



Lesotho

1 Introduction

The Kingdom of Lesotho has been an independent country since 1966; however, it has had limited experience of being a democracy since its independence from the United Kingdom. Lesotho became a formal constitutional democracy in 1993, but undemocratic political upheavals continue to haunt the country. In 1998, an army mutiny resulted in SADC troops (from South Africa and Botswana) being asked by the government to assist in protecting it and putting down a would-be military coup.

The political uncertainty has continued into 2020 with Prime Minister Thomas Thabane's resignation from office amidst a scandal surrounding the murder of his ex-wife in 2017, two days before Thabane was sworn in as Prime Minister. While Thabane cited health and age as the reasons for his stepping down in May 2020, it is evident that the investigation into his ex-wife's murder influenced his decision as his current wife was charged with the murder in February 2020. Thabane himself appeared in court in February 2020 for 'acting in common purpose', but, at the time of writing, has not been formally charged concerning the murder.¹

Lesotho is a small landlocked country surrounded by the Republic of South Africa. Lesotho has a sparse population of 2.1 million people² and is mostly underdeveloped, with only 31.5% of the people living in an urban environment and 33.73% having access to electricity.³ The internet is available to approximately 31.9% of the population, and 20.8% have a Facebook account.⁴ As for television infrastructure in Lesotho, the country has completed the conversion from analogue to digital terrestrial television, having opted for the DVB-T2 signal standard. The analogue switch-off date was the 17th of June 2015.⁵ Television penetration remains low in Lesotho with only 29.47% of households having access to a television and 52.78% having access to a radio.⁶

There is little doubt that the media environment in Lesotho is not in step with international standards for democratic media regulation. There is an old-style state broadcaster operating under the Ministry for Communications, Science and Technology which, despite numerous promises, has yet to be transformed into a public broadcaster.

The broadcasting regulator, the Lesotho Communications Authority, has never been a particularly independent body. Amendments to governing legislation over the past five years have deprived it of much of the functional independence it once had and have given a significant number of powers to the minister for communications, science and technology. Nevertheless, there is a level of media diversity in both broadcasting and print media, and the people of Lesotho do have access to a broader range of news, information and general viewpoints than was the case previously.

This chapter introduces working journalists and other media practitioners to the legal environment governing media operations in Lesotho. The chapter is divided into five sections:

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

This chapter aims to equip the reader with an understanding of the primary laws governing the media in Lesotho. Crucial weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Lesotho, 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

In this section, you will learn:

- ▷ definition of a constitution
- ▷ definition of constitutional supremacy
- ▷ definition of a limitations clause
- ▷ constitutional provisions that protect the media
- ▷ constitutional provisions that might require caution from the media or might conflict with media interests
- ▷ key institutions relevant to the media established under the Constitution of Lesotho
- ▷ enforcing rights under the constitution
- ▷ the three branches of government and separation of powers
- ▷ weaknesses in the Constitution of Lesotho 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. Such constitutions set out the rules by which members of the organisation agree to operate. However, constitutions can also govern much larger entities and entire nations.

The Lesotho Constitution, for example, sets out the basic rules of the Kingdom of Lesotho. These are the rules on which the entire country operates. A vital constitutional provision in this regard is section 1(1), which states that: 'Lesotho shall be a sovereign democratic Kingdom.'

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 essential 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 legislation could be challenged in a court of law and could be overturned on the ground that it is unconstitutional.

The Constitution of Lesotho makes provision for constitutional supremacy. Section 2 specifically states: 'This Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.'

2.3 Definition of a limitations clause

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

The Constitution of Lesotho makes provision for legal limitations on the exercise and protection of rights contained in Chapter II of the Constitution of Lesotho, which is headed Protection of Fundamental Human Rights and Freedoms. Section 4(1) provides explicitly that the various rights provided for in Chapter II are 'subject to such limitations ... designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest'.

It is therefore clear that the rights contained in Chapter II of the Constitution of Lesotho are subject to the limitations contained in the provisions of the right itself.

The limitations in respect of each right are dealt with below.

2.4 Constitutional rights that protect the media

The Constitution of Lesotho contains several important provisions in Chapter II, Protection of Fundamental Human Rights and Freedoms, which directly protect the media, including publishers, broadcasters, journalists, editors and producers.

It is important to note that section 4(2) specifies that the provisions of Chapter II apply to 'persons acting in a private capacity' as well to 'the Government of Lesotho'. The effect of this provision is to require ordinary people, as well as governmental officials, to comply with the protection of fundamental human rights and freedoms provisions as set out in Chapter II. Thus, ordinary people are, for example, required not to deny freedom of expression rights to anyone else.

2.4.1 Freedom of expression

The most important provision that protects the media is section 14(1), Freedom of Expression, which states:

Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of freedom of expression, including freedom to hold opinions without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

This provision needs some explanation.

- ▶ The freedom applies to everyone and not just to certain people, for example, citizens. Hence everybody enjoys this fundamental right.
- ▶ The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many examples of this, including physical expression (such as mime or dance), photography or art.
- ▶ Section 14(1) specifies that the right to freedom of expression includes the 'freedom to hold opinions without interference', thereby protecting the media's right to write opinion pieces and commentary on important issues of the day.
- ▶ Section 14(1) specifies that the right to freedom of expression includes the: 'freedom to receive information and ideas without interference'. This freedom to receive information is a fundamental aspect of freedom of expression, and this subsection effectively enshrines the right to this free flow of information. Thus, the information rights of audiences, for example, as well as the expression rights of the media are protected. This right is important because it also protects organisations that foster media development. These organisations facilitate public access to different sources and types of information,

particularly in rural areas which traditionally have little access to the media.

