



# **Democratic Republic of the Congo**

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# 1 Introduction

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The Democratic Republic of the Congo (DRC) is the second-largest country in Africa, with a population of approximately 84 million people.<sup>1</sup> The DRC gained independence from Belgium in 1960. Its post-independence history is bloody: the first post-independence leader, Patrice Lumumba, was assassinated in 1961. In 1965, military officer Mobutu Sese Seko assumed power after a period of civil war. Mobutu ruled his one-party state (which he renamed Zaire) until 1996, when he was ousted by an armed coalition led by Laurent Kabil. However, the country remained dangerously unstable and effectively in a state of civil war. In 2001, Laurent Kabil was assassinated by his bodyguard and was succeeded by his son, Joseph Kabil. Although Joseph Kabil is credited with introducing a number of important reforms, most notably a new constitution, his democratic credentials remained extremely poor. The last election which he won (in 2011) is disputed and lacked credibility due to widespread irregularities. President Kabil's second five-year term of office ended in December 2016, but the DRC failed to hold elections and he ruled without an electoral mandate, albeit with the backing of the Constitutional Court. In May 2016, the Constitutional Court, in a heavily criticised judgment, interpreted section 70 of the constitution, which provides that the president continues in office until the assumption of office of his successor, as entitling President Kabil to remain in office without an election having taken place. Critics argue that the Constitutional Court should have found section 75 of the constitution applicable — this provides for the Head of the Senate to assume office temporarily in the case of a presidential vacancy.<sup>2</sup>

In August 2018, President Kabil announced he would not be running for a third term and the ruling party chose Emmanuel Shadari, seen as a Kabil loyalist,<sup>3</sup> as its candidate for the presidential elections. The presidential elections were held on 30 December 2018.<sup>4</sup> The outcome of the election was extremely controversial. The Electoral Commission and the Constitutional Court certified that Felix Tshisekedi, an opposition figure, won the election. However, powerful institutions, such as the Catholic Church, disputed this, and it, and the international press, reported that another opposition leader, Martin Fayulu, had, in fact, won by a landslide as evidenced by leaked election data.<sup>5</sup>

At the time, the African Union called for the DRC to delay announcing the election results due to serious discrepancies between the provisional results announced by the Electoral Commission and the actual ballots cast.<sup>6</sup> This was ignored and, on 24 January 2019, Mr Tshisekedi (apparently with former-President Kabil's backing) was sworn in as the country's new president.<sup>7</sup> Mr Tshisekedi's election has since been accepted by the European Union and the United States of America. The AU also backtracked on its objections to the election results as it elected Mr Tshisekedi the second vice-president of the AU on 16 February 2019.<sup>8</sup>

The eastern part of the DRC remains in a state of armed conflict, and most of the population lives in dire poverty despite the country having an abundance of

*This chapter is also available in French as a downloadable pdf file at [www.kas.de/MediaLawAfrica](http://www.kas.de/MediaLawAfrica).*

natural resources.<sup>9</sup> At the time of writing, more than 13 million Congolese need humanitarian aid and more than 4.5 million are displaced — the highest number for the DRC in more than 20 years.<sup>10</sup>

Nevertheless, the twenty-first century has, in a number of respects, heralded a new era for the media in the DRC. Since the fall of Mobutu, independent newspapers and broadcasters — both radio and television — have flourished. There have also been significant changes in the regulation of the broadcast media, particularly through the establishment of the High Council for Broadcasting and Communications, a constitutionally recognised body. However, the DRC continues to be a country that clearly does not foster freedom of the press and the situation has deteriorated since President Kabila's second term of office came to an end in December 2016.<sup>11</sup> A number of laws limit the ability of the press to inform the public about matters of the day. All too often journalists are arrested and detained, and independent media houses are often raided and banned. In the case of broadcasters, many have had their broadcasting distribution signals suspended without notice.<sup>12</sup> The DRC features regularly on international lists of poor media environments, and there is little doubt that the country is, sadly, not in line with international standards for democratic media regulation. Internet and social media shut downs are frequent<sup>13</sup> even though internet penetration is extremely low at approximately 6%.<sup>14</sup>

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

- ▶ Media and the constitution
- ▶ Media-related legislation
- ▶ Media-related regulations
- ▶ Media self-regulation
- ▶ Media-related case law

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

## 2 The media and the constitution

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In this section, you will learn:

- ▷ the definition of a constitution
- ▷ what is meant by constitutional supremacy
- ▷ how a limitations clause operates
- ▷ which constitutional provisions protect the media
- ▷ which constitutional provisions might require caution from the media or might conflict with media interests
- ▷ what key institutions relevant to the media are established under the DRC Constitution
- ▷ how rights are enforced under the constitution
- ▷ what is meant by the 'three branches of government' and 'separation of powers'
- ▷ whether there are any clear weaknesses in the DRC Constitution that ought to be strengthened to protect the media

### 2.1 Definition of a constitution

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

The current Constitution of the DRC was adopted after a national referendum held in 2005. It came into force on 18 February 2006 and has been amended since then. The constitution contains the underlying principles and values of the DRC.

A key constitutional provision in this regard is the introductory section entitled 'Description of rationales'. This section sets out a number of essential principles of

the DRC Constitution. In brief, these are:

- ▶ *State and sovereignty*: This principle sets out that the DRC is divided into the capital and 25 provinces, with juristic personality and powers. However, it is important to note that, in practice, the DRC still operates with 11 provinces and has yet to implement these provincial constitutional provisions. This principle also reaffirms the democratic principle that all governmental authority emanates from the Congolese people.
- ▶ *Human rights, fundamental freedoms and duties of the citizen and the state*: This principle reaffirms the DRC's commitment to internationally accepted human rights and fundamental freedoms. Note that gender equality is specifically mentioned.
- ▶ *Organisation of governmental authority*: This principle lists the new institutions of the DRC, namely: the president, parliament, Cabinet and the courts. The objectives of all governmental institutions are to: ensure harmonious functioning of the state; avoid conflicts; institutionalise the rule of law; counter any tendency towards dictatorship; guarantee good governance; combat impunity; and preserve the principle of democratic succession.

## 2.2 Definition of constitutional supremacy

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

The constitution of the DRC does not explicitly refer to constitutional supremacy. In addition, the constitution is contradictory as to whether or not constitutional supremacy is in fact recognised. For example, section 221 stipulates that: 'Provided that they are not contrary to the present constitution, legislative and regulatory texts currently in force, remain valid until abolition or amendment.' This demonstrates an intention towards constitutional supremacy.

On the other hand, almost every fundamental right and freedom contained in the DRC Constitution is subject to an internal limitation, which essentially provides that the right is subject to ordinary legislation. Clearly, such provisions (and there are many in the DRC Constitution) undermine the notion of constitutional supremacy.

## 2.3 Definition of a limitations clause

It is clear that rights are not absolute as society would not be able to function. For example, if the right to freedom of movement were absolute, society would not be able to imprison convicted criminals. Similarly, if the right to freedom of expression were absolute, the state would not be able to protect its citizens from hate speech

or false defamatory statements made with reckless disregard for the truth. Clearly, governments require the ability to limit rights in order to serve important societal interests; however, owing to the supremacy of the constitution this can only be done in accordance with the constitution.

The DRC Constitution makes provision for two types of legal limitations on the exercise and protection of rights, which are contained in Part II of the constitution, Human Rights, Fundamental Freedoms and Duties of the Citizen and the State.

### **2.3.1 State of emergency derogations**

Section 85 of the Constitution of the DRC provides that the president may declare a state of emergency when circumstances exist that endanger the independence or territorial integrity of the country, or which disrupt the proper functioning of state institutions.

The president is first required to consult with the prime minister and with the presidents of both parliamentary chambers, that is, the National Assembly and the Senate. Section 85 further provides that the state of emergency is to be regulated by law.

Importantly, section 61 sets out the fundamental rights that may not be derogated from, even in a declared state of emergency. Unfortunately, the only right of real relevance to the media that is so protected from emergency provisions is the right to freedom of thought, conscience and religion.

### **2.3.2 Rights-specific limitations**

The second type of limitation that is unfortunately common in the Constitution of the DRC, is the undermining of a right contained in Part II in the actual wording of the right itself. Many constitutions contain a general limitations provision. General limitations provisions apply to the provisions of a bill of rights or other statement setting out the fundamental rights. These types of clauses allow a government to pass laws limiting rights, provided this is done in accordance with the constitution. These general limitations provisions usually contain wording which make it clear that statutory limitations of rights can be enacted only if these are reasonable and recognised internationally as being necessary in an open and democratic society.

The DRC Constitution, however, contains no such general limitations clause, and each right that ostensibly protects the public and the media is subject to an internal limitation of that right in the wording of the right itself.

The wording of the internal limitations contained in the provisions of Part II is consistent. In brief, such internal limitations take the following form: the right is subject to legislation.

There are no limitations on the nature of the legislation (or restrictions) that can be passed, such as being reasonable, in line with international rights and freedoms, or being necessary in an open and democratic society.

The effect of this limitation formulation is the almost universal undermining of the very concept of constitutional supremacy. The protection given by a constitutional right is entirely subjugated to the content of legislation passed by parliament, and no special requirements in respect of such rights-limiting legislation are required. The content of the various applicable limitations is dealt with in the discussion on the specific rights, below.

## 2.4 Constitutional provisions that protect the media

The Constitution of the DRC contains a number of important provisions in Part II, Human Rights, Fundamental Freedoms and Duties of the Citizen and the State, which directly protect the media, including publishers, broadcasters, journalists, editors and producers. There are, however, provisions elsewhere in the constitution that assist the media as it goes about its work of reporting on issues in the public interest, and these are also included in this section.

### 2.4.1 Rights that protect the media

#### Freedom of expression

The most important basic provision that protects the media is section 23, which states: 'Every person has the right to freedom of expression. This right implies the freedom to express one's opinions or beliefs, notably through speech, writings or pictures; in compliance with statutory provisions, public order and good morals.'

This provision needs some detailed explanation.

- ▶ The freedom applies to 'every person' and not just to certain people, such as citizens. Hence *everybody* enjoys this fundamental right.
- ▶ The freedom is not limited to spoken or written words but extends to non-verbal or non-written 'expression'. This provision expressly includes pictures within the right to freedom of expression.

There are, however, some serious concerns with the formulation of this right, given that it contains the internal limitation that the right is exercised 'in compliance with statutory provisions, public order and good morals'. Clearly, legislation that governs freedom of expression trumps the constitutional right to such expression. This renders the right effectively meaningless.

#### Access to information and freedom of the press

Linked to the right to freedom of expression, but of more explicit importance for the media, is section 24, which provides that:

*Everyone has the right of access to information. Press freedom, freedom of access to information and broadcasting through radio and television, the print media or by the use of any other means of communication, are guaranteed, subject to the preservation of public*

*order, good morals and the rights of others. Legislation is to govern the exercise of these rights. State-owned audio-visual and print media are public entities, to which fair access is guaranteed to all political and social trends. The status of the State-owned media is governed by national law which guarantees the objectivity, impartiality and pluralistic approach to opinions in the processing and dissemination of information.*

This provision is very important for a number of reasons:

- ▶ It specifically and explicitly guarantees the right of access to information and does not distinguish between state-held or privately-held information.
- ▶ It specifically protects the right to broadcast, and to use the print media and other forms of communication.
- ▶ It specifically mentions state-owned media (broadcast and print) and stipulates that these are to be governed by laws guaranteeing objectivity, impartiality and pluralism.

There are, however, some serious concerns with the formulation of this right, given that it contains the internal limitation that 'legislation is to govern the exercise of these rights'. Obviously, legislation that governs the exercise of the right to access to information and press freedom trumps the constitutional right to such freedoms. Again, this renders the rights effectively meaningless.

### **Privacy**

Section 31 of the DRC Constitution provides that 'Everyone has the right to privacy and is entitled to confidentiality in respect of personal correspondence, telecommunications or any other form of communication'. These rights may be infringed upon only in instances provided for in legislation. It is important to note the protection given to personal communication which also protects journalists' notebooks, computers and general communication with their sources.

