19(3)(b) of the ICCPR specifically provides, in its relevant part, that the exercise of the right to freedom of expression 'may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for the protection of national security ...'
- ▶ Principles 1(c) and (d), read together with principles 2(a) and (b) and principle 6 of the Johannesburg Principles, provide that the exercise of the right to freedom of expression 'may be subject to restrictions ... for the protection of national security. No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restrictions rests with the government ... A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use, or threat, of force or its capacity to respond to the use, or threat, of force, whether from an external source, such as a military threat, or an internal

source, such as incitement to violent overthrow of the government. In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security. For example, this could include protecting a government from embarrassment or exposure of wrongdoing, concealing information about the functioning of its public institutions, entrenching a particular ideology or suppressing industrial unrest.'

- ▶ Principle 23 of the Johannesburg Principles provides that 'Expression shall not be subject to prior censorship in the interest of protecting national security, except in a time of public emergency which threatens the life of the country ...'
- ▶ The Unesco Media Development Indicators provide that 'restrictions upon freedom of expression ... based on ... national security ... should be clear and narrowly defined in law and justifiable as necessary in a democratic society in accordance with international law and that such laws should be subject to a public interest override where appropriate.'
- ▶ The Unesco Media Development Indicators provide that 'national security restrictions must not inhibit public debate about issues of public concern.'

3.8.2 Summary

- ▶ Protecting national security or territorial integrity are both legitimate grounds for regulating, or even prohibiting, expression by the media. This cannot inhibit public debate on matters of public concern.
- ▶ Restricting the media's right to freedom of expression on the basis of a national security interest is not legitimate:
 - ▶ unless it can be shown that:
 - › the restriction will protect a country's existence or its territorial integrity against the threat of force, whether external or internal
 - › there is a causal link between the expression and the risk of the threat of force
 - ▶ if it protects interests unrelated to national security, including, for example:
 - › protecting a government from embarrassment or exposure of wrongdoing
 - › concealing information about the functioning of its public institutions
 - › entrenching a particular ideology
 - › suppressing industrial unrest.

3.8.3 Comment

- ▶ It is interesting to note that the international instruments go into a great deal of detail as to when resorting to a 'national interest' restriction would not be

legitimate. This is undoubtedly due to the history of the near-systematic abuse of this otherwise legitimate ground for media restriction by many government officials, particularly in the security forces.

- ▶ It is noteworthy that the international instruments detail the nature of the threat to national security and its relationship to the proposed restricted expression that must exist before such a ground will be legitimate.
- ▶ Very few national laws, particularly in southern African countries, comply with these requirements.

3.9 War or state of emergency

3.9.1 Relevant provisions in international instruments

- ▶ Article 15(1) of the European Convention on Human Rights provides that 'In a time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'
- ▶ Principle 3 of the Johannesburg Principles provides that 'In a time of public emergency which threatens the life of the country and the existence of which is officially and lawfully proclaimed in accordance with both national and international law, a state may impose restrictions on freedom of expression and information but only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government's other obligations under international law.'
- ▶ Principle 23 of the Johannesburg Principles provides that 'Expression shall not be subject to prior censorship in the interest of protecting national security, except in a time of public emergency which threatens the life of the country ...'
- ▶ The Unesco Media Development Indicators expressly provide that laws must 'not allow state actors to seize control of broadcasters during an emergency.'

3.9.2 Summary

- ▶ War or a state of emergency are both legitimate grounds for regulating, or even prohibiting, expression by the media, including by means of prior censorship, provided that this is done only for the period of time strictly necessary in the circumstances.
- ▶ Emergency laws must not allow states to seize control of broadcasters during an emergency.

3.9.3 Comment

- ▶ Comments are confined only to issues on states of emergency.

- ▶ Many governments abuse emergency powers and use them to stifle dissent rather than to protect the population. One of the most important aspects of the internationally articulated standards for emergency restrictions is the requirement that these last for a limited period only. Consequently, states of emergency that are said to be 'indefinite', or which, in practice, last for years or decades, do not meet international standards of legitimacy.
- ▶ Another noteworthy aspect is the requirement that emergency laws do not allow state organs to seize control of broadcasters during an emergency. Many national broadcasting laws allow for broadcasters to be required to broadcast public service announcements by government during public emergencies. This is obviously very different from governments taking over a broadcaster altogether.