- ▶ Section 14(1) specifies that the right to freedom of expression includes the ‘freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons)’. This is an important provision because it protects the right to communicate information and ideas to the public, a critically important role of the press and the media more generally. Therefore, although the Constitution of Lesotho does not specifically mention the press or the media, the freedom to perform that role, namely to communicate information to the public, is protected.
- ▶ Section 14(1) specifies that the right to freedom of expression includes the ‘freedom from interference with his correspondence’. This protection of correspondence (which would presumably include letters, emails and telefaxes) is a critical right for working journalists.

An important adjunct to the right of freedom of expression is section 14(4), which specifically grants ‘any person who feels aggrieved by statements or ideas disseminated to the public ... has the right to reply or to require a correction to be made, under such conditions as the law may establish’. This provision requires some comment as it is obvious that the constitution envisages that a right of reply is an important way of mediating disputes arising from the right to freedom of expression. Note, however, that this right of reply is also not limitless and must be exercised in accordance with the law.

As has been discussed, constitutional rights are never absolute. Sections 14(2) and (3) outline the basis on which the right to freedom of expression set out in section 14(1) may be limited. Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits the right to freedom of expression will not violate section 14(1) of the constitution provided that it:

- ▶ is in the interests of defence, public safety, public order, public morality or public health
- ▶ protects the reputations and rights of others or the private lives of people involved in legal proceedings
- ▶ prevents the disclosure of confidential information
- ▶ maintains the authority and independence of the courts
- ▶ regulates the technical administration or operation of matters such as telephony and broadcasting
- ▶ imposes restrictions on public officers
- ▶ is practically necessary in a democratic society.

2.4.2 Freedom from arbitrary search or entry

A second right that protects the media is contained in section 10(1) of the Lesotho Constitution. This right grants everyone the entitlement to ‘freedom from arbitrary search or entry, that is to say, he shall not (except with his own consent) be subjected to the search of his person or his property or the entry by others on his premises’. Being free from arbitrary searches and seizure of notebooks, computer flash disks, rolls or disks of film and other tools of a journalist’s trade is an important right, but it can be limited.

As discussed, constitutional rights are never absolute. Sections 10(2) and (3) set out the basis on which the right to freedom from arbitrary search or entry outlined in section 10(1) may be limited. Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits the freedom from arbitrary search or entry will not violate section 10(1) of the constitution provided that it:

- ▶ is in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development or utilisation of mineral resources or any other property to promote the public benefit. This list of interests is much wider than the allowable interests for limiting freedom of expression
- ▶ protects the rights of others
- ▶ authorises any public authority to conduct entries and searches for tax purposes or concerning government property
- ▶ is done in terms of a court order
- ▶ is practically necessary in a democratic society.

2.4.3 Freedom of conscience

Section 13(1) of the Lesotho Constitution guarantees every person the right to ‘freedom of conscience, including freedom of thought’. Freedom of thought is important for the media as it provides additional protection for commentary on public issues of importance. As discussed, constitutional rights are never absolute. Sections 13(5) and (6) set out the basis on which the right to freedom of conscience detailed in section 13(1) may be limited. Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits freedom of conscience will not violate section 13(1) of the constitution provided that it:

- ▶ is in the interests of defence, public safety, public order, public morality or public health
- ▶ protects the rights of others
- ▶ is practically necessary in a democratic society.

2.4.4 Freedom of association

A fourth protection is provided for in section 16(1) of the Lesotho Constitution, which grants every person the ‘freedom to associate freely with other persons for ideological, religious, political, economic, labour, social, cultural, recreational and similar purposes’, thereby guaranteeing the rights of the press to form press associations but also to form media houses and to conduct media operations.

Constitutional rights are never absolute. Sections 16(2) and (3) set out the basis on which the right to freedom of association detailed in section 16(1) may be limited. Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits freedom of association will not violate section 16(1) of the constitution provided that it:

- ▶ is in the interests of defence, public safety, public order, public morality or public health
- ▶ protects the rights of others
- ▶ imposes restrictions on public officers
- ▶ is practically necessary in a democratic society.

2.4.5 Right to a fair trial

A fifth protection is provided in section 12(9) of the Lesotho Constitution which states, as a general rule, that ‘all proceedings of every court ... including the announcement of the decision of the court ... shall be held in public’. This right to so-called open justice is important because it allows the media to be present during court proceedings. Note that this section also applies to other adjudicative bodies that determine rights issues. It seems, therefore, that the Ombudsman’s proceedings, for example, would similarly be public.

Constitutional rights are never absolute. Sections 12(10) provides that the above general right to open court hearings shall not prevent a court (or similar body) from limiting public access to the extent as may be empowered by law and which may be:

- ▶ ‘reasonably necessary in the circumstances where publicity would prejudice the interests of justice ... or in the interests of public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons involved in the proceedings,’ section 12(10)(a)
- ▶ ‘in the interests of defence, public safety or public order’, section 12(10)(b).

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

Just as some certain rights or freedoms protect the media, other rights or freedoms

can protect individuals and institutions from the media. It is essential for journalists to understand which provisions in the constitution can be used against the media. Several of these exist.

2.5.1 Right to respect for private and family life

Section 11(1) of the Lesotho Constitution provides that ‘Every person shall be entitled to respect for his private and family life and home’. This privacy right 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. The media does have to be careful in this regard and should be aware that there are always boundaries in respect of privacy which 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, as well as the nature of the issue being dealt with by the media.

2.5.2 States of emergency and derogations from fundamental human rights and freedoms provisions

It is also important to note the provisions of sections 21 and 23 of Chapter II in the Constitution of Lesotho, which deal with derogations of fundamental human rights and freedoms and states of emergency. In terms of section 23, a state of emergency may be proclaimed by the prime minister acting in accordance with the Council of State for 14 days. If each house of parliament approves the declaration, then it will remain in force for six months (although this can be extended for up to six months at a time) in ‘a time of war or other public emergency which threatens the life of the nation’. Importantly, section 21 specifically allows for states of emergency legislation to provide for the derogation of certain rights laid down in Chapter II of the Lesotho Constitution. However, none of the rights which are important to the media and which have been summarised above are included in the list.