There are, however, some serious concerns with the formulation of this right, given that it contains the internal limitation that 'these rights may be infringed upon in instances provided for in legislation'. Clearly, legislation that details how rights may be infringed upon trumps the constitutional right to such rights. Again, this renders the rights effectively meaningless.

### **Freedom of thought, conscience and religion**

The right to freedom of opinion is specifically provided for in section 23, dealt with above. However, it is important to note that section 22 also protects the right to freedom of thought, conscience and religion. Section 22 specifically recognises the right of everyone freely to express his or her 'personal convictions', either alone or in a group, privately or in public. However, this is subject to law, public order, good morals and the rights of others. Furthermore, section 22 specifically provides that this freedom is to be governed by legislation.

The freedom to hold and impart opinions is important for the media as it protects journalistic commentary on public issues of importance.

There are, however, some serious concerns with the formulation of this right, given that it contains the internal limitation that these rights are 'subject to law, public order, good morals and the rights of others'. Legislation that details how rights may be infringed upon trumps the constitutional right to such rights. Again, this renders the rights effectively meaningless.

### **Freedom of association**

Another important protection is provided for in section 37, in which the state guarantees freedom of association. Section 37 also stipulates that public authorities are to cooperate with those associations that promote the social, economic, intellectual, educational, moral and spiritual development of society. This protects the rights of the press to form press associations as well as to form media houses and operations. Similarly, section 38 guarantees the right to form trade unions. This protects journalists and media workers who want to form media-related trade unions.

There are, however, some serious concerns with the formulation of these rights, given that both sections 37 and 38 specifically provide that laws are to prescribe how the rights are to be exercised. It is clear that legislation that details how rights may be infringed upon trumps the constitutional right to such rights. Again, this renders the rights effectively meaningless.

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

Note that there are provisions in the DRC Constitution, apart from the human rights provisions, which are important and which assist the media in performing its functions.

#### **Provisions regarding illiteracy eradication**

Section 44 specifically commits the state to eradicating illiteracy and the government is under a constitutional obligation to develop a programme to do so. Having a literate population is particularly important for the growth and development of the print and online media.

#### **Provisions regarding intellectual property rights and cultural heritage protection**

Section 46 of the DRC Constitution protects, among other things, the rights of authors. Intellectual property rights are guaranteed and stated to be protected by law. Furthermore, the state undertakes in this section to protect the 'national cultural heritage' to ensure its promotion. Arguably, the latter state undertaking could support local media.

### **Provisions regarding the functioning of parliament**

Section 107 of the constitution deals with actions that can be taken against members of parliament (MPs). The first sentence in section 107 specifically states that no MP may be prosecuted, arrested, detained or convicted on the basis of opinions expressed or votes taken while in office. However, the next three sentences of section 107 provide for a number of instances in which MPs can be arrested, prosecuted or detained. These are for crimes outside parliament and special protections, including authorisation by parliament itself, are required. The provisions enable MPs to speak freely during parliamentary proceedings without facing arrest or legal proceedings.

Section 118 of the constitution provides that sessions of the National Assembly and the Senate (that is, of parliament) are open to the public, unless held *in camera*. This means that, generally speaking, the media has access to the workings of parliament by being able to be physically present in parliament.

### **Provisions regarding the functioning of the courts**

Section 20 provides that court proceedings are to be held in public unless such proceedings will endanger public order or offend public morality. Section 21 further provides, among other things, that all judgments must be read out in public.

The effect of these provisions is that, unless proceedings are held *in camera*, the media will have access to the workings of the courts by being able to be physically present in court, both for proceedings and judgments.

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

As set out above, all the rights or freedoms that ostensibly protect the media contain internal limitations which give law-makers the power to limit or otherwise deny individuals and the media their fundamental rights and freedoms. Furthermore, there are other rights or freedoms that can be used to protect individuals and institutions from the media. It is important for journalists to understand which provisions in the constitution can be used against the media. There are a number of these in the DRC Constitution.

### **2.5.1 Right to dignity**

The right to human dignity is provided for in section 11, which provides that 'All human beings have equal status in dignity'. Dignity is a right that is often raised in defamation or slander cases because defamation, by definition, undermines the dignity of the person being defamed. This right is one that is often set up against the right to freedom of the press, requiring a balancing of constitutional rights. Interestingly, there is no internal limitation on the right to dignity.

### **2.5.2 Right to privacy**

Similarly, the right to privacy (discussed in some detail above) is often raised in litigation involving the media, with subjects of press attention asserting their rights not to be photographed, written about or followed in public, among other things. The media does have to be careful in this regard. Journalists should be aware that there are always 'boundaries' in respect of privacy that need to be respected and which are dependent on the particular circumstances, including whether or not the person is a public figure or holds public office and the nature of the issue being dealt with by the media.

### **2.5.3 Respecting the rights of others**

Section 16 contains an interesting provision which may affect the work of journalists and the media generally. The second sentence of this section provides that everyone has the right to life, physical integrity and to freely develop his or her personality, while abiding by the law, public order, public morality and avoiding infringing upon the rights of others. This is an extraordinary provision because it not only envisages a balancing of rights between individuals, but it elevates legislation and public order and public morality to the same level as the constitutional rights of individuals. This provision is so broadly framed that it could be used to justify a number of limitations on the expressive rights of the press and the media, as well as on the informational rights of individuals.

### **2.5.4 States of emergency provisions**

It is also important to note the provisions in sections 85 and 61 of the DRC Constitution. These deal with states of emergency and non-derogation of rights, respectively, and have already been dealt with under the discussion on limitations above.

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

There are a number of important institutions in relation to the media which are established under the DRC Constitution. These include the High Council of Broadcasting and Communication, the Human Rights Commission and the judiciary.

### **2.6.1 The High Council of Broadcasting and Communication**

Section 212 of the DRC Constitution establishes the High Council of Broadcasting and Communication (HCBC), which is vested with legal personality. The section provides that the HCBC's role, in compliance with the law, is to:

- ▶ protect and preserve freedom of the press
- ▶ protect and preserve all means of mass communication

- ▶ enforce compliance with a code of conduct regarding matters relating to information
- ▶ monitor fair access to state-owned media by all political parties, associations and citizens.

The HCBC is therefore confined to operating within the strictures of broadcasting and/or related communications legislation. Section 212 also provides that the HCBC's composition, powers, organisation and functions are to be governed by parliamentary legislation (as opposed to presidential ordinances).

It is important to note that section 212 is the only section under Part V, 'Institutions that support democracy'.

### **2.6.2 The Human Rights Commission**

Section 222 of the constitution empowers parliament to establish any other institution that would support democracy. Parliament has enacted the Human Rights Commission Act, Act 13/011 of 2013 (the HRC Act).

Section 1 of the HRC Act establishes the Human Rights Commission (the HR Commission) as an independent body with legal personality.

In terms of section 14 of the HRC Act, the HR Commission consists of nine members. In terms of section 16 of the HR Act, the National Assembly develops a list of recommended candidates of twice the number of commission seats to be filled. In terms of section 17, the president appoints the commissioners from the list of recommended candidates by way of a presidential ordinance. Their terms of office are for five years and this is renewable once – section 19. The HR Commission has the ability to establish committees in terms of section 12 with specified mandate areas such as: civil, political, socio-economic and cultural rights, as well as rights of particular groups such as women, children and the disabled.

Section 15 read with section 18 of the HRC Act, sets out the criteria to be a commissioner. Persons who are disqualified in terms of section 18 include: members of government, the police or military, magistrates, public servants, members of political parties and employees of state-owned enterprises. The positive criteria for appointment set out in section 15 include: DRC Citizenship, being at least 30 years of age, be a university graduate and have at least five years of professional experience with a manifest interest in the field of human rights.

The powers of the HR Commission are set out in section 6 of the HRC Act and they include the power to:

- ▶ investigate any alleged violation of human rights
- ▶ assist complainants in court cases involving human rights violations
- ▶ conduct prison visits to uphold human rights in the prisons
- ▶ safeguard the rights of women, children, the disabled and the elderly, as well as those living with HIV Aids

- ▶ promote awareness of human rights within the society
- ▶ assist other human rights organisations to protect human rights
- ▶ make recommendation for legislative amendments to parliament.

The HR Commission submits its Annual Report to the president and to the National Assembly in terms of section 7. It is noteworthy that the HR Commission has the power to require police cooperation (section 30) and to enter any premises in furtherance of its work in terms of section 31. People seeking the assistance of the HR Commission have the right to remain anonymous in terms of section 32 of the HRC Act.

Importantly, from a freedom of expression point of view, section 35 provides that communications (verbal and written) by HR Commissioners cannot be subject to litigation, whether defamatory, in breach of official secrets and the like.

### 2.6.3 The judiciary

Part III of the DRC Constitution is headed 'Judicial authority'. In terms of section 149, judicial authority is exercised in the DRC by the following courts and tribunals:

- ▶ *Constitutional Court*: In terms of sections 160, 161 and 164, the Constitutional Court is responsible for:
  - ▶ certifying the constitutionality of legislation
  - ▶ interpreting provisions of the constitution
  - ▶ adjudicating disputes regarding elections
  - ▶ adjudicating disputes between branches (for example, the executive versus the legislature) and tiers of government (for example, national versus provincial)
  - ▶ hearing appeals from the Supreme Court of Appeal or the State Council regarding jurisdictional issues
  - ▶ operating as a criminal hearing for charges against the president or prime minister.

The composition of the Constitutional Court is provided for in section 158 of the constitution. The Constitutional Court is made up of nine judges. Three of these are personally appointed by the president, three are appointed by parliament and three are nominated by the High Council of the Judiciary.

At least two-thirds of the judges of the Constitutional Court must be jurists from either the judiciary, the bar or legal academia.

- ▶ *Supreme Court of Appeal*: This is the final court of appeal in all matters heard by civil and military courts, in terms of section 153 of the Constitution of the DRC. Furthermore, it is also the court of first instance in respect of offences alleged to have been committed by people holding high public office, including MPs,

Cabinet members, the judiciary and provincial premiers.

- ▶ *State Council*: This is the final court of appeal dealing with infringements of measures, regulations and decisions of central administrative authorities, in terms of section 155 of the constitution.
- ▶ *Military High Court*: In terms of section 156, military courts deal with offences committed by members of the armed forces and the police.
- ▶ Other civil and military courts and tribunals.

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

Section 150 of the DRC Constitution provides that the judiciary is the custodian of individual freedoms and fundamental rights of citizens. It further provides that judges are subject to the authority of the law alone. Section 151 emphasises that members of the executive and the legislature may not:

- ▶ instruct judges in matters relating to jurisdiction or judgments
- ▶ obstruct the course of justice
- ▶ oppose the execution of a judicial decision.

Section 151 also specifically renders null and void any legislation designed to circumvent pending litigation.

Section 152 deals with the High Council of the Judiciary, which is the body established to perform managerial functions in the exercise of judicial authority. It issues recommendations for the appointment, promotion and dismissal of judicial officers and is the disciplinary authority of judicial officers. The High Council may also issue advisory opinions regarding applications for pardon.

Legislation determines organisational matters and functions of the High Council of the Judiciary. According to section 152, the High Council comprises the judge president of the Constitutional Court; the state prosecutor assigned to the Constitutional Court; the judge president of the Supreme Court of Appeal; the state prosecutor assigned to the Court of Appeal; the judge president of the State Council; the state prosecutor assigned to the State Council; the judge president of the Military High Court; the state attorney assigned to the Military High Court; the judge presidents of the courts of appeal and the state prosecutors assigned to these courts; the judge presidents of administrative courts of appeal and the state prosecutors assigned to these courts; the judge presidents of military courts and the state attorneys assigned to those military courts; two chief magistrates of the

circuit courts of appeal elected by the magistrates of such circuits; two magistrates of the circuit courts of appeal elected by the magistrates of such circuits; one chief magistrate and one magistrate per military high court jurisdiction.

## 2.7 Enforcing rights under the constitution

A right is only as effective as its enforcement. All too often rights are enshrined in documents, such as a constitution or a bill of rights, and yet remain empty of substance because they cannot be enforced properly. Section 150 specifies that the judiciary is the custodian of individual freedoms and fundamental rights of citizens.