3.10 Protection of public order or safety

3.10.1 Relevant provisions in international instruments

- ▶ In its relevant part, paragraph 3 of principle 3 of the African Declaration on Internet Rights and Freedoms provides that the right to freedom of expression on the internet 'should not be subject to any restrictions, except those which ..., pursue a legitimate aim as expressly listed under international human rights law (namely ... the protection of ... public order...) ...'
- ▶ Principle 9.3.b of the Principles of African Freedom of Expression and Access to Information Declaration provides that 'A limitation shall serve a legitimate aim where the objective of the limitation is ... to protect ... public order ...'
- ▶ Article 10(2) of the European Convention on Human Rights specifically provides, in its relevant part, that freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of ... public safety ... [and] for the prevention of disorder ...'
- ▶ Article 19(3)(b) of the ICCPR specifically provides, in its relevant part, that the exercise of the right to freedom of expression 'may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for the protection of ... public order ...'

3.10.2 Summary

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

3.10.3 Comment

- ▶ As is the case with emergency provisions, governments often abuse the

grounds of public order or public safety to restrict the publication of legitimate expressions of dissent. National laws often do not comply with internationally articulated standards in regard to these grounds.

3.11 Protection of public health

3.11.1 Relevant provisions in international instruments

- ▶ In its relevant part, paragraph 3 of principle 3 of the African Declaration on Internet Rights and Freedoms essentially provides that the right to freedom of expression on the internet ‘should not be subject to any restrictions, except those which ... pursue a legitimate aim as expressly listed under international human rights law (namely ... the protection of ... public health ...) ...’
- ▶ Principle 9.3.b of the Principles of African Freedom of Expression and Access to Information Declaration provides that ‘A limitation shall serve a legitimate aim where the objective of the limitation is ... to protect ... public health.’
- ▶ Article 10(2) of the European Convention on Human Rights specifically provides, in its relevant part, that freedom of expression ‘may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of health ...’
- ▶ Article 19(3)(b) of the ICCPR specifically provides, in its relevant part, that the exercise of the right to freedom of expression ‘may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for the protection of ... public health ...’

3.11.2 Summary

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

3.11.3 Comment

A number of countries have introduced prohibitions on disinformation regarding Covid-19 as part of emergency provisions to deal with the pandemic. However, there have been a number of instances where disinformation provisions have been abused by governments to stifle legitimate criticism of official action in response to the pandemic.

3.12 Maintaining the authority and impartiality of the judiciary

3.12.1 Relevant provisions in international instruments

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

formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for maintaining the authority and impartiality of the judiciary ...'

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

3.12.2 Summary

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

3.12.3 Comment

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

- ▶ the rule against scandalising the court: This is where attacks on the judiciary are such that they undermine the administration of justice. This obviously goes far beyond fair and reasonable comment and criticism of judgments and judges which does not undermine the administration of justice.
- ▶ the *sub judice* rule: This is where the outcome of a judicial proceeding is effectively preempted or prejudiced through the publication of information which also undermines the administration of justice.

3.13 For the prevention of crime

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

3.14 Prevent the disclosure of information received in confidence

3.14.1 Relevant provisions in international instruments

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

3.14.2 Comment

This provision can operate in at least two ways:

- ▶ to protect the government's ability to secure the free flow of confidential information to itself
- ▶ to protect the media's ability to guarantee confidential sources of information.

Many countries secure the former without sufficiently protecting the latter.

4 Laws that hinder the media in performing its role

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

- ▶ democratic media regulation
- ▶ democratic broadcasting regulation
- ▶ democratic internet regulation
- ▶ restricting publication or broadcasting by the media.

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

- ▶ unreasonably restrict market entry — that is, which act as a barrier to establishing independent media sources
- ▶ provide for prior censorship
- ▶ favour individual rights, particularly of public officials, over the public's right to know
- ▶ do not comply with internationally accepted restrictions on the publication of obscene materials
- ▶ do not comply with internationally accepted restrictions on the publication of propaganda for war or hate speech
- ▶ do not comply with internationally accepted restrictions on the publication of information which threatens national security, territorial integrity and public order

- ▶ do not comply with internationally accepted restrictions on the publication of information which threatens law enforcement
- ▶ provide for indefinite states of emergency
- ▶ do not comply with internationally accepted restrictions on the publication of information which undermines the judiciary
- ▶ criminalise defamation.

4.1 Laws that unreasonably restrict market entry

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

Note that licensing is, in fact, required in respect of broadcasting due to the need to regulate frequency spectrum use effectively. However, there is no requirement to license a person to provide content online (outside of some very specific exceptions for scheduled programming streamed online). Recently Tanzania re-enacted regulations to license (at an exorbitant fee) online content providers such as bloggers²⁴ but it remains to be seen if these will go unchallenged.

4.2 Laws that provide for prior censorship

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

It is clear from the plethora of prohibitions against the publication of different types of information that censorship is a feature of African media law. Surprisingly many prohibitions remain in place from the colonial era, cementing censorship and denying people their rights to receive information and ideas. This issue is one of the most pressing areas for law reform in southern Africa to secure press freedom in the region.