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

There are several important institutions concerning the media that are established under the Constitution of Lesotho, namely, the judiciary, the Judicial Service Commission (JSC) and the Ombudsman.

2.6.1 The judiciary

In terms of section 118(1) of the Constitution of Lesotho, judicial power is vested in the courts of Lesotho. These are the Court of Appeal (the apex court), the High Court, subordinate courts and courts-martial, and any other tribunal exercising a judicial function as may be established by parliament.

The judiciary is an essential institution for the media because the two rely on each other to support and strengthen democratic practices in a country. The judiciary

needs the media to inform the public about its judgments and its role as one of the branches of government, and the media is essential to building public trust and respect for the judiciary, which is the foundation of the rule of law in society. The media needs the judiciary because of the courts' ability to protect the media from unlawful action by the state and from unfair damages claims by litigants.

Section 118(2) specifically provides that the courts shall be 'independent and free from interference and subject only to this Constitution and to any other law'. In terms of sections 120 and 124 of the Lesotho Constitution, the key judicial appointment procedures are as follows:

- ▶ The Chief Justice of the High Court and the President of the Appeal Court are appointed by the king, acting in accordance with advice from the prime minister.
- ▶ The other High Court judges (called 'puisne' judges in the constitution) are essentially appointed by the king, acting in accordance with the advice of the JSC. Note that the direct meaning of puisne is 'of lower rank'.
- ▶ Justices of Appeal are essentially appointed by the king, acting in accordance with the advice of the JSC and after consultation with the President of the Appeal Court.

In terms of sections 121 and 125 of the Lesotho Constitution, the Chief Justice, the puisne judges and the judges of the Court of Appeal may be removed from office 'only for inability to perform the functions of his office ... or for misbehaviour'.

The removal of any of these judges by the king requires a prior finding by a tribunal recommending removal.

2.6.2 The Judicial Service Commission

The JSC is a constitutional body that is established to:

- ▶ participate in the appointment of puisne and Appeal Court judges
- ▶ be responsible for exercising disciplinary control over registrars, magistrates and members of subordinate courts.

The JSC is relevant to the media because of its critical role in the judiciary, the proper functioning and independence of which are essential for democracy. In terms of section 132(1), the JSC is made up of the Chief Justice, the attorney-general, the chairperson of the Public Service Commission, and an appointee of the king recommended by the Chief Justice who is appointed for a five-year term.

2.6.3 The Ombudsman

The Ombudsman is an important office for the media because it, too, is aimed at holding public power accountable. In terms of section 134(1) of the Lesotho Constitution, the Ombudsman is appointed by the king, acting following the advice

of the prime minister. The main power of the Ombudsman is to investigate action taken by an officer in any government department, local government authority or statutory corporation, which has resulted in an alleged injustice in terms of section 135 of the constitution.

2.6.4 The Human Rights Commission

Section 133A of the Constitution of Lesotho establishes the Human Rights Commission as an independent organisation free from interference and subject only to the constitution and any other law. While the HRC is not exclusively relevant to the media, the functions of the HRC, as provided for in section 133F of the constitution, include monitoring the state of human rights in Lesotho which rights the media relies on to function.

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.

While rights are generally enforceable by the courts, the Constitution of Lesotho also envisages the right of people, including the media, to approach a body such as the Ombudsman or the HRC to assist in the enforcement of rights.

Perhaps one of the most effective ways in which rights are protected under the Constitution of Lesotho is by the provisions of the constitution which entrench most of the provisions of Chapter II, headed Protection of Fundamental Human Rights and Freedoms.

Section 85(3) of the constitution requires that a constitutional amendment to Chapter II needs to have the support of a majority vote of the entire electorate, in addition to having been passed by parliament, before it can be sent to the king for his assent. Effectively, this requires a national referendum on any such constitutional amendment.

2.8 The three branches of government and separation of powers

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

2.8.1 Branches of government

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

The executive

In terms of section 86 of the Constitution of Lesotho, executive power in Lesotho is vested in the king. In terms of section 44(1), the King of Lesotho is a constitutional monarch and head of state. The College of Chiefs may, in accordance with the customary law of Lesotho, designate the person (or persons, in order of prior right) who is entitled to succeed to the Office of King upon the death (or other vacancy) of the king, in terms of section 45(1) of the Lesotho Constitution. The College of Chiefs consists of the 22 principal chiefs of Lesotho, which are set out in Schedule 2 to the constitution, in terms of sections 104(1) and 103(1) of the Lesotho Constitution.

Section 86 of the Lesotho Constitution provides that executive power in Lesotho is exercised by the king via the officers or authorities of the government of Lesotho.

Section 88 of the Constitution of Lesotho provides for a Cabinet of ministers comprising the prime minister and the other ministers. This Cabinet is responsible to the two houses of parliament for all things done by any minister. Section 87(1) of the Constitution of Lesotho stipulates that the prime minister is appointed by the king acting on the advice of the Council of State. Note that section 87(2) requires that the prime minister so appointed must be the leader of the majority party or coalition in the National Assembly, that is, the person who appears to the Council of State to command the support of the majority of members in the National Assembly.

The Council of State is established in terms of section 95 of the constitution. Its role is to assist the king in the discharge of his functions and to exercise certain constitutional functions. The Council of State consists of the following members, all of whom must be citizens of Lesotho, the prime minister, the speaker of the National Assembly, two judges (or former judges) of the High Court or Court of Appeal appointed by the king on the advice of the Chief Justice, the attorney-general, the commander of the defence force, the commissioner of police, a principal chief nominated by the College of Chiefs, two members of the National Assembly (namely, the leaders of the two largest opposition parties) appointed by the speaker; three persons appointed by the king on the advice of the prime minister by virtue of their special expertise, skills or experience and a member of the legal profession in private practice nominated by the Law Society.