An interesting aspect of the DRC Constitution is Principle 4 of the objects of the constitution, which provides that no constitutional amendment can be made to constitutional provisions regarding the republican form of state, universal suffrage, the representative form of government, term of office of the president, judicial independence and political pluralism.

## 2.8 The three branches of government and separation of powers

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

### 2.8.1 Branches of government

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

The DRC Constitution differs somewhat from international norms as section 68 recognises that the state institutions in the DRC are the president, parliament, government, and courts and tribunals. Nevertheless, it is clear that the executive comprises both the president and the government, so these will be discussed under the same heading.

#### The executive

In terms of section 69 of the DRC Constitution, executive power is vested in the president. The president is elected by a simple majority of the electorate in terms of section 71 of the constitution and, in terms of section 70, serves for a five year term which is renewable only once. In this regard, it is important to reiterate that President Kabila's second term of office expired at the end of 2016 and he remained in office unconstitutionally for two years thereafter.

The president appoints the prime minister and all other members of Cabinet in terms of section 78 of the constitution.

Sections 79–89 set out a number of the functions of the president. These include:

- ▶ chairing the Council of Ministers, essentially the Cabinet
- ▶ promulgating legislation passed by parliament
- ▶ legislating by means of issuing ordinances
- ▶ appointing provincial premiers and deputy premiers
- ▶ appointing, suspending or dismissing various high-ranking public officials, including members of the Cabinet, ambassadors, civil servants, members of the military and state-owned enterprise officials
- ▶ appointing, suspending or dismissing judges or public prosecutors on the recommendation of the High Council of the Judiciary
- ▶ chairing meetings of the Defence High Council
- ▶ conferring honours
- ▶ declaring states of emergency or war
- ▶ granting pardons.

Section 90 sets out the composition of the Ministerial Cabinet, namely:

- ▶ the prime minister and deputy prime minister
- ▶ ministers and their deputies
- ▶ ministers of state and delegated ministers, if any.

Section 91 sets out the functions of the Ministerial Cabinet. These are to define, together with the president, state policies and to assume responsibility therefor.

Section 92 of the DRC Constitution sets out the responsibilities of the prime minister, these are to:

- ▶ implement legislation
- ▶ issue regulations
- ▶ appoint lower-ranking civil servants and army officers.

Note that the prime minister is empowered to delegate the above powers to other ministers in the Cabinet.

Section 93 of the DRC Constitution sets out the responsibilities of individual ministers, these are to:

- ▶ assume responsibility for their own departments

- ▶ oversee the implementation of Cabinet's programme within their ministry, subject to the direction of the prime minister
- ▶ issue regulations by way of ministerial decrees.

### The legislature

Section 100 of the DRC Constitution provides that legislative authority is exercised by parliament, consisting of the National Assembly and the Senate. However, as discussed above, the president has legislative powers through his/her ability to issue ordinances. There is, therefore, an overlap between the legislative authority of the legislature (i.e. parliament), and the president (who is head of the executive). Indeed, section 130 specifically provides that the right to initiate legislation belongs concurrently to Cabinet, each member of the National Assembly and each member of the Senate.

In terms of section 101 of the DRC Constitution, members of the National Assembly are elected by universal, direct and secret suffrage. Candidates to membership of the Senate are nominated by political parties or by individuals, in terms of section 104, and are elected by provincial assemblies.

Note that, in terms of sections 101 and 104 respectively, the number and eligibility of members of the National Assembly and the Senate are determined by electoral law and not by the constitution.

### The judiciary

As already discussed, judicial power in the DRC is vested in the courts and military tribunals.

#### 2.8.2 Separation of powers

It is important, in a functioning democracy, to divide governmental power between different organs of the state in order to guard against the centralisation of power, which may lead to abuse thereof. This is known as the 'separation of powers' doctrine. The aim is to separate the functions of the three branches of government — the executive, the legislature and the judiciary — so that no single branch is able to operate alone, assume complete state control and amass centralised power. While each branch performs a number of different functions, each also plays a 'watchdog' role in respect of the other. This helps to ensure that public power is exercised in a manner that is accountable to the general public and is in accordance with the constitution.

Unfortunately, the Constitution of the DRC does not protect the principle of separation of powers as the president has such prodigious powers in respect of all aspects of government. For example, section 79 entitles the president 'to legislate by means of ordinances'. In other words, presidential ordinances have the force of legislation. This is entirely out of step with international constitutional and democratic norms of the separation of powers.

## 2.9 Weaknesses in the constitution that ought to be strengthened to protect the media

There are a number of weaknesses in the DRC Constitution. If these provisions were strengthened, there would be specific benefits for the media in the DRC.

- ▶ It is deeply troubling that the constitutional provisions regarding fundamental human rights all contain internal limitations, which essentially undermine the supremacy of constitutional rights by making such rights subject to legislation.
- ▶ The section in the constitution establishing the HCBC does not specifically protect the independence of the Council, thereby undermining its ability to carry out media-related functions in support of democracy.
- ▶ The DRC Constitution does not sufficiently provide for the separation of powers, given the very real legislative functions provided to members of the executive, particularly the president. This undermines a key construct of democratic government, namely the legislature

## 3 The media and legislation

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In this section, you will learn:

- ▷ what legislation is and how it comes into being
- ▷ legislation governing the operations of the media in general
- ▷ legislation governing the making and exhibition of films
- ▷ legislation governing the broadcast media generally
- ▷ legislation governing the state broadcast media
- ▷ legislation governing the state newsgathering agency
- ▷ legislation that threatens a journalist's duty to protect sources
- ▷ legislation that prohibits the publication of certain kinds of information

### 3.1 Legislation: An introduction

#### 3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed by parliament, or ordinances issued by the president, both of which have legislative authority. Legislative authority in the DRC is a complex matter as it is vested both in parliament — which is made up of the National Assembly and the Senate — and in the president.

In respect of parliamentary legislation, the process is as follows:

- ▶ parliament and the president are ordinarily involved in passing legislation — sections 135 and 136 of the Constitution of the DRC
- ▶ within six days of a statute's adoption by both chambers of parliament, the statute is to be transmitted to the president for promulgation — section 136 of the Constitution of the DRC
- ▶ within 15 days of the adoption of the statute, the president is entitled to request parliament to deliberate anew on the entire statute or particular provisions thereof, which request cannot be refused — section 137 of the Constitution of the DRC
- ▶ within 15 days of adoption, a statute may be referred to the Constitutional Court for a declaration of constitutionality by a range of people, including the president; the prime minister; the presidents of either the National Assembly or the Senate; or by one-tenth of the total number of members of the National Assembly and of the Senate. Such a ruling must be issued within 30 days — section 139 of the Constitution of the DRC
- ▶ the president promulgates the statute within 15 days of the expiry of the deadlines set out in sections 136, 137 and 139, failing which the statute is deemed to have been promulgated by operation of law — section 140 of the Constitution of the DRC
- ▶ statutes are published in the Government Gazette (section 141 of the constitution) and acquire the force of law 30 days after such gazetting, unless the statute provides otherwise — section 142 of the Constitution of the DRC.

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

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

If a bill is passed by the DRC Parliament in accordance with the various applicable procedures set out above, it becomes an act once it is so passed.

As mentioned, an Act must be published in the Government Gazette and becomes law only 30 days after it has been published unless otherwise stated, in terms of section 142 of the DRC Constitution.

### **3.2 Legislation governing the operation of the media in general**

The DRC has a number of colonial-era media laws that apply alongside post- independence media laws. Some laws dealing with the day-to-day employment and conduct of journalists and their accreditation include:

- ▶ Ordinance 23-113 of 25 April 1956
- ▶ Criminal Code, 1940
- ▶ Ordinance 81-012 of 2 April 1981
- ▶ The High Council of Broadcasting and Communications Act, Act No. 11-001 dated 10 January 2011.

It is important to note that a number of colonial-era statutes or ordinances (as they were called when passed under the colonial administration) have not been repealed.

#### **3.2.1 Ordinance 23-113 of 25 April 1956: Travel Documents for the Press**

This ordinance governs official accreditation documentation that is required by journalists when travelling around the country undertaking official press duties. It is extremely draconian, requiring journalists to apply for such travel passes at least every three years.

Articles 1 and 2, read together, require journalists (print or broadcast media) to obtain certain passes and badges issued by the director-general of the National Information Service. Journalists need these in order to conduct press business when they travel around the country to cover events. They include the following:

- ▶ *Individual travel passes and badges:* These are governed by articles 3, 4, 6, 9 and 12.
  - ▶ any journalist employed in the print media, the broadcast media or in a news agency must make an application, in accordance with the prescribed form, for an individual press pass to travel within the DRC
  - ▶ the application is required to include the journalist's qualifications, the nature of the journalist's work (his/her habitual assignment) and the reason for the need to travel
  - ▶ importantly, article 5 specifies the application will be granted provided that the journalist's travel in the relevant area will not undermine public order and public safety
  - ▶ the press pass is valid for a maximum period of three years, but this is left to the director-general's discretion
  - ▶ once an individual press pass has been granted, the holder may then apply for a travel badge

- ▶ the travel badge is required to be worn in a visible place
- ▶ note that the director-general can cancel the press pass at any time. It appears that the badge must be applied for each year as it ceases to be valid on 31 December annually, or upon the lapsing of the individual travel pass.
- ▶ *Vehicle travel passes and badges:* These are governed by articles 7 and 8, and 13–16.
  - ▶ the holder of an individual press pass may also apply for a vehicle pass
  - ▶ the application must be made in accordance with the prescribed form
  - ▶ a vehicle pass has the same period of validity as the individual press pass that it relates to
  - ▶ importantly, article 8 also specifies the application will be granted provided that the journalist's travel in the relevant area will not undermine public order and public safety
  - ▶ once a vehicle pass has been granted, the holder may then apply for a vehicle travel badge
  - ▶ the travel badge is required to be placed on the car in a visible place
  - ▶ note that the director-general can cancel the vehicle badge pass at any time. It appears that the vehicle badge must be applied for each year as it ceases to be valid on 31 December annually, or upon the lapsing of the vehicle pass.
- ▶ *Special travel passes:* These are governed by articles 17–20.
  - ▶ the provisions govern the issuing of 'special' travel passes for journalists (and their vehicles) depending on the needs of public order, peace and security
  - ▶ the director-general may issue these special passes (which have a different colour and bear the word 'Special' thereon). They are exceptional, temporary and only valid for a particular locality
  - ▶ Article 23 requires the director-general to keep a register of all individual, vehicle and special travel passes and badges granted by him or her
  - ▶ Article 24 requires journalists who leave the profession to return all passes (whether valid, expired or cancelled) to the director-general.

### 3.2.2 Criminal Code, 1940

Most of the provisions of the Criminal Code do not directly pertain to the media; however, it is important to note the provisions of section 150(h). This makes it an offence not to publish the full and correct name and address of any author or publisher of any published writing. The penalty is imprisonment or a fine.

### 3.2.3 Ordinance 81-012 of 2 April 1981: Statute to Govern Journalists

This general statute governs the day-to-day work of journalists in the DRC. It contains a number of provisions governing the employment and operations of journalists. The statute is implemented by the Ministry of Information.

- ▶ *Press cards:* articles 5 and 6 of the ordinance require all journalists, including trainee journalists, to apply for a card (either a press card or a trainee press card) from the Press Union of the DRC. The card is cancelled upon the person leaving the profession or for violating professional ethics.
- ▶ *Qualifications:* articles 7 and 8 provide that, after completing studies at a recognised school of journalism, the candidate must pass a national examination to be recognised as a professional journalist. No press outlet can employ a journalist who has not passed such examination. Note that trainee journalists (who serve an apprenticeship for 24 months or, if they have educational qualifications from a recognised journalism institution, for 12 months) may not constitute more than one-third of the workforce within a press outlet. In addition, all trainee journalists must be declared fit and proper persons before taking the national examination.
- ▶ *Categories of journalistic employment:* articles 9–11 set out the various employment positions within a press outlet. These are:
  - ▶ executive positions:
    - › editorial director
    - › editorial secretary general
    - › editor-in-chief
    - › deputy editor
    - › editorial secretary.
  - ▶ contributing staff:
    - › general administrator
    - › heads of various departments and design
    - › senior reporters
    - › junior reporters.