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

In an effort to guard against embarrassing public revelations in the media, governments sometimes enact (or deliberately fail to repeal) laws which provide a great deal of protection for private and even public figures at the expense of the media's right to publish or broadcast and the public's right to know.

Thus, criminal defamation laws, insult laws or civil defamation laws — whether provided for in a statute or in the common law, as determined by the judiciary — that do not comply with internationally accepted standards for laws protecting privacy, reputations, or the rights of others, greatly hinder the media in its operations.

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

Although many southern African countries continue to have criminal defamation laws on their statute books, it is important to note that international best practice standards indicate that the appropriate way of protecting against defamation is through civil sanctions such as damages awards, and not through criminal sanctions such as fines and/or periods of imprisonment.

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

Generally, the mainstream media does not often fall foul of laws that regulate obscenity, morality or which aim to protect children. However, in the recent past, there have been a number of examples in Africa where obscenity laws have been invoked by officials to try to prevent the publication of news and information that is in the public interest.

In one instance, an editor of a publication running a story about the state of public health care in Zambia faced obscenity charges for circulating to public officials (not even publishing) photographs of a woman giving birth on the pavement outside a hospital.²⁵

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

Prohibitions on the ground of ‘morality’ or ‘obscenity’ are increasingly outdated; with many developed-country jurisdictions recognizing the rights and the freedoms of adults to make their own moral judgements on expression-related issues.

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

Although one generally associates the passage of hate speech legislation with progressive governments anxious to protect citizens from racism or other

discrimination, governments sometimes make use of such legislation to stifle dissent and prevent the publication of material in the public interest. Further, a perennial problem with hate speech and anti-discrimination restrictions is that they are often too broadly framed, capturing legitimate content within the net of prohibitions on hate or discriminatory speech.

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

Unfortunately, governments often confuse national security with government popularity. Thus, a threat to a government's standing or popularity among citizens is seen as a threat to 'national security' or 'public order'. This means that governments often abuse legitimate grounds for limiting media expression of national security or territorial integrity for their own, as opposed to the public, interests.

Unfortunately, a large number of national laws relating to security issues — such as defence, intelligence, classified information, terrorism and the like — often do not comply with internationally accepted standards for such legislation. These standards have been set out chapters 1 and 2.

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

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

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

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

4.8 Laws that provide for indefinite states of emergency

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

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

As a general rule it is rare that the judiciary acts in such a way as to unreasonably prevent the media from publishing information in the public interest. However, laws such as the *sub judice* rule in common law can be abused in ways that harm the media and prevent it from carrying out its functions.

For example, sometimes public officials involved in court proceedings cite the *sub judice* rule as a reason for providing no information to the media, even if the case is on a matter of public importance and the publication of information would not prejudice the outcome of the case.

5 Laws that assist the media to perform its various roles

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

- ▶ democratic media regulation
- ▶ democratic broadcasting regulation
- ▶ democratic internet regulation
- ▶ restricting publication or broadcasting by the media.

There are also other kinds of laws that greatly assist the media, if only indirectly, in its day to day operations, as well as in terms of building long-term support for media freedom.

While it is difficult to give a definitive or even comprehensive list of the kinds of laws that assist the media, seven types of laws have been selected, which are commonly seen as supporting the functioning of the media, namely:

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

5.1 Constitutions

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

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

- ▶ an independent judiciary that has the final say over the legal interpretation of the provisions of the constitution should be provided for in the constitution.
- ▶ general public watchdog bodies to protect the public from abuses of power and to preserve constitutional values should be established by the constitution. Bodies that can perform these roles include human rights commissions, public protectors or a public ombudsman.

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

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

- ▶ ensuring that regulation does not result in the public being unreasonably denied access to news and information in the public interest
- ▶ ensuring a media environment that supports values such as diversity, independence, freedom of expression and of the press and professionalism in the media.

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

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

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

5.4 Laws that comply with internationally accepted standards for democratic internet regulation

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

- ▶ ensuring that regulation does not result in the public being unreasonably denied access to news and information online in the public interest, including through guarding against government interference with the internet such as internet or social media blackouts, and internet throttling

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

5.5 Laws that comply with internationally accepted standards for restricting publication (including online) or broadcasting by the media

If all laws that restrict what the media may publish (whether in print or online) or broadcast were to comply with internationally accepted standards for restricting publication or broadcasting by the media (set out previously in this chapter), this will assist the media to perform its roles effectively by ensuring that regulation does not result in the public being unreasonably denied access to news and information in the public interest.

5.6 Access to information legislation

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

Access to information statutes almost always provide for grounds upon which disclosure of the information or access to the records requested can be denied. Generally, these grounds are there to protect important societal interests, such as crime prevention, national security, privacy or information provided in confidence.