In terms of section 87(3) of the constitution, the other offices of minister (and there must be at least seven of these, including the office of the deputy prime minister) are established by parliament or, subject to what is done by parliament, by the king acting in accordance with the advice of the prime minister.

The king appoints the other ministers on the advice of the prime minister, from among the members of the National Assembly or from among the senators, in terms of section 87(4) of the Constitution of Lesotho. In terms of section 89 of the constitution, the king, acting in accordance with the written advice of the prime minister, assigns to the prime minister or any other minister responsibility for any business of the government of Lesotho.

The king, acting on the advice of the prime minister, also appoints assistant ministers from among the ranks of members of the National Assembly and the Senate, in terms of section 93 of the Lesotho Constitution. Note that these assistant ministers are not members of Cabinet.

The legislature

In terms of section 70(1) of the Constitution of Lesotho, legislative or law-making power in Lesotho is vested in parliament.

In terms of section 54 of the Constitution of Lesotho, parliament consists of the king, a Senate and a National Assembly.

In terms of sections 56 and 57, the National Assembly consists of 80 members elected in terms of a constituency system by the electorate, made up of all adult citizens of Lesotho who meet the prescribed residency requirements.

In terms of section 55, the Senate consists of the 22 principal chiefs (or their designated representatives) and 11 other senators nominated by the king, acting in accordance with the advice of the Council of State. Consequently, the Senate is not an elected body.

The judiciary

Judicial power, as previously discussed, is vested in the courts. The role of the judiciary is to interpret the law and to adjudicate legal disputes in accordance with the law.

2.8.2 Separation of powers

It is important in a functioning democracy to divide government power between different organs of the state to guard against the centralisation of power, which may lead to abuses of power. This is known as the separation of powers doctrine.

The aim, as the Lesotho Constitution has largely done, is to separate the functions of the three branches of government, the executive, the legislature and the judiciary, so that no single branch is able to operate alone, assume complete state control and amass centralised power. Each branch performs a number of different functions but also plays a watchdog role in respect to the others. This helps ensure that public power is exercised in a manner that is accountable to the general public and in accordance with the constitution.

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

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

2.9.1 Remove internal constitutional qualifiers to certain rights

As discussed above, the Constitution of Lesotho makes provision for certain rights to be subject to internal limitations; that is, the provision dealing with a right contains its own limitations clause, which sets out how government can limit the ambit of the right legitimately.

These internal limitations occur in a number of sections on rights, in Chapter II of the Lesotho Constitution. They deal specifically and only with the limitation or qualification of the particular right that is dealt with in that section. As outlined more fully above, the right to freedom of expression contains such an internal limitation. In other words, the section that contains the right also details the parameters or limitations allowable in respect of that right.

The rights contained in the provisions dealing with Fundamental Human Rights and Freedoms set out in Chapter II of the Constitution of Lesotho, would, however, be strengthened if the rights were subject to a single generally applicable limitations clause rather than each having their own limitations clause.

Such a general limitations clause would apply to all of the provisions of Chapter II of the Constitution of Lesotho, that is, to the fundamental rights and freedoms. It would allow a government to pass laws limiting rights generally, provided this is done by the provisions of a limitations clause that applies equally to all rights. It makes the ambit of the rights and the grounds for limitation much clearer for the public because there are no specific limitations provisions that apply to each right separately.

2.9.2 Strengthen procedural consultation provisions

On the face of it, the Constitution of Lesotho makes provisions for close consultation by various state players. For example, the king often is required to act on the advice of the prime minister or the Council of State. However, section 91 of the constitution deals with the exercise of the king's functions and subsection (5) specifically states that:

where the King is required by this Constitution to act in accordance with the advice of any person or authority, the question whether he has received or acted in accordance with such advice shall not be enquired into by any court.

A similar but more generally applicable provision is contained in section 155(8) of the constitution, which deals with situations 'where a person or authority is authorised or required to exercise any function after consultation with some other person or authority', and it provides that:

the person or authority first referred to shall not be required to act in accordance with the advice of the other person or authority [which is clear from the plain wording in any event] and the question of whether such consultation was made shall not be enquired into in any court.

The effect of these provisions is troubling. Essentially, it allows state actors not to comply with constitutionally mandated consultation requirements as no court of law has jurisdiction to enquire whether or not such procedurally important consultations, in fact, took place. These provisions should be amended or repealed altogether because they undermine the very notion of constitutional supremacy. If the constitution requires prior consultation by key state personnel, this should be done. If it is not done, the High Court should be able to enquire into this and set aside such state action for procedural non-compliance with constitutionally mandated consultation.

2.9.3 Bolster independence of the broadcasting regulator and of the public broadcaster

It is disappointing that the Constitution of Lesotho does not provide constitutional protection for an independent broadcasting regulator and for a public broadcaster, given how important both of these institutions are for ensuring access to news and information by the public.

3 The media and legislation

In this section, you will learn:

- ▷ what legislation is and how it comes into being
- ▷ legislation governing the operations of print media
- ▷ legislation governing the broadcasting media generally
- ▷ legislation governing the state broadcasting sector and the state news agency
- ▷ legislation governing broadcasting signal distribution
- ▷ legislation that threatens a journalist's duty to protect sources
- ▷ legislation that prohibits the publication of certain kinds of information
- ▷ legislation that specifically assists the media in performing its functions

3.1 Legislation: An introduction

3.1.1 What legislation is and how it comes into being

Legislation is a body of law consisting of acts properly passed by parliament, the legislative authority. As we know, legislative authority in Lesotho is vested in parliament, which, in terms of section 70 of the constitution, is made up of the king, the National Assembly and the Senate. Consequently, both houses of parliament and the king are ordinarily involved in passing legislation.