Note that these are guidelines and press outlets are free to structure themselves differently if they so wish. Promotions are governed by the press outlets' internal rules and procedures. However, article 11 specifies that vacancies are to be filled temporarily by the immediate subordinate (with corresponding pay increases and the like), until such time as the position is filled. If the position is not filled within 12 months, the immediate subordinate assumes the position on a permanent basis.

► *Professional status of journalists:* articles 12–27 deal with the professional status of journalists. Every journalist is required to be categorised into one of four statuses:

- **Active:** This is where the journalist actively conducts his/herself as a professional journalist on behalf of his/her employer. Note that the ordinance sets out employment-related provisions for active journalists including that:
  - › journalists be paid in accordance with work performed
  - › 'risky' assignments require the journalist to be covered by life insurance
  - › leave be given: 30 days' annual leave, sick leave, 15 days' study leave every three years and public holidays.
- **On secondment:** This is where a journalist, whether in the public or private sector, stops conducting his/herself as a journalist in order to take up a temporary position:
  - › in an organisation which acts in the public interest or is foreign or professional
  - › in the military during wartime
  - › in accordance with a Cabinet resolution based either in the military or in any other capacity in the public interest
  - › in public office.

Note that when the secondment expires, the journalist automatically resumes his/her previous position. The employment requirements of this ordinance do not apply while the journalist is on secondment if these contradict the employment tenets of the organisation to which the journalist is seconded. The institution is responsible for remuneration. In addition, the secondment activities are required to count towards promotion.

- **Available:** A journalist is considered to be 'available':
  - › if he/she has taken up further studies or is on a professional development course
  - › if he/she is sick.

The editorial director of a press outlet must declare a particular journalist as being 'available'. The duration of 'availability' is taken into account in the calculation of the length of service of the particular journalist.

- **Suspended:** A journalist may be 'suspended' by the editorial director or his/her deputy of the press outlet for a period of between 48 hours and one month, if there are sufficiently serious grounds. Note that disciplinary proceedings must be instituted and completed within a month, otherwise the suspension is withdrawn. Note, however, that if the misconduct

constitutes an offence, then the suspension continues until the completion of the judicial process. If the judicial process results in an acquittal, then the journalist is retrospectively reinstated and all his/her rights are retrospectively restored, including salary and other benefits.

- ▶ *Working hours:* Article 28 provides that journalists are to work six days a week. Overtime requires compensatory rest periods.
- ▶ *Remuneration of journalists and other benefits:*
  - ▶ Articles 29–34 regulate the remuneration of journalists. In essence, a journalist's basic salary is based on the particular employment position in question (and the schedules to the statute contain these). The basic salary increases, depending on the number of years worked in that position and the results of performance assessments, based on particular prescribed percentages. Further, the editorial director has discretion to pay additional amounts for seniority, educational qualifications and long-service awards. The press outlet may make additional payments in accordance with its capabilities.
  - ▶ Article 35 provides for social and other benefits for journalists, including child and medical and disability benefits, accommodation, vacation benefits and travel expenses. The rates thereof are determined through a process of collective bargaining within the press outlet concerned.
- ▶ *Disciplinary procedure:* Articles 36–39 deal with disciplinary action against journalists.
  - ▶ In brief, there are three disciplinary measures that can be taken against a journalist:
    - ▶ reprimand
    - ▶ temporary suspension
    - ▶ dismissal.

Note that, in terms of article 46, grounds for immediate dismissal include acts of dishonesty (such as theft and fraud), insubordination, corruption, intentional prejudice caused to the press outlet and acts of violence.

The statute is, however, entirely silent on what conduct would warrant disciplinary action.

Furthermore, the actual rules of procedure in any disciplinary matter are to be determined by the press outlet concerned.

In the event of legal proceedings against a journalist arising out of facts that have also given rise to disciplinary proceedings, the administrative authority (which essentially regulates bureaucratic matters) has the power to review a disciplinary proceeding finding of guilt if a court of law finds the journalist not guilty for lack of evidence.

Where a journalist is sentenced by a court to three or more months in prison, the media outlet may dismiss the journalist without a hearing.

A journalist has the right to appeal a disciplinary finding and to be represented by his/her trade union.

- ▶ *Rights, duties and conflicts of interest:* These are dealt with in articles 40-43. In brief, these are the following:
  - ▶ A journalist must fulfil his/her duties with professionalism.
  - ▶ A journalist must accept the terms of his/her employment that conform with this statute.
  - ▶ A journalist must personally fulfil his/her responsibilities.
  - ▶ A journalist is personally accountable to his/her superiors for the performance of specific instructions.
  - ▶ It is strictly forbidden for journalists to demand gifts and benefits of any kind.
  - ▶ A journalist must adhere strictly to the relevant code of conduct applicable to journalists.
  - ▶ A press outlet is expected to protect its journalists against personal threats and physical attacks while on assignment and, where applicable, to compensate its journalists for injuries suffered.

- ▶ *Termination of employment:* articles 44-52 cover the provisions regarding termination of employment. In brief, these are the following: a journalist's employment (and accreditation) terminates upon death, dismissal, resignation and retirement (the retirement age is 55, but a journalist may apply for retirement after 20 years of service). Note that the statute provides for so-called 'deemed' resignations, which include being absent without leave, refusing to perform functions during his/her notice period in the case of a voluntary resignation and after being incapacitated (this requires medical certification) for a period of two years.

Note that the administrative authority plays a role in that it has to accept a letter of resignation from a journalist.

The statute contains a number of detailed provisions regarding pension benefits for journalists.

The statute also provides that a journalist may repudiate a contract of employment where the press outlet commits grave infringements against a journalist, including physical injury, intentional prejudice, exposure to grave danger and the like. In such cases, the journalist does not need to tender his/her resignation and serve a notice period.

- ▶ *Trade unions:* articles 53-54 entitle a journalist to join and hold office in a trade union.

### **3.2.4 High Council of Broadcasting and Communications Act 11/001 dated 10 January 2011**

#### **The HCBC's main functions**

In terms of articles 8 and 9 (where other sections apply these are specified), the general functions of the HCBC include:

- ▶ guaranteeing freedom of the press, information and mass communication
- ▶ overseeing adherence to a code of conduct in respect of information provision
- ▶ overseeing equitable access to state providers of information and communication by all political parties and associations
- ▶ developing a code of conduct
- ▶ mediating in media-related disputes
- ▶ promoting excellence in media production
- ▶ promoting a culture of peace, democracy, human rights and fundamental freedoms
- ▶ promoting a national culture through the media
- ▶ protecting children
- ▶ filing reports to parliament
- ▶ providing advisory opinions on draft laws to parliament or to the government — article 10.

Overall, the HCBC is responsible for the day-to-day oversight of the media.

In terms of article 17, any person wishing to operate a print, broadcast or online media service must submit a dossier to the Council of the HCBC for compliance checks. Unfortunately, no additional information is given in the act as to what the dossier is to contain. We surmise that it requires a detailed description of the content of the service. The statute is entirely silent on licence and permit applications.

#### **Sanctions**

In terms of article 58, the HCBC is entitled to investigate and impose sanctions on the media for:

- ▶ non-adherence to the content of the annexures to permits (again, we stress the statute is silent as to who is responsible for granting and drafting these permits)
- ▶ illegally operating as a professional journalist or illegally exercising any other function in relation to the print or broadcast media

- ▶ illegally altering share capital and means of financing
- ▶ illegally loaning money to third parties
- ▶ refusing to furnish information requested by the HCBC
- ▶ unlawfully broadcasting television or radio programmes or creating interferences with third-party frequencies
- ▶ failing to disclose tariffs to subscribers
- ▶ fraudulently broadcasting additional radio or television channels
- ▶ failing to observe sanctions imposed by the HCBC
- ▶ unlawful copyright infringements of broadcast material.

In terms of article 59, the HCBC has alarmingly wide powers to suspend a broadcast service for a period not exceeding three months or to seize documents, films, video cassettes and other media-related information.

No limitations on this discretion are provided for (unlike the grounds set out above) and no grounds for such action are stated in the statute. The HCBC, therefore, has broad power to act with impunity.

### **3.3 Legislation governing the making of films**

There are a number of constraints on the making of films in the DRC — something that obviously impacts upon the visual media, such as television.

The main piece of legislation governing film in the DRC is Ordinance 53 of 1936 (or the Film Ordinance).

Some key aspects of it are as follows:

- ▶ In terms of article 1 of the Film Ordinance, no one may produce a film in a public place unless authorised to do so by the director-general of information services. Any person contravening this section is guilty of an offence and is liable to imprisonment or a fine, in terms of article 8 of the Film Ordinance.
- ▶ In terms of articles 2 and 3, applications for authorisation to make a film must be in writing and lodged with the director-general at least one month prior to the proposed commencement of filming. The applications must include a range of information such as the names, addresses and nationalities of the applicant, the travel route and the duration of the planned filming. Note that, where non-'European' or 'Asian' actors are to be used, specific information regarding their roles is required to be provided. If the film is a documentary, then the documentary genre must be specified — that is, indigenous life, flora, fauna, landscape, etc.
- ▶ In terms of article 4, the director-general has the discretion to exempt the

applicant from submitting a detailed film script for his/her prior approval.

- ▶ In terms of article 5, the director-general may issue his approval of the application conditional upon the presence of a state official to monitor filming at the applicant's expense. The state official may impose restrictions on filming and has broad discretion in this regard.

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

#### **3.4.1 Legislation that regulates broadcasting generally**

Broadcasting in the DRC is regulated by the:

- ▶ High Council of Broadcasting and Communications (HCBC) Act, Act 11-001 dated 10 January 2011
- ▶ Press Freedom Act, Act 96-002 dated 22 June 1996
- ▶ Telecommunications Act, Act 13-2002 dated 16 October 2002
- ▶ Post and Telecommunications Act, Act 14-2002 dated 16 October 2002.

#### **3.4.2 Establishment of the HCBC and the Regulatory Authority**

The DRC has more than one regulatory authority for broadcasting and signal distribution. While regulators are established in terms of a number of different statutes, it is clear that real power in respect of broadcasting resides in the executive branch of government and, in particular, with the Ministry of Press and Information. Despite being a constitutionally mandated body, the HCBC operates alongside a Regulatory Authority, which deals with technical matters, and is overshadowed by the very real powers exercised by the executive.

##### **The HCBC**

As required by the constitution, article 2 of the HCBC Act establishes the HCBC as an institution supporting democracy. Article 2 provides that the HCBC is independent, autonomous and endowed with legal personality.

##### **The Regulatory Authority**

Article 8 of Telecommunications Act establishes the Regulatory Authority, which is a public service with legal personality. This same body is, however, also established in terms of article 1 of the Post and Telecommunications Act as being a juristic entity, which is an independent organ of regulatory authority.

#### **3.4.3 Main functions**

##### **The HCBC**

In terms of article 8 of the HCBC Act, the HCBC's main functions are to:

- ▶ guarantee freedom of the press, information and mass communication
- ▶ oversee adherence to a code of conduct in respect of information provision
- ▶ oversee equitable access to state providers of information and communication by all political parties and associations
- ▶ develop a code of conduct
- ▶ mediate in media-related disputes
- ▶ promote excellence in media production
- ▶ promote a culture of peace, democracy, human rights and fundamental freedoms
- ▶ promote national culture through the media
- ▶ protect children
- ▶ file reports to parliament
- ▶ provide advisory opinions on draft laws to parliament or to the government.

It is clear that licensing — a key regulatory function in terms of international good practice — is not a function of the HCBC.

### **The Regulatory Authority**

In terms of article 8 of the Telecommunications Act, the aims of the Regulatory Authority with regard to signal distribution include:

- ▶ overseeing adherence to laws and regulations relating to telecommunications matters
- ▶ processing licence applications and permits. Note that the section is extremely vague as to exactly what kinds of licences and permits are being referred to, but it appears that these are technical licences and permits appropriate to signal distribution matters
- ▶ operating a register of licences
- ▶ managing frequency bands
- ▶ enforcing compliance with the provisions of the Telecommunications Act.