Progressive access to information laws will contain a public interest override clause, allowing for the information to be disclosed if there is an overwhelming public interest in the information being made public (for example, if this will provide evidence of a crime or public wrongdoing), even if the information falls within one of the grounds for non-disclosure.

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

5.7 Whistleblower protection and anti-corruption laws

Other laws that are often particularly useful for journalists are statutes designed to promote good governance by supporting anti-corruption measures. Thus, anti-corruption statutes or statutes that provide 'whistleblower' protection for those who alert the authorities (or the media) to public wrongdoing, particularly criminal

activities by public officials, help to provide an environment in which the media is able to access sources of public interest information without those sources suffering abuse or retaliation as a result.

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

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

Notes

- 1 <http://www.article19.org/data/files/pdfs/standards/accessairwaves.pdf> [accessed 28 April 2019]
- 2 <https://africaninternetrights.org/articles/#download-lang> [accessed 28 April 2019]
- 3 <https://www.achpr.org/legalinstruments/detail?id=69#:~:text=The%20Declaration%20of%20Principles%20of,2019%20in%20Banjul%2C%20The%20Gambia.> [accessed 16 June April 2020]
- 4 <http://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf> [accessed 30 April 2019]
- 5 <http://www.unesco.org/new/en/communication-and-information/flagship-project-activities/worldpress-freedom-day/previous-celebrations/worldpressfreedomday200900000/dakar-declaration/> [accessed 28 April 2019]
- 6 http://www.wan-ifra.org/sites/default/files/field_article_file/Declaration%20of%20Table%20Mountain%20Eng%20text.pdf [accessed 28 April 2019]
- 7 https://www.echr.coe.int/Documents/Convention_ENG.pdf%23page=9 [accessed 30 April 2019]
- 8 <https://www.refworld.org/docid/3ae6b3940.html> [accessed 30 April 2019]
- 9 <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf> [accessed 30 April 2019]
- 10 <http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf> [accessed 28 April 2019]
- 11 <https://au.int/en/treaties/african-union-convention-cyber-security-and-personal-data-protection> [accessed 29 April 2019]
- 12 <http://www.achpr.org/sessions/48th/resolutions/169/> [accessed 28 April 2019]
- 13 <https://unesdoc.unesco.org/ark:/48223/pf0000367617?posInSet=1&queryId=a46642b0-1893-4f04-9bfb-b832b0851652> [accessed 1 December 2020]
- 14 <https://unesdoc.unesco.org/ark:/48223/pf0000163102> [accessed 28 April 2019]
- 15 <http://www.itu.int/wsis/docs/geneva/official/dop.html> [accessed 28 April 2019]
- 16 <https://www.iol.co.za/news/africa/zimbabwe-internet-blackout-slammed-for-enabling-crimes-against-humanity-18867243> [accessed 1 May 2019]

- 17 <https://qz.com/africa/1513023/drc-shuts-down-internet-sms-ahead-of-election-results/> [accessed 1 May 2019]
- 18 For example, Zambia, <https://advox.globalvoices.org/2016/10/11/the-plight-of-the-zambian-watchdog-embattled-opposition-news-site-goes-down/> [accessed 1 May 2019].
- 19 <https://www.fin24.com/Opinion/shutting-down-the-internet-doesnt-work-but-governments-keep-doing-it-20190222-2> [accessed 1 May 2019].
- 20 Justine Limpitlaw Human Rights Impacts of Taxing Popular Internet Services: the Cases of Kenya, Tanzania and Uganda 2019 <https://www.apc.org/en/pubs/human-rights-impacts-taxing-popular-internet-services-cases-kenya-tanzania-and-uganda> [accessed 1 May 2019].
- 21 *Konate v Burkina Faso* Application No. 004/2013. <http://en.african-court.org/images/Cases/Judgment/Judgment%20Appl.0042013%20Lohe%20Issa%20Konate%20v%20Burkina%20Faso%20-English.pdf> [accessed 1 May 2019]
- 22 *Ibid.* At paragraph 165 of the judgment.
- 23 *Ibid.* At paragraph 166 of the judgment.
- 24 Justine Limpitlaw Human Rights Impacts of Taxing Popular Internet Services: the Cases of Kenya, Tanzania and Uganda 2019 <https://www.apc.org/en/pubs/human-rights-impacts-taxing-popular-internet-services-cases-kenya-tanzania-and-uganda> [accessed 1 May 2019]. The regulations which were the subject of this article were repealed and replaced with new ones in 2020 but these have not addressed the problem. See the chapter on Tanzania for more details.
- 25 <https://www.iol.co.za/news/africa/editor-held-over-obscene-picture-of-woman-449535> [accessed 1 May 2019].