There are detailed rules in sections 78–80 and 85 of the constitution, which set out the different law-making processes that apply to different types of legislation. It is important for journalists and others in the media to be aware that the constitution requires different types of legislation to be passed in accordance with particular procedures.

The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the Constitution of Lesotho, there are three kinds of legislation, each of which has particular procedures, rules or both applicable to it. These are:

- ▶ legislation that amends the constitution, the procedures, applicable rules or both are set out in section 85 of the constitution
- ▶ ordinary legislation, the procedures, applicable rules or both are set out in sections 78 and 80 of the constitution
- ▶ legislation that deals with financial measures, the procedures, applicable rules or both are set out in section 79 of the constitution.

3.1.2 The difference between a bill and an act

A bill is a piece of draft legislation that is debated and usually amended by parliament during the law-making process. In terms of section 78(2) of the Lesotho Constitution, a bill may originate only in the National Assembly.

If a bill is passed by the parliament following the various applicable procedures required for different types of bills, as set out above, it becomes an act once it is assented to by the king, in terms of section 78(4) of the constitution. An act must be published in the gazette promptly and takes effect or comes into force when it is published or on a date specified in the act itself, in terms of section 78(6) of the constitution.

It is, however, important to note that some of the laws governing certain media-related aspects are proclamations or orders which came into force prior to the coming into effect of the 1993 Lesotho Constitution. As they were passed by the governing authority of the time and have yet to be repealed, they are still good law. In a number of instances, the relevant governing authority was not parliament.

3.2 Legislation governing the operations of print media

Unfortunately, there are a number of restraints on the ability to operate as a print media publication in Lesotho.

In particular, Lesotho requires the registration of newspapers, which is out of step with international best practice. These kinds of restrictions effectively impinge on the public's right to know by setting barriers to media operations.

Some key requirements are laid down by the Printing and Publishing Act, Act 10 of 1967, in respect of a newspaper, the definition of which includes a newspaper, magazine or periodical that is published at least monthly and which is intended for public sale or distribution:

- ▶ Section 7 of the Printing and Publishing Act prohibits a person from printing or publishing a newspaper without previously obtaining a certificate of registration from the registrar-general and paying the prescribed fee. If a person does print or publish a newspaper without a certificate of registration, this is an offence, and the person can be sentenced to a fine, imprisonment or both, under section 15 of the Printing and Publishing Act.
- ▶ Furthermore, section 8 of the Printing and Publishing Act requires that notice of any intention to print and publish a newspaper in Lesotho must be given to the registrar-general, including full details of the newspaper's name, the name and address of each proprietor, publisher, printer, manager and responsible editor. The provision of any false information is an offence and the person concerned can be sentenced to a fine, imprisonment or both under section 15 of the Printing and Publishing Act.
- ▶ Section 9 requires any changes in the above-registered information to be provided by the proprietor and the publisher to the registrar-general. Failure to do so is an offence and the person concerned can be sentenced to a fine, imprisonment or both under section 15 of the Printing and Publishing Act.

Besides the newspaper registration requirements set out above, section 6 of the Printing and Publishing Act also requires all printed matter (extremely broadly defined) to have the address at which the printed matter is published and the name and address of the proprietor, publisher and printer thereof printed legibly on its first or last sheet. Failure to do so is an offence and the person concerned can be sentenced to a fine, imprisonment or both under section 15 of the Printing and Publishing Act.

3.3 Legislation governing the broadcast media generally

3.3.1 Statutes that regulate broadcasting generally

Broadcasting in Lesotho is regulated in terms of the Communications Act, Act 4 of 2012 (Communications Act). The act is defined as 'an Act to provide for the regulation of the telecommunications, broadcasting and postal sectors'. In terms of

section 56 of the Communications Act, the Lesotho Communications Authority Act 2000, has been repealed.

Establishment of the Lesotho Communications Authority (LCA)

The Communication Act provides, in section 3 that the LCA, established as a body corporate by the Lesotho Communications Act 2000, remains in existence. Section 3(3) of the Communications Act states 'In the performance of its functions, the authority shall be independent and not subject to control by any person or authority.' This provision, therefore, envisages the LCA as an independent authority.

Main functions of the LCA

In terms of sections 4 and 5 of the Communications Act, the duties and powers of the LCA are to:

- ▶ implement the Communications Act and any regulations or rules made under it
- ▶ facilitate new entries into the communications market and the provision of new communications services
- ▶ allocate resources necessary for the provision of communications services
- ▶ promote and preserve competition in the communications market
- ▶ protect consumer interests
- ▶ facilitate cooperation between licensees
- ▶ facilitate cooperative deployment and use of infrastructure among licensees
- ▶ facilitate the resolution of disputes regarding communication services
- ▶ promote Lesotho's participation in the global information society
- ▶ consult with members of the communications industry and the public
- ▶ conduct competitive market analysis and regulatory impact assessments and impose pro-competitive remedies in any market that is found to lack effective competition
- ▶ grant licences for communication services
- ▶ prescribe licence fees for communication services
- ▶ allocate resources, including radio frequency spectrum
- ▶ establish technical standards for equipment used in the provision of communication services
- ▶ review, approve or reject consolidation of licensees

- ▶ monitor standards in the communication market
- ▶ resolve disputes
- ▶ investigate and adjudicate any contravention of the Communications Act
- ▶ facilitate and administer internet infrastructure and designate an entity to manage internet domain names
- ▶ suspend or revoke licences in the communications market.

Appointment of LCA Board Members

Section 6 of the Communications Act provides that the LCA operates with a board of seven members, which is responsible for the duties of the LCA and consists of a chairperson, five other members and the chief executive officer (CEO) who will be an ex-officio member of the board.