In terms of article 25 of the Telecommunications Act, the Regulatory Authority issues a technical permit after approval of the minister in charge of telecommunications. In terms of article 57 of the Press Freedom Act, this technical permit appears to be a pre-condition for obtaining a broadcasting permit or licence.

### **3.4.4 Appointment of members**

#### **The HCBC**

In terms of article 24 of the HCBC Act, there are 15 members of the HCBC, namely:

- ▶ one member chosen by the president
- ▶ two members chosen by the National Assembly
- ▶ two members chosen by the Senate
- ▶ one member chosen by government
- ▶ one member chosen by the High Council of the Judiciary
- ▶ three members chosen by professional media associations (print, radio and television)
- ▶ one member representing the advertising sector
- ▶ one member chosen by the National Council of Advocates
- ▶ one member chosen by the Association of Parents and Students
- ▶ two members chosen by associations for the protection of media rights.

However, in terms of article 26, the president formally appoints all members of the HCBC.

#### **The Regulatory Authority**

Article 9 of the Post and Telecommunications Act stipulates that the Regulatory Authority is made up of a seven-member council consisting of a president, a deputy-president and five councillors. Further, article 10 stipulates that all council members are officially appointed by the president of the DRC, who personally designates its president and deputy, while parliament nominates two of the five councillors and the minister in charge of telecommunications nominates the last three.

### **3.4.5 Funding for the regulators**

#### **The HCBC**

Article 53 of the HCBC Act provides that the HCBC is operating and financial costs are to be provided for from monies appropriated by parliament — in other words, specifically allocated to the HCBC in the national budget.

#### **The Regulatory Authority**

Article 21 of the Post and Telecommunications Act provides that the Regulatory

Authority is funded through various sources of income, including service and administrative fees and taxes.

### **3.4.6 Licensing regime for broadcasters and signal distributors in the DRC**

#### **Broadcast licensing**

Broadcasting-related licensing in the DRC is not conducted by an independent authority. Article 56 of the Press Freedom Act provides for a system of governmental permits to provide commercial radio and television broadcasting services. An applicant needs to submit a declaration, either to the Ministry of Press and Information, or to the relevant regional entity responsible for press and information matters. In terms of article 57, such a declaration must include:

- ▶ the company registration number
- ▶ channels to be broadcast
- ▶ names, birth dates, criminal records (if any) and certificates of good conduct of both the owner and head of programming
- ▶ statement on the nationality of the head of programming
- ▶ addresses of the head office and any subsidiary companies
- ▶ a copy of the company's internal rules and regulations
- ▶ a copy of the schedule of programmes to be broadcast
- ▶ a copy of the licence granted by the Ministry of Post and Telecommunications. Note that this appears to be a signal distribution licence — the technical licence identifying spectrum to be used, which is obtained in terms of section 33 of the Telecommunications Act.

It appears that the Ministry of Press and Information is able to impose conditions in respect of such broadcasting permits. Note that there are no specific references to community broadcasting services in the DRC statutes, although a number of community broadcasters are operational in the country.

#### **Frequency spectrum licensing**

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

In terms of article 33 of the Telecommunications Act, the Regulatory Authority assigns frequencies to licensed broadcasters, both radio and television, after consulting with the minister of information.

### **3.4.7 Responsibilities of broadcasters in the DRC**

#### **Adherence to licence conditions and other requirements**

In terms of article 87 of the Press Freedom Act, no person may provide a broadcasting service without adhering to the requirements of the Press Freedom Act.

In terms of articles 63(a), 64(b) and 65 of the Press Freedom Act, the head of programming and the producer of the particular programme in question, are criminally liable for any breach of the conditions imposed by the Ministry of Press and Information when granting a permit for the commercial broadcasting service. They are to be sentenced in accordance with the provisions of the Criminal Code.

In terms of articles 63(b) and 64(a) of the Press Freedom Act, the owner, head of programming and the producer of the specific programme that breached the relevant condition, are also liable for civil damages in respect of such breach of the conditions imposed by the Ministry of Press and Information when granting a permit for the commercial broadcasting service.

In terms of article 58 of the HCBC Act, the HCBC is entitled to investigate and impose sanctions on the media for:

- ▶ non-adherence to content of the annexures to permits (again, we stress that the statute is silent as to who is responsible for granting and drafting these permits)
- ▶ illegally operating as a professional journalist or illegally exercising any other function in relation to the print or broadcast media
- ▶ illegally altering share capital and means of financing
- ▶ illegally loaning money to third parties
- ▶ refusing to furnish information requested by the HCBC
- ▶ unlawfully broadcasting television or radio programmes or creating interferences with third-party frequencies
- ▶ failing to disclose tariffs to subscribers
- ▶ fraudulently broadcasting additional radio or television channels
- ▶ failing to observe sanctions imposed by the HCBC
- ▶ unlawful copyright infringements of broadcast material.

In terms of article 59 of the HCBC Act, the HCBC has extremely wide powers to suspend a broadcast service for a period not exceeding three months or to seize documents, films, video cassettes and other media-related information. No limitations on this discretion are provided for (unlike the grounds set out above) and no grounds for such action are stated in the statute. This gives the HCBC broad power

to act with impunity. The HCBC, however, cannot permanently cancel a frequency allocation without a court order.

### **Adherence to local content requirements**

Article 66 of the Press Freedom Act requires all broadcasters to ensure that at least 50% of all programming broadcast is locally produced.

### **Right of reply**

In terms of articles 67–72 of the Press Freedom Act, any person is entitled to reply, free of charge, to any matter that affects his/her or its honour or reputation, which has been broadcast by any broadcasting service, within 15 days of the original broadcast. The person seeking to exercise the right of reply must specify the allegations to be addressed. The length of reply may not exceed the duration of the original allegation, unless absolutely necessary.

Any state official is automatically entitled to a right of reply, provided such reply relates to factually inaccurate material broadcast. The reply in this instance may be up to twice the duration of the original broadcast. The right of reply ought to take place in the next airing of the programme following the receipt of the request to exercise the right of reply.

Any refusal to allow a right of reply is subject to sanctions imposed in terms of article 83 of the Press Freedom Act. Article 83 empowers the minister of, or regional authority responsible for, press and information to: order the seizure of documents, suspend the broadcast of one or more offending programmes or suspend a broadcasting service for a period not exceeding three months in the following circumstances:

- ▶ for refusing to grant a right of reply
- ▶ for broadcasting material in contravention of laws, good morals or public order.

### **Adherence to ownership and control limitations for private broadcasting services**

Article 7 of the HCBC Act imposes ownership and control restrictions on broadcasters. It provides that not more than 40% of shares of a commercial broadcaster be owned by foreigners. If a Congolese person or entity owns more than 50% of the shares in a commercial broadcaster, he/she or it cannot do so on behalf of a foreign person or entity.

Similarly, article 61 of the Press Freedom Act provides that Congolese citizens must constitute the majority of shareholders in a broadcasting service company.

### **Adherence to statutory prohibitions on broadcasting content**

The only clear prohibition relates to reporting on court proceedings. These provisions are set out in detail in the section dealing with the prohibition on the

publication of information relating to court proceedings, covered later in this chapter.

### **Providing information regarding a service**

In terms of article 17 of the HCBC Act, any person wishing to operate a print, broadcast or online media service must submit a dossier to the HCBC Council for compliance checks. Unfortunately, no additional information is given in the statute as to what the dossier is to contain. We surmise that it requires a detailed description of the content of the service. The statute is entirely silent on licence/permit applications, which are required in terms of the Press Freedom Act.

### **3.4.8 Are the HCBC and the Regulatory Authority independent regulators?**

The HCBC and the Regulatory Authority are not independent bodies.

#### **The HCBC**

While article 2 of the HCBC Act provides that the HCBC is independent and autonomous and article 53 provides that it is funded by parliament, the HCBC's independence is compromised in the following ways:

- ▶ All its members are appointed by the president, although a number of different institutions are involved in choosing the appointees. The body as a whole is not required to act in the public interest and there is no public nominations process or other public involvement in the appointments.
- ▶ The HCBC cannot be said to act as a broadcasting regulator in the general sense because it is not involved in licensing in any way and has no regulation-making powers. The HCBC appears to be only a content-related oversight body, with extremely limited remit of powers.

This means that the HCBC does not meet international best practice standards with regard to appointment requirements for independent bodies and institutional independence.

#### **The Regulatory Authority**

The Regulatory Authority plainly works closely with the ministers for post and telecommunications and press and information and does not act to grant permits or licences without the ministers' approval. The Regulatory Authority is not independent because it functions only in conjunction with the relevant ministers.

### **3.4.9 Weaknesses in the legislation which should be amended**

There are a number of problems with the legislative framework for the regulation of broadcasting generally in the DRC. The main problem is that none of the bodies involved in the regulation of broadcasting are independent.

Executive officers and departments are intimately involved in granting licences and

permits and there is no emphasis on the need for the public interest to be served in any of the relevant statutory provisions.

There are many different laws governing licensing, authorisations and permits, but all of these involve senior officials within the executive branch of government. There cannot be said to be genuine independent institutions governing broadcasting in the DRC, particularly in respect of the licensing of new operators.

### 3.5 Legislation that regulates the state broadcast media

Two statutes regulate the state broadcast media:

- ▶ Ordinance 81-050 of 1981 regulates the Congolese National Radio and Television Broadcaster (*Radio Télévision Nationale Congolaise* — RTNC). Note that the name of the national broadcaster has changed (in line with the country's general name change from Zaire to Congo), although the ordinance still refers to the old entity.
- ▶ Public Enterprises Act, Act 78-002 of 1978, regulates all public enterprises in the DRC, of which the RTNC is one.

#### 3.5.1 Establishment of the RTNC

Article 1 of Ordinance 050 created the RTNC, which was established as a public enterprise with separate legal personality — that is, it is capable of suing and being sued. The RTNC's aims are stated to be both educational and commercial.

The Public Enterprises Act governs many aspects of the RTNC as it is a public enterprise in terms of article 1 of Ordinance 050.

Article 2 of the Public Enterprises Act provides that any public enterprise has at least one of the following characteristics. It is:

- ▶ created and controlled by state organs in order to fulfil a public mandate
- ▶ created to perform a specific function
- ▶ a joint venture among state entities to perform a specific function
- ▶ created through the initiative of other public enterprises in association with state entities to perform a specific function.

#### 3.5.2 The RTNC's mandate

Article 2 of Ordinance 050 provides that the RTNC may establish stations or bureaus anywhere in the DRC or in foreign countries.

Article 3 of Ordinance 050 sets out the RTNC's broadcasting mandate. This is not an extensive mandate and article 3 refers only to three aspects, namely to:

- ▶ operate national radio and television broadcasting services

- ▶ provide information, training and education to the masses
- ▶ create and promote cinematographic productions.

### **3.5.3 The RTNC's governing structures and member appointment**

In terms of article 7 of Ordinance 050, there are three structures within the RTNC: a board of directors, a managerial committee and an office of chartered accountants.

#### **Board of directors**

Article 10 provides that the board of directors is the highest authority within the RTNC when it comes to administrative acts and social responsibility.

In terms of article 8 of Ordinance 050, the RTNC is controlled by a board of directors comprising nine members: a chief executive officer, two company secretaries, representatives of the departments of Information and Portfolios (this department manages Cabinet function) and a representative of the National Parents' Association.

In terms of article 8, the RTNC board members are appointed in terms of articles 6–24 of the Public Enterprises Act. In terms of article 7 of the Public Enterprises Act, all member of the RTNC Board are appointed by the president for a renewable term of five years. Article 7 also gives the president absolute discretion to remove a board member during his/her term of office.

#### **Managerial committee**

Article 11 of Ordinance 050 requires the managerial committee to implement all decisions taken by the board of directors and to be responsible for the day-to-day operations of the RTNC, in accordance with the RTNC's internal rules and regulations.

In terms of article 11 of the Public Enterprises Act, the members of the RTNC managerial committee are appointed by the RTNC board.