Section 6(4) empowers the minister responsible for communications to appoint all members of the LCA after issuing a public invitation for recommendations or expressions of interest for appointment to the LCA. Section 13(5) of the Communications Act empowers the minister to appoint the CEO of the LCA on the recommendation of the board, and only after the board has caused to be published, in a manner readily accessible, an invitation to submit expressions of interest for the position. However, the minister is empowered to reject the board's recommendation but must consult with the board on a suitable candidate thereafter.

Section 10 of the Communications Act empowers the minister to appoint or remove the chairperson of the LCA in the same manner as is provided for in section 8 that allows the minister to remove members of the LCA from office for misconduct or physical or mental incapacity.

In terms of section 14(a) of the Communications Act, the minister is empowered to remove the CEO of the LCA, only on a request by the LCA board in which it justifies the removal, or, in terms of section 14(b), if the CEO has breached the retention agreement established in consultation with the LCA board, between the CEO and the minister in terms of section 13(8).

Funding for the LCA

In terms of section 16(2) of the Communications Act, the LCA is funded from:

- ▶ money appropriated by parliament. In other words, funding for the LCA must be provided for in the national budget
- ▶ service, licence and administration fees
- ▶ fines imposed by the LCA
- ▶ grants, contributions or endowments
- ▶ funding that the LCA may raise or impose under the Communications Act.

In terms of section 16(1) of the Communications Act, the LCA is required to prepare an annual budget in which the anticipated revenues and expenditures of the LCA are specified.

The establishment of the Universal Service Fund

Section 33 of the Communications Act establishes the Universal Service Fund (USF) to promote the development of communication services in unserved and under-served areas of Lesotho. The USF will be managed by a body known as the Universal Service Fund Committee (USFC).

The establishment of the USFC

The USFC is established under section 35(1) of the Communications Act and in terms of section 35(2) consists of:

- ▶ a member of the ministry responsible communications (this person is the chairperson)
- ▶ a representative from the LCA (this person is the deputy-chairperson)
- ▶ a representative of the ministry responsible for local government
- ▶ a representative of the ministry responsible for finance
- ▶ a representative of the Lesotho Electricity Company.

In terms of section 35(3) of the Communications Act, the USFC will have an executive secretary appointed by the LCA on a contract basis for a period not longer than three years. In terms of 35(4) of the Communications Act, the executive secretary serves as both the committee secretary and a non-voting member of USFC. The executive secretary's responsibilities include:

- ▶ carrying out the decisions of the USFC
- ▶ transacting the day-to-day business of the USF
- ▶ exercising the powers delegated to him or her by the USFC.

Main functions of the USFC

In terms of section 36 of the Communications Act, the main functions of the USFC are to ensure that people throughout Lesotho have access to, among other things, a diverse range of radio and television broadcasting services as well as basic domestic and international telephony services and internet access.

Funding for the USF

The USF is funded in terms of section 34 of the Communications Act from:

- ▶ money appropriated by the government, pursuant to an appropriation made by parliament, or in any other lawful manner

- ▶ an initial contribution from the LCA
- ▶ an annual contribution from the LCA of not less than 25% of any annual surplus
- ▶ grants from donor agencies
- ▶ contributions from licensees not exceeding 2% of their net operating income from the provision of communication services in Lesotho.

The LCA may exempt or reduce the contribution of licensees to the USF in cases where the licensee operates as a non-profit organisation, does not provide a public communications service or is authorised to act pursuant to a class licence.

Establishment of the Broadcasting Disputes Resolution Panel

Section 39(1) of the Communications Act establishes the Broadcasting Disputes Resolution Panel (BDRP). Section 39(2) of the Communications Act provides that the BDRP shall consist of a chairperson and four other members. All the members of the BDRP are appointed for a period of three years and are eligible for re-appointment. In terms of section 39(3) of the Communications Act, the members of the BDRP are selected by the minister responsible for communications after soliciting nominations and recommendations from the public.

Funding the BDRP

In terms of section 39(9) of the Communications Act, the BDRP will receive its funding from fees imposed on broadcasting licensees by the LCA as well as money contributed by the LCA. The BDRP will also get funding from money appropriated for its use by the Lesotho Parliament.

Main functions of the BDRP

The BDRP effectively operates as an arm of the LCA. In terms of section 39(8) of the Communications Act, the main functions of the BDRP include:

- ▶ preparing a broadcasting code of conduct
- ▶ reviewing and seeking to resolve disputes regarding broadcasting content (unresolved disputes must be referred to the LCA with recommendations for resolution) developing a budget for the BDRP and submitting it to the minister responsible for communications, and the LCA. Should the LCA believe that a licensee has contravened the Communications Act, they must refer it to the BDRP in terms of section 41(1) of the Communications Act.

Concerning its dispute resolution role, section 41(2) of the Communications Act requires the BDRP to establish the written procedures for the resolution of disputes. The BDRP must ensure that the licensee against whom a complaint has been made, receives an opportunity to respond and that any recommendation made to the LCA is based solely on the record compiled by the BDRP. Should the BDRP be unable to resolve a dispute within 90 days of receipt of the complaint,

they must refer the matter to the LCA with all the relevant facts and provide recommendations for the resolution of the dispute in terms of section 41(4).

Section 41(5) of the Communications Act provides that on receipt of the BDRP's recommendation to initiate enforcement proceedings, in terms of section 46 of the Communications Act, the LCA is required to inform the licensee against whom the enforcement proceedings are due to convene, of the alleged contravention and provide a timeframe for the licensee to respond. The LCA is also required to provide a timeframe in which the enforcement proceedings will take place either by an adjudicatory hearing or a written plea filed by the licensee. Alternatively, the LCA may dismiss the complaint.