#### **Office of chartered accountants**

Article 14 of Ordinance 050 provides that all financial transactions of the RTNC must be under the direction of the office of chartered accountants, which is to have between two and four accountants. Note that members of the office of chartered accountants are appointed by the president for a renewable term of two years.

### **3.5.4 Funding for the RTNC**

Article 4 of Ordinance 050 sets out how the RTNC is funded. The four sources of funding are:

- ▶ the commercial exploitation of broadcasting, cinematographic productions, etc.

- ▶ the administration of its assets, including property
- ▶ state subsidies
- ▶ donations.

Article 31 of Ordinance 050 makes it clear that the RTNC's budget is required to be submitted to the Department of Portfolio for approval.

Articles 25–27 of Ordinance 050 provide that any net profit made by the RTNC is to be distributed as follows:

- ▶ Five per cent is to be allocated to an RTNC reserve fund, until such time as the reserve fund is equal to an amount constituting 10% of the entire capital valuation of the RTNC.
- ▶ The Department of Portfolio decides whether or not the remaining 95%:
  - ▶ is to be placed in additional reserve funds if so recommended by the RTNC Board of Directors;
  - ▶ is to be carried over for the next financial year; or
  - ▶ is to be paid over to the national treasury.

Article 32 provides that the president must approve any increase or decrease in the asset pool of the RTNC, as recommended by the Department of Portfolio.

### **3.5.5 The RTNC: Public or state broadcaster?**

The RTNC is clearly a state broadcaster. Its board members serve entirely at the discretion of the president and its budget is approved and provided for by the Minister of Portfolio. The RTNC is also under close executive supervision. In terms of article 31 of Ordinance 050, the RTNC is required to report to:

- ▶ the Department of Information on the following issues:
  - ▶ tenders
  - ▶ organisational structure
  - ▶ personnel
  - ▶ salaries
  - ▶ building maintenance
  - ▶ annual report
  - ▶ the establishment of regional offices in the DRC or foreign bureaux.
- ▶ the Department of Portfolio on the following issues:
  - ▶ buying and selling of property
  - ▶ loans

- ▶ financial cessions and acquisitions
- ▶ general accounting issues
- ▶ budgets and financial projections
- ▶ year-end statements
- ▶ balance sheet.

Furthermore, while the RTNC board publishes an annual report, this is not presented to parliament but, instead, to the Department of Information. The RTNC's accountability, therefore, appears to be to the executive rather than to the public's elected representatives in parliament.

### **3.5.6 Weaknesses in Ordinance 050 which should be amended**

It is clear that the RTNC is not a public broadcaster since it lacks basic independence. It ought to have a far more detailed public mandate that requires it to operate in the public interest and it should be accountable directly to parliament. Furthermore, the RTNC ought to be funded directly from parliamentary disbursements specifically provided for in the national budget.

While it is appropriate for the president to formally appoint the members of the RTNC Board, this ought to happen only after a transparent and public nomination process, as well as a short-listing and recommendation process conducted by a multi-party body such as parliament.

Lastly, RTNC board members should be removed only on objective grounds for incapacity or failure to perform.

## **3.6 Legislation that governs the state newsgathering agency**

Two statutes govern the state newsgathering agency, the Congolese Press Agency (CPA):

- ▶ Ordinance 81-052 of 1981
- ▶ Public Enterprises Act, Act 78-002 of 1978.

### **3.6.1 Establishment of the Congolese Press Agency**

The CPA was initially established by Ordinance 67-83 of 1967 and is currently regulated in terms of Ordinance 052. Article 1 of Ordinance 052 provides that the CPA is a public institution with legal personality (that is, it is capable of suing and being sued) and that it has as its focus technical, administrative and commercial activities.

### **3.6.2 The CPA's main mandate**

Article 3 sets out the CPA's mandate, namely to:

- ▶ gather information that is accurate, complete and not contrary to public morals
- ▶ make this information commercially available to users
- ▶ undertake feasibility studies with regard to programming or means of communication (television or print based) in order to promote the international credibility of the DRC
- ▶ create an international network to have a worldwide presence
- ▶ promote the country's development
- ▶ ensure the education of the public through the broadcast of its content.

In order to achieve its mandate, article 4 contains a number of requirements for the CPA, including to:

- ▶ present information in a fair and impartial manner
- ▶ provide users with information on a regular and uninterrupted basis
- ▶ not allow itself to be under the influence of a political party or pressure group.

The last requirement is interesting, given that the CPA is obviously a state news agency.

### **3.6.3 The CPA's governing structures and member appointment**

In terms of article 8 of Ordinance 052, there are three structures within the CPA: a board of directors, a managerial committee and an office of chartered accountants. In terms of article 9 of Ordinance 052, the functioning of the CPA is governed by articles 6–24 of the Public Enterprises Act.

Article 9 of Ordinance 052 provides that the CPA board is made up of nine members, including certain members of the managerial committee appointed in terms of articles 6 and 17 of the Public Enterprises Act.

Article 18 of the Public Enterprises Act provides that the managerial committee is responsible for the day-to-day implementation of board decisions.

Article 17 of the Public Enterprises Act provides that the managerial committee comprises a general manager, two administrators and a staff representative. Of these, all serve on the CPA board, except for the staff representative.

In terms of Article 9 of Ordinance of 052, the other directors are a representative of:

- ▶ the Office of the President
- ▶ the Department of Information
- ▶ the Department of Portfolio

- ▶ press bodies (three representatives).

Article 7 of the Public Enterprises Act provides that the CPA board members are appointed by the president. They serve at his discretion as he is able to remove them from office at will.

Article 23 of Ordinance 052 provides that the CPA reports directly to the Office of the President.

### **3.6.4 Funding for the CPA**

In terms of article 5 of Ordinance 052, the CPA is funded through a range of sources, including from contracts for services rendered to its customers, donations and state subsidies.

In terms of articles 18–23, the president determines whether or not the net profit of the CPA is to be:

- ▶ carried over for the next financial year, or
- ▶ paid over to the national treasury.

Given that the CPA is both government funded and controlled through reporting directly to the presidency and, given that the CPA board serves at the will of the president, it is clear that the CPA operates as a government communications and information service.

## **3.7 Legislation that regulates online media**

There are no internet-specific laws in the DRC but that does not mean that the internet is unregulated. The DRC has a very poor record of respecting the online rights of its inhabitants, despite the fact that only 6.1% of the population has internet access.<sup>15</sup> The government limits its inhabitants' rights to the internet in numerous ways:

- ▶ Internet shut downs — this is where access to the entire internet is shut down preventing any IP-related activity from taking place such as: accessing websites, sending emails, WhatsApp or other IP-based messaging services or being able to access social media such as Twitter or Facebook and search engines such as Google.
- ▶ Targeted shut downs — this is where particular sites are blocked, such as social media sites Twitter and Facebook and communications services such as Skype.
- ▶ Throttled internet — this is where the speed of the internet is deliberately slowed so as to render it effectively unusable.

These disruptions are said to cost the DRC's economy approximately US\$2 million a day.

Some press reports have asserted that the Regulatory Authority has made use of article 3(i) of the Post and Telecommunications Act (dealt with above) which provides that the Regulatory Authority must protect the public interest, to require telecommunications companies providing internet access to suspend the internet or to shut down particular sites or services including SMS services.<sup>16</sup> Other press reports have asserted that it is the Minister of Posts and Telecommunications that is responsible for ordering the restrictions and quotes him as citing national security grounds for these.<sup>17</sup> In this regard, article 46 of the Telecommunications Act (also dealt with above) empowers the state to prohibit the use of or seize telecommunications facilities in the interests of national security.

### **3.8 Legislation that undermines a journalist's duty to protect his or her sources**

A journalist's sources are the lifeblood of his or her profession. Without trusted sources, a journalist cannot obtain information that is not already in the public domain. However, sources will often be prepared to provide critical information only if they are confident that their identities will remain confidential and will be respected and protected by a journalist.

This is particularly true of so-called whistle blowers — inside sources that are able to provide journalists with information regarding illegal activities, whether by company or government personnel. Consequently, democratic countries often provide special protection for journalists' sources. It is recognised that, without such protection, information that the public needs to know would not be given to journalists.

The only statute in the DRC that clearly deals with this issue is the Criminal Procedure Code, 1959. The Criminal Procedure Code was enacted prior to the DRC's independence, but has been amended numerous times since then. Provisions of the Criminal Procedure Code might be used to compel a journalist to reveal confidential sources.

Article 78 of the Criminal Procedure Code, for example, provides that any person who, without a valid excuse, fails to appear in court, take the required oath or give evidence as required, may be sentenced to imprisonment, a fine or both.

This provision might conflict with a journalist's ethical obligation to protect his or her sources. However, it is important to note that, whether or not requiring a journalist to reveal a source is in fact an unconstitutional violation of the right to freedom of expression will depend on the particular circumstances in each case, particularly on whether the information is available from any other source. It is, therefore, extremely difficult to state that these provisions are, by themselves, a violation of the right to freedom of expression under the constitution.

### **3.9 Legislation that prohibits the publication of certain kinds of information**

A number of statutes contain provisions which, looked at closely, undermine the public's right to receive information and the media's right to publish such information. These statutes are targeted and prohibit the publication of certain kinds of information, including:

- ▶ Information regarding legal proceedings
- ▶ Information relating to public safety, order and security, or which otherwise undermines government's authority (such as incitement)
- ▶ Information that constitutes state secrets
- ▶ False information that alarms the nation
- ▶ Information which insults the president
- ▶ Information which offends against public morals
- ▶ Information which constitutes xenophobia
- ▶ Information which promotes hate speech or discrimination.

#### **3.9.1 Prohibition on the publication of information relating to legal proceedings**

- ▶ Article 79(a) of the Press Freedom Act, 96-002 of 1996, prohibits the publication of any judicial matter prior to this being read out in a court of law.
- ▶ Article 79(b) of the Press Freedom Act prohibits the publication of any judicial deliberations or any information regarding activities of the High Council or of magistrates without their express permission.
- ▶ Article 79(c) of the Press Freedom Act prohibits the publication of photographs, drawings or pictures depicting crimes of violence or crimes against public morals, unless permission has been granted by the relevant chief judicial officer.
- ▶ Article 79(d) of the Press Freedom Act prohibits the broadcasting of court proceedings, unless permission has been granted by the relevant chief judicial officer.
- ▶ Article 79(e) of the Press Freedom Act prohibits the publication of the identity of a rape victim, unless the victim has given express permission for his or her identity to be revealed.
- ▶ Article 79(f) of the Press Freedom Act prohibits the publication of information regarding fines, costs and damages awarded against a litigant by a court of law. This provision is extraordinary in that it appears that the public is not

entitled to obtain any information regarding court orders dealing with fines, costs and damages awards.

- ▶ Article 81 of the Press Freedom Act provides that any person guilty of publishing the above prohibited information can be sentenced to a period of imprisonment, the payment of a fine, or both.

### **3.9.2 Prohibition on the publication of state security-related information**

#### **Press Freedom Act 96-002 of 1996**

Articles 76 and 77 of the Press Freedom Act make it an offence to incite others (whether through speeches, writings, images or any other written means) to commit punishable offences, including theft, murder, looting, arson or any act threatening the stability of the state.

It is important to note that incitement is an offence in terms of article 77 of the Press Freedom Act, even if the incitement is not acted upon. The punishment for such incitement is to be meted out in accordance with articles 22 and 23 of the Criminal Code. Article 22 essentially provides that a person who incites anyone to commit punishable offences is to be charged as an accomplice to such crimes.

Article 23 of the Criminal Code provides that an accomplice is to receive a sentence not more than half of the prison sentence given to the perpetrator(s) of the crime. However, the law is unclear as to how such accomplices are to be sentenced if the incitement does not result in any criminal offences being perpetrated by anyone.

Article 78 of the Press Freedom Act provides that any person who incites active armed forces to switch allegiances to a foreign power in times of war is guilty of high treason. Article 181 of the Criminal Code, 1940, provides that the crime of high treason is punishable by death.

#### **High Council of Broadcasting Act, Act 11/001 of 2011**

Article 6 of the High Council of Broadcasting (HBC) Act prohibits the media from condoning criminal activity or inciting others to violence. Articles 69–73 provide that a media enterprise found guilty of the above can be sentenced to various fines.