In terms of section 47 of the Communications Act, should the LCA determine that a licensee has contravened the Communications Act, or any rule, regulation, code, provision, or directive established under the Communications Act, or has violated a condition contained in its licence it may:

- ▶ issue a warning to the licensee
- ▶ direct the licensee to take actions necessary to remedy the violation
- ▶ impose a fine on the licensee
- ▶ require that the licensee make restitution to any person directly injured as a result of the contravention
- ▶ modify suspend or revoke the licensee's licence.

Making broadcasting regulations

Under the Communications Act, there are two kinds of subordinate legislation, namely regulations and rules. Section 55 of Communications Act, provides that the minister responsible for communications, in consultation with the LCA (which means that the LCA must agree) may, by notice published in the Government Gazette, make regulations for carrying into effect the provisions of the Communications Act. Effectively, this means that the minister (albeit with LCA consent) makes broadcasting regulations.

Furthermore, the Communications Act, in terms of section 5, provides that the LCA shall issue administrative orders and rules as are necessary for the exercise of its power and performing its duties in the implementation of policies under the Communications Act.

Broadcasting Code

In terms of section 40(1) of the Communications Act, a Broadcasting Code developed by the BDRP must be submitted to the minister responsible for communications for approval. The Broadcasting Code must govern:

- ▶ obscene or offensive content and content that is likely to incite violence to persons or property

- ▶ fairness, accuracy and balance of news broadcasts
- ▶ protection of privacy
- ▶ carrying of political advertising
- ▶ advertising and sponsorships.

The minister is authorised by section 40(3) of the Communications Act, on receipt of the Broadcasting Code proposed by the BDRP, and following a public consultation process, to either reject or accept the Broadcasting Code. Section 40(4) of the Broadcasting Code provides that the minister is not allowed to reject the proposed Broadcasting Code unless it fundamentally fails to protect the legitimate interests of the state, the broadcasting industry or the public.

Should the minister reject the Broadcasting Code, section 40(5) of the Communications Act requires that the minister provide a written explanation of the changes necessary to the BDRP which will then have 60 days to propose revisions. Section 40(6) of the Communications Act states that the Broadcasting Code will only come into effect on publication in the Gazette. Section 40(7) of the Communications Act states that no modification to the Broadcasting Code shall be effective unless approved by the minister and published in the Gazette.

The applicable code is dealt with in the regulations section below and is the one developed initially under the now-repealed Lesotho Communications Authority Act.

Licensing regime for broadcasters in Lesotho

Broadcasting Licence Requirement

Section 44(1)(c) of the Communications Act prohibits any person from establishing or providing a communication service that requires a licence (which includes a broadcasting service) in Lesotho, without a licence issued pursuant to the Communications Act. The penalty for doing so is a fine, imprisonment or both.

Types and Categories of Broadcasting Licences

Section 19(3) of the Communications Act empowers the LCA to grant two different types of licences, namely individual or class licences. Although there are no provisions in the Communications Act that distinguish between these in detail, the LCA website⁷ provides that class licences are granted on a first-come-first-served basis and have standard terms and conditions per category. Individual licences are applied for in response to an invitation to apply and have licensee-specific conditions imposed.

Section 38 of the Communications Act authorises the LCA to prescribe different categories of broadcasting services, including:

- ▶ *Public*: a broadcasting service with national coverage that services all sectors of society equitably and is funded by parliament

- ▶ *Private*: a non-profit broadcast service owned by an individual or entity
- ▶ *Commercial*: a for-profit broadcast service with select coverage areas
- ▶ *Community*: community-owned non-profit broadcasting services with a community-wide coverage area.

Section 38(2) of the Communications Act provides that audio, visual or any other content distributed via the internet may be licenced or regulated as broadcasting. This provision is overbroad as it purports to require all content provided over the internet to be licensed by the LCA. It is not clear how these provisions are, or could be, enforced, particularly concerning social media content.

Broadcasting Licensing Process

Section 5(1)(d) of the Communications Act empowers the LCA to grant licences for the provision of communications services and to prescribe licensing fees. Further, section 19(1) empowers the LCA to authorise the provision of a communications service, including a broadcasting service.

The actual legal provisions regarding the licensing process are dealt with in the regulations section below.

It is critical to note that notwithstanding the LCA's powers in respect of granting licences, both the LCA and the minister are empowered to suspend broadcasting licensees.

The minister is empowered, in terms of section 20(1)(b) read with section 20(2) of the Communications Act, to unilaterally issue an emergency suspension order preventing a broadcasting licensee from providing a service, provided the minister has reasonable grounds to believe this is in the interests of national security or public order and there is no other way to forestall the threat.

The LCA is empowered in terms of section 20(1)(a) (albeit impliedly), to suspend or revoke a licence granted by it after an investigation in terms of section 45 by the BDRP as dealt with above.

Frequency spectrum licensing

Section 5(1)(e) of the Communications Act empowers the LCA to allocate resources for the provision of communications services; this includes radio frequency spectrum. Again, this is implemented by way of regulation.

Responsibilities of broadcasters under the Communications Act

Adherence to Licence Conditions

The Communications Act does not expressly empower the LCA to impose licence conditions. However, it is implied from several sections, including section 45 which enables the LCA to determine whether or not a licensee has contravened the

Communications Act, or any rule, regulation, code, provision, or directive, or has violated a condition contained in its licence.

Is the LCA an Independent Regulator?

The LCA cannot be said to have any real independence. The LCA operates as an arm of the minister responsible for communications in the following ways:

- ▶ All the board members are appointed by the minister (albeit after a public nomination process) and does not involve a multi-party body such as parliament. Therefore, the LCA, is, effectively, an arm of the executive branch of government and is not independent from the point of appointments.
- ▶ The minister appoints the CEO of the LCA on the recommendation of the LCA, but the minister may reject this recommendation.
- ▶ The minister is empowered to suspend or remove any member of the LCA from office.
- ▶ The minister may unilaterally issue an emergency suspension of a licensee's licence should he or she feel the continued operation of the licensee poses a direct threat to national security or public order. This does not require consultation with the LCA.
- ▶ The minister is responsible for making communications regulations, albeit in consultation with the LCA.