#### **Criminal Code, 1940**

Article 209 of the Criminal Code prohibits the distribution of foreign publications which aim to destabilise the state. The penalty is imprisonment and/or a fine.

Article 211 of the Criminal Code prohibits the publication of false information that undermines public order. The penalty is a period of imprisonment and/or a fine.

### **3.9.3 Prohibition on the publication of information relating to state secrets**

Article 188 of the Criminal Code, 1940, makes it an offence to disclose state secrets. The penalty is imprisonment.

### **3.9.4 Prohibition on the publication of false information that alarms the nation**

Article 199B of the Criminal Code, 1940, prohibits the publication of false information that alarms the nation. The penalty is imprisonment and/or a fine.

### **3.9.5 Prohibition on the publication of expression which insults the president**

Article 77 of the Press Freedom Act 96-002 of 1996, makes it an offence to publish anything which offends the president. In terms of article 77, read with article 76 of the Press Freedom Act, the punishment for offending the president is to be meted out in accordance with articles 22 and 23 of the Criminal Code. However, as these sections deal with accomplices to crimes, it is unclear what the punishment might be for offending the president.

### **3.9.6 Prohibition on the publication of expression which offends against public morals**

Article 6 of the High Council of Broadcasting Act, Act 11/001 of 2011, prohibits the media from being used to offend against public morals. Articles 69 and 73 provide that a media enterprise found guilty of the above can be sentenced to various fines.

### **3.9.7 Prohibition on the publication of expression which constitutes xenophobia**

Article 6 of the High Council of Broadcasting Act, Act 11/001 of 2011, prohibits the media from being used to promote xenophobia. Articles 69 and 73 provide that a media enterprise found guilty of the above can be sentenced to various fines.

### **3.9.8 Prohibition on the publication of expression which promotes hate speech or discrimination**

Article 6 of the High Council of Broadcasting Act, Act 11/001 of 2011, prohibits the media from being used to promote tribal, racial or religious hatred or any other form of discrimination. Articles 69 and 73 provide that a media enterprise found guilty of the above can be sentenced to various fines.

## 4 Regulations affecting the media

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In this section, you will learn:

- ▷ what regulations are
- ▷ key regulations governing the media generally

### 4.1 Definition of regulations

Regulations are subordinate legislation. They are legal rules, made in terms of an empowering statute (that is, a piece of legislation), made by a public functionary — usually by a minister or a regulatory body.

### 4.2 Key regulations governing the media

There are a number of regulations which govern both the print and broadcast media. Some of these regulations have been prescribed by the HCBC and some are ministerial decrees. These are the:

- ▶ Press, Radio, Television and Advertising Fees Decree
- ▶ Broadcast Press Freedom and Professional Practice Decree
- ▶ Radio and Television and Compliance Commission Decree
- ▶ Administrative Fees on Photographic or Filmed Reportage Decree
- ▶ Broadcasting Press Freedom and Professional Practice Implementing Measures Decree
- ▶ Code of Conduct for Congolese Journalists Regulations
- ▶ Foreign-owned Radio and Television Services Decree
- ▶ Migration to DTT Decree
- ▶ Election Coverage Regulations
- ▶ Licence Renewal Decree
- ▶ Accreditation of Journalists Covering Elections Regulations.

#### 4.2.1 Press, Radio, Television and Advertising Fees Decree

The Press, Radio, Television and Advertising Fees Decree, Ministerial Decree 04/MIP/018/96, dated 26 November 1996, is a short decree. It requires administrative

fees to be paid by all press publications, television and radio stations, press agencies and advertising agencies and for authorisation to film or photograph news events. Note, however, that the regulations do not specify what the fees are.

#### **4.2.2 Broadcast Press Freedom and Professional Practice Decree**

The Broadcast Press Freedom and Professional Practice Decree, Ministerial Decree 04/MIP/020/96 dated 26 November 1996, sets out a number of requirements for broadcasters operating in the DRC. It applies to all broadcasters — radio and television, public and private — in terms of Article 1.

In brief, these requirements include the following:

- ▶ In terms of article 2 of the Broadcasting Practice Decree, the content declarations required to be provided by the broadcasters in terms of Press Freedom Act, Act 96-002 dated 22 June 1996, must be in writing.
- ▶ In terms of article 3, the content of every advertisement requires approval by the Compliance Committee prior to being broadcast.
- ▶ Article 4 provides that all administrative fees payable by the broadcasters will be set by the minister of information and the press.
- ▶ Article 5 requires private broadcasters to comply with the content declaration requirement within three months of the coming into force of the decree.
- ▶ Article 7 empowers the secretary of the Ministry of Information and the Press to implement the Broadcasting Practice Decree.
- ▶ The Annexure to the Broadcasting Practice Decree sets out a list of further requirements that all broadcasters must comply with upon being granted a licence. In brief, these include the following:
  - ▶ **Ministerial Approval of Broadcast Service:** Before commencing operations, a broadcast service must obtain approval from the Minister of Information and the Press.
  - ▶ **Content:**
    - ▶ A content declaration required to be provided by the broadcasters in terms of the Press Freedom Act, Act 96-002 dated 22 June 1996, must be submitted to the Regulatory Authority.
    - ▶ Broadcasters will be held responsible for content broadcast.
    - ▶ Broadcasters are to be impartial and objective when broadcasting political content.
    - ▶ If a private broadcaster is carrying a programme of the RTNC, such programme must be broadcast delayed and in its entirety.
    - ▶ 50% of all programmes broadcast must be local. Note that what constitutes 'local' programming is not defined.

- › All political propaganda is prohibited. Note that what constitutes 'political propaganda' is not defined.
- › When broadcasting television content that is not suitable for children, broadcasters must ensure that a white square appears on the top right-hand corner of the television screen as an audience advisory.
- › Foreign content:
  - › The broadcaster must ensure that all foreign content broadcast has one or more of the following characteristics: educational, scientific or religious. It is not well-defined how such a requirement is imposed upon commercial satellite broadcasters operating in the DRC, whose programmes clearly do not comply with this requirement
  - › Satellite broadcasters are responsible for all programmes broadcast on the satellite bouquet.
- › **Retention of copies of programmes broadcast:** Every broadcaster must keep a copy of all broadcasts for at least 30 days.
- › **Fees payable:** The Annexure contains a number of administrative and other fees payable by a broadcaster. These are the following:
  - › A content declaration fee of US\$500.00 is payable in the equivalent number of Congolese francs.
  - › Non-commercial radio and television stations are to pay a licence fee of US\$5,000.00, payable in the equivalent number of Congolese francs.
  - › Commercial radio and television stations are to pay a licence fee of US\$10,000.00, payable in the equivalent number of Congolese francs.
  - › Press agencies are to pay a licence fee of US\$500.00, payable in the equivalent number of Congolese francs.
  - › Advertising agencies are to pay a licence fee of US\$500.00, payable in the equivalent number of Congolese francs.
  - › A monthly administrative fee payable to the Compliance Commission.
- › **Copyright:**
  - › Broadly, this section requires broadcasters to respect and acknowledge intellectual property rights, including copyright.
  - › Copyrights must be lodged with Soneca, a national intellectual property repository.
  - › Should satellite broadcasts violate intellectual property rights, the broadcaster is liable.

- ▶ **Advertising:**
  - › Advertising that does not conform to the broadcaster's content declaration may not be broadcast.
  - › All advertising rates must be provided for in a written contract between the advertiser and the broadcaster.
  - › All advertising must be approved by the Compliance Commission prior to being broadcast.
- ▶ **Penalties:** Failure to comply with any requirements in the Annexure will be subject to penalties provided in other laws.

#### **4.2.3 Radio and Television and Compliance Commission, Ministerial Decree**

##### **Establishment of the Compliance Commission**

Article 1 of the Radio and Television and Compliance Commission, Ministerial Decree 04/MIP/006/97 dated 28 February 1997, provides for the establishment of a Compliance Commission by the Ministry of Information and the Press. Article 3 of the Compliance Commission Decree provides that the compliance commission comprises six members, namely:

- ▶ a president, who is the secretary of the Ministry of Information and the Press
- ▶ an advisor on judicial matters
- ▶ an advisor on broadcasting matters
- ▶ an advisor on press matters
- ▶ an advisor on technical matters
- ▶ an administrator of broadcasting.

Although not explicit, it seems that the advisors and broadcasting administrator are appointed by the Minister of Information and the Press.

##### **Mandate of the Compliance Commission**

In terms of article 2 of the Compliance Commission Decree, the three main objectives of the compliance commission are to:

- ▶ receive and examine content declarations provided by broadcasters in terms of the Press Freedom Act
- ▶ ensure broadcasters' compliance with statutes, regulations and other applicable legal rules governing broadcasting
- ▶ make recommendations on sanctions in the event of a breach by a broadcaster of any applicable statutes, regulations and other applicable legal rules governing broadcasting.

## Funding of the compliance commission

Article 4 of the Compliance Commission Decree provides that all broadcasters must pay 10% of their advertising revenues to the compliance commission, calculated on a monthly basis.

### 4.2.4 Administrative Fees on Photographic or Filmed Reportage Ministerial Decree

The Administrative Fees on Photographic or Filmed Reportage Ministerial Decree 04/MIP/008/97, dated 3 May 1997 is a very short decree that essentially sets administrative fees for photographic and filmed reportage.

Although the terms of the decree are extremely vague, it appears that each photographic or film assignment requires the payment of a US\$50.00 fee to the secretary-general of information — a significant reduction on the previous fees set.

### 4.2.5 Broadcasting Press Freedom and Professional Practice Implementing Measures — Ministerial Decree

The Broadcasting Press Freedom and Professional Practice Implementing Measures — Ministerial Decree 04/MCP/011/2002, dated 20 August 2002, contains a number of content restrictions upon or information requirements for radio and television broadcasters operating in the DRC. In brief, these are as follows:

- ▶ Article 1 prohibits the broadcasting of any content that does not comport with the declaration of content made by the broadcaster in terms of the Press Freedom Act.
- ▶ Article 2 requires the prior approval of every advertisement to be broadcast by the Compliance Commission.
- ▶ Article 3 prohibits the broadcast of any content that contradicts Congolese laws or which disturbs public order or infringes on good morals.
- ▶ Article 4 prohibits the broadcast of films, images or documentaries of a pornographic nature.
- ▶ Article 5 establishes a watershed period for television; films depicting violence and horror may be broadcast only after 22h00.
- ▶ Article 6 requires applicants for licences to submit a report to the Compliance Committee setting out their broadcasting technical capacity.
- ▶ Article 7 creates a penalties provision. Depending on the seriousness of the contravention, non-compliance with the Broadcasting Decree can result in the:
  - ▶ seizure of documents and films or video cassettes belonging to the offender
  - ▶ suspension of one or more programmes on the broadcasting service

- ▶ suspension of the broadcasting service itself for a period not exceeding three months
- ▶ withdrawal of the licence.

#### **4.2.6 The Code of Conduct for Congolese Journalists Regulations**

The Code of Conduct for Congolese Journalists — Regulation by the High Council of Broadcasting and Communications dated 4 March 2004, regulates all journalists, whether working in print, online or broadcast media.

The code of conduct is divided into two sections: Part A sets out the duties of journalists, while Part B sets out the rights of journalists. These are summarised in brief:

##### **▶ Part A: Duties of journalists**

- ▶ to promote freedom of opinion and the public's right to access to information
- ▶ to demonstrate fairness, honesty and independence when reporting on individuals and society
- ▶ to be impartial when reporting on controversial issues
- ▶ to be responsible for published work
- ▶ not to engage in defamation, insult, slander, unsubstantiated accusations, falsification of documents, distortions of facts, lies, incitement to hatred, as well as not to condone values that are contrary to the practice of journalism
- ▶ to uphold the truth by relying on established facts and avoiding blackmail or the violation of a third party's good faith
- ▶ not to take bribes
- ▶ to identify sources of information, where possible, unless such sources request confidentiality
- ▶ not to engage in the distortion or embellishment of facts or information
- ▶ to rectify errors promptly and grant timely right of reply
- ▶ to respect human dignity and privacy of persons, particularly with regard to personal intimacy
- ▶ to promote national culture, citizenship and the virtues of the DRC, which are tolerance, pluralism of opinion, democracy and the universal values of peace, equality, human rights and social progress
- ▶ to exercise circumspection with regard to information that might harm vital state interests
- ▶ to show solidarity with fellow journalists and to abide by decisions taken by the HCBC

- ▶ not to publish corrections to articles that never existed in the first place.

▶ **Part B: Rights of journalists**

Journalists are entitled to the protections set out in articles 16 to 20 as summarised below and must comply with the provisions of article 21 also as summarised below:

- ▶ protection of sources of information
- ▶ free access to sources of information and the right to investigate all facets of public life. Secrecy can be requested of a journalist only with regard to public and private matters in exceptional circumstances
- ▶ to refuse to carry out instructions of a superior which are contrary to journalistic ethics. A journalist cannot be forced to express him/herself in a manner that is contrary to his/her beliefs or opinions, and if so forced, he/she may choose to resign
- ▶ the editorial team of any media outlet must be informed of any decision that affects the existence of such outlet and must be consulted in respect of employment-related managerial decisions
- ▶ journalists have the right to engage in collective bargaining
- ▶ journalists must abide by the code of conduct.

**4.2.7 Foreign-owned Radio and Television Services Decree**

The Foreign-owned Radio and Television Services Decree (No. CAB/M-CM/LMO/010/2016 was promulgated by the Minister of Communications in 2016. It seeks to regulate the levels of foreign ownership of radio and television services broadcasting in the DRC as follows:

- ▶ The majority shareholding in any broadcasting service must be by DRC citizens in accordance with the requirements of article 61 of the Press Freedom Act (dealt with above) — article 1.
- ▶ All broadcasters had 30 days from the date the Decree came into effect to comply with the majority Congolese shareholder requirement provided for in article 1 failing which, the broadcasting service was prohibited from operating — article 2.
- ▶ Foreign media outlets that do not broadcast to the DRC may nevertheless establish a partnership with a local broadcaster as a programme content provider to such local broadcasters, provided prior written approval is obtained from the Minister of Communications. However, the minister may cancel any such contract within 10 days of approving same if he or she is of the opinion that the partnership terms are not been adhered to — articles 3-5.
- ▶ Should a partnership agreement between a foreign content provider and a local broadcaster be cancelled in terms of article 5, or if the contract is

terminated by either party, the local broadcaster is required to cease broadcasting the foreign content immediately and existing parties to such contracts are given 45 days to amend their existing contracts accordingly — articles 6 and 7.

- ▶ Enforcement of the Decree is to be carried out by the secretary-general of the Ministry of Communications — article 8.

#### **4.2.8 Migration to DTT Decree**

The Migration to DTT Decree (No. 002/TNT/CAB/MCM/LMO/2015) was promulgated by the Minister of Post and Telecommunications, together with the Minister of Media and Communication, in 2015 in terms of the Post and Telecommunications Act (dealt with above). The Decree deals with the migration of television from analogue terrestrial to digital terrestrial. In brief, it provides as follows:

- ▶ the migration from analogue to DTT in the UHF and VHF frequency bands in the DRC began on 25 April 2015 and the digital switchover is to be completed by 17 June 2020 — articles 1 and 3.
- ▶ from 25 April 2015, the manufacturing or importation of any analogue television signal receiver device was prohibited — article 4.
- ▶ enforcement of the Decree is to be carried out by the secretary-general of the Ministry of Post and Telecommunications — article 6.

It is noteworthy that two ministers are responsible for the migration to DTT. This is probably because the aim of migrating to DTT is to free up spectrum in the UHF and VHF frequency bands for use primarily by mobile broadband services.

#### **4.2.9 Election Coverage Regulations**

The HCBC has promulgated the Election Coverage Regulations No. CSAC/AP/001/2015, that were intended to provide election coverage regulations for the media for the 2016 elections which never took place. However, we assume that they will be used for the proposed 2018 elections, assuming these take place, and so we include them here. In brief the key provisions are as follows:

- ▶ Article 3 provides that all media (note includes broadcasting and other media) must report accurately on all events during the election period.
- ▶ Article 4 requires all media to refrain from publicising any materials that incite hatred or discrimination or undermine national unity.
- ▶ Article 5 requires all media to observe applicable Codes of Conduct.
- ▶ Article 6 regulates access to the state broadcaster, namely, the RTNC by the Presidential candidates and it provides that:
  - ▶ there is to be no change in the coverage of government activity as a result of the election.

- ▶ all presidential candidates are entitled to be featured on the state broadcaster on three occasions and for three minutes for each such occasion.
- ▶ Articles 7 to 43 deal with the detail of Presidential candidates' appearances on the RTNC as provided for in article 6. They include provisions on language, disqualification by the Electoral Commission and the format of presentation of the candidate's views, such as reading from a prepared statement on engaging in a question and answer session.
- ▶ Articles 44 to 51 deal with the election coverage by privately-owned media. Essentially, they are free not to provide a platform for political parties or candidates contesting the election. However they must communicate their decision as to whether or not they are to cover the election to the HCBC. Their general obligations during the election period are to be fair and impartial.
- ▶ Article 52 deals with online media and provides that Presidential candidates may create websites for their electoral campaign. These sites are required to be interactive and comments posted by the public are required to accord with good morals, human dignity, respect for privacy and national security.
- ▶ Articles 53-60 deal with election campaign posters, pamphlets and loudhailers. They include that a presidential candidate is legally liable for the content of their posters and that the posters must be removed within seven days of the election. There are also provisions regarding the placement of posters and the required measurements of them, including provisions regarding posters pasted on vehicles. There are also provisions prohibiting the destruction or damaging of election posters. Pamphlets are to be distributed by hand. Distribution of pamphlets by aircraft is specifically prohibited. Stationary loudhailers may be used for campaigning.
- ▶ Article 61 provides that all campaigning through the media is to cease 48 hours prior to the actual election day.
- ▶ Article 62 provides that a presidential candidate may apply to the HCBC for the RTNC to cover a specific campaign event on 72 hours prior notice. Approval of such request is at the discretion of the HCBC.
- ▶ Article 63 is a generally-applicable section which requires all media to comply with the principles of fairness, objectivity, impartiality and equitable access in respect of their presidential election coverage.
- ▶ Articles 64 to 67 contain prohibitions imposed upon the media regarding election coverage. These include:
  - ▶ prohibiting commercial sponsorship of election-related coverage — article 64
  - ▶ requiring clear distinctions between regular reporting and election coverage — article 65
  - ▶ prohibitions against media incitement of violence, hatred and discrimination — article 66

- ▶ prohibiting the publication of results before the end of the election itself — article 67.
- ▶ Article 68 requires broadcasters to clearly identify campaign-related material.
- ▶ Article 69 requires all journalists, news-anchors, producers and all other media professionals to conduct themselves in accordance with high professional standards.
- ▶ Article 70 empowers the HCBC to suspend any media house for a period of seven to ninety days for violating any provision of the Electoral Coverage Regulations. It is important to note that no process is provided for in respect of such a suspension or indeed for the media house to be given a hearing in respect of the suspension.

#### **4.2.10 Licence Renewal Decree**

The Licence Renewal Decree No. CAB/MIN/PTNTIC/EON/DTC/MMW/002/2017, (the Renewal Decree), was promulgated in 2017 by the Minister of Posts and Telecommunications.

The Renewal Decree purports to make provision for how renewals of 20 year-operating licences (telecommunications, broadcasting, postal services and new technologies) are to be conducted. In brief, the Decree provides that:

- ▶ applications for renewals must be at least twenty-four months prior to the current expiry date — article 4.
- ▶ renewal applications must be submitted to both the Minister and the Regulatory Authority (dealt with earlier in this chapter) — article 5.
- ▶ the Regulatory Authority makes a recommendation to the Minister as to whether or not the renewal application is to succeed but the Minister has the discretion to refuse such renewal application — article 6.
- ▶ any refusal to renew on the Minister's part may be appealed against within three months of the refusal — article 7.
- ▶ a licence which is renewed also has a period of 20 years — article 4.

#### **4.2.11 Accreditation of Journalists Covering Elections Regulations**

Regulation 030/CENI-RDC/18, issued by the National Independent Electoral Commission of the DRC (NIEC) in 2018, sets out registration requirements for journalists wishing to report on election matters in the DRC — presidential, national and provincial.

Essentially, such journalists (who have to be already registered in terms of the laws set out above) are required to apply to the NIEC for further accreditation to cover and report on elections.

The accreditation requirements cover both national and foreign reporters. Upon accreditation, the journalist is provided with a card allowing him or her to report on election matters.

## 5 Media self-regulation

One of the greatest problems facing the media in the DRC is the lack of self-regulatory mechanisms for content dispute resolution.

The media has failed to develop industry-wide associations capable of developing and enforcing self-regulatory provisions for attaining appropriate professional standards for the media. This lack of self-regulation has led to disputes involving the media having to be settled in the courts.

## 6 Case law and the media

The DRC's court and jurisprudential system is a civil law system. Consequently, the case law is not as strictly based on precedent as is the case in common law systems (commonly found in former British colonies).

Case law in the DRC certainly affects the media and working journalists. For example, journalists are sometimes tried before military tribunals for crimes such as high treason. However, accessing Congolese case law is extremely difficult.

DRC case law is not published electronically or in law reports and there is no formal indexing system of previous judgments. The services of a lawyer who has access to the registrar of the relevant court is usually essential when trying to obtain a copy of a particular judgment.

### Notes

- 1 <http://worldpopulationreview.com/countries/dr-congo-population/> [accessed 30 April 2019]
- 2 <http://www.refworld.org/pdfid/57da8f6c4.pdf> [accessed 30 April 2019]
- 3 <https://thisisafrica.me/drccs-kabila-to-step-down-after-17-years/> [accessed 30 April 2019]
- 4 <https://www.aljazeera.com/news/2018/12/drc-election-polls-open-long-delayed-vote-181230055430093.html> [accessed 30 April 2019]
- 5 <https://www.theguardian.com/world/2019/jan/17/african-union-democratic-republic-congo-dc-delay-election-announcement> [accessed 30 April 2019]
- 6 <https://www.theguardian.com/world/2019/jan/17/african-union-democratic-republic-congo-dc-delay-election-announcement> [accessed 30 April 2019]
- 7 <https://www.irishtimes.com/news/world/africa/opposition-leader-felix-tshisekedi-sworn-in-as-congo-president-1.3769401> [accessed 30 April 2019]

- 8 <http://www.theafricareport.com/Central-Africa/drc-what-kabilas-deal-with-tshisekedi-means-for-africa-and-beyond.html> [accessed 30 April 2019]
- 9 See, generally, <http://www.state.gov/r/pa/ei/bgn/2823.htm#history>, [accessed 30 April 2019]
- 10 <https://www.theguardian.com/world/2018/apr/03/millions-flee-bloodshed-as-congos-army-steps-up-fight-with-rebels-in-east> [accessed 30 April 2019]
- 11 <https://www.amnesty.org/download/Documents/AFR6247612016ENGLISH.pdf> [accessed 30 April 2019]
- 12 See, [http://www.ifex.org/democratic\\_republic\\_of\\_congo/](http://www.ifex.org/democratic_republic_of_congo/). [accessed 30 April 2019]
- 13 [https://cipesa.org/?wpfb\\_dl=234](https://cipesa.org/?wpfb_dl=234) [accessed 30 April 2019]
- 14 <https://www.internetworkworldstats.com/africa.htm#cd> [accessed 30 April 2019]
- 15 <https://www.internetworkworldstats.com/africa.htm#cd> [accessed 30 April 2019]
- 16 See: <https://qz.com/africa/1187727/the-dr-congo-is-using-a-decades-old-law-to-shut-down-the-internet/> and <https://www.mediacongo.net//article-actualite-22652.html> [accessed 30 April 2019]
- 17 <https://www.zdnet.com/article/congo-suspends-internet-sms-services/> [accessed 30 April 2019]