Is the BDRP an independent regulator?

The BDRP cannot be said to be independent as the minister has immense power over the operation of the BDRP in the following ways:

- ▶ The members of the BDRP are appointed by the minister (albeit after a public nomination process) and does not involve a multi-party body such as parliament. Therefore this body which is critical to the functioning of the LCA, is, effectively, an arm of the executive branch of government.
- ▶ The BDRP is responsible for the development of the Broadcasting Code. However, the minister can reject any proposed Broadcasting Code and any changes made to the Broadcasting Code must be approved by the minister.

It is fair to say that the Communications Act does not comply with the agreed international best practice for broadcasting regulation.

Amending the legislation to strengthen the broadcast media generally

There are two broad problems with the legislative framework for the regulation of broadcasting generally in Lesotho:

- ▶ First, Lesotho ought to introduce legislation to establish a genuinely independent communications regulatory authority to act in the public interest, free

from executive interference. The mandate of such an independent authority should be to ensure, among other things, that the citizens of Lesotho have access to a diverse range of high-quality public, commercial and community broadcasting services, as well as to ensure that freedom of expression is appropriately protected from commercial and governmental interference.

- ▶ The board of the LCA ought to be appointed by a process that includes the recommendations of a multi-party body such as parliament and, ideally, the appointments ought to be formally made by the president and not a minister.
- ▶ Further, the LCA ought to be solely responsible for licensing decisions, and no minister should have the authority to suspend a communications service, including a broadcasting service.
- ▶ The LCA ought to be solely responsible for regulating communications in the public interest. Although there may be a requirement to consult with the relevant ministry, the minister ought not to have the power to make regulations, irrespective of whether or not this is done in consultation with the LCA.

3.4 Legislation governing the state broadcast media and the state news agency

3.4.1 State broadcast media

Lesotho has still not passed legislation to create a public broadcaster. The Lesotho National Broadcasting Service (LNBS) is a part of the Ministry of Communications, Science and Technology, and according to the 2009 Lesotho Media Policy, the LNBS continues to operate 'as an arm of the Government'. The LNBS consists of:

- ▶ Television Lesotho, which provides free-to-air television in Lesotho. It is important to note that terrestrial infrastructure is limited, which means that Television Lesotho, which is only accessible throughout the entire country via satellite.
- ▶ Radio Lesotho, which provides two sound broadcasting channels or services that are available free-to-air throughout the entire country.

A Lesotho Broadcasting Corporation Bill was published in 2004, which aimed to transform the state broadcaster (the LNBS) into a public broadcaster; however, the bill was never enacted.

In the 2008 Lesotho Communications Policy, the Ministry of Communications, Science and Technology promised that the Lesotho government would undertake several regulatory reforms, including transforming the LNBS from 'a state broadcaster into a public service broadcaster'. In terms of the 2008 Communications Policy, this would 'entail corporatizing the LNBS and making it accountable to an independent board with the goal of serving the public interest'. Furthermore, the 2008 Communications Policy promised that the public service broadcaster 'will

have editorial independence and any content restrictions or requirements will be contained in its charter, along with a clear source of funding for operations and expansion'. To date, this has not happened.

In 2009 the government adopted another policy, the Lesotho Media Policy, which also dealt with transforming the LNBS from a state broadcaster to a public broadcaster, to be known as the Lesotho Broadcasting Corporation of Lesotho. The 2009 Media Policy stated that the Lesotho Broadcasting Corporation of Lesotho would act 'independently of Government or commercial influence'. It said further that this transformation process would require the corporatisation of the public broadcaster and the establishment of an independent board of directors. However, the 2009 media policy still makes provision for the minister to appoint the 'independent' board of directors of the public broadcaster, albeit after consultation with the National Assembly's portfolio committee responsible for communications.

It is important to note that such ministerial appointments would not be following internationally accepted standards for independent governance structures for public broadcasting services. In any event, and disappointingly, Lesotho has yet to pass legislation transforming the LNBS from a state to a public broadcasting service.

3.4.2 State news agency

The Lesotho News Agency (LENA) is a state news agency which operates as a department in the Ministry of Communications, Science and Technology. In the 2009 media policy, the government undertook as a matter of policy to corporatise LENA and transform it into an autonomous news service. It further committed to ensure that LENA would be headed by 'an independent board, appointed by the Minister, representing a broad spectrum of experience and views'. An organisation whose entire board is appointed by the minister cannot be said to be independent of government. Lesotho has yet to pass legislation transforming LENA from a state to an independent news agency.

3.5 Legislation governing broadcasting signal distribution

The Communications Act is relevant to broadcasting signal distribution or transmission, which is the technical process of ensuring that the content-carrying signal of a broadcaster is distributed so that it can be heard, viewed or both, by its intended audience. The Communications Act makes it clear that broadcasting signal distribution or transmission is a form of communications network service which would need to be licensed under the Communications Act and would need to comply with all relevant statutory provisions, including tariffs and other matters. The LNBS, the state broadcaster, operates terrestrial broadcasting transmission infrastructure in Lesotho, which is used by its competitors as well.

3.6 Legislation that undermines a journalist's duty to protect his or her sources

A journalist's sources are the lifeblood of their 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 certain that their identities will remain confidential and will be respected and protected by a journalist. This is particularly true of so-called whistleblowers, inside sources that are able to provide journalists with information regarding illegal activities, whether by company or government personnel. Consequently, democratic countries often provide special protection for journalists' sources. It is recognised that, without such protection, information that the public needs to know would not be given to journalists.

3.6.1 Criminal Procedure and Evidence Act, 1981

Preparatory examinations

In terms of section 65 of the Criminal Procedure and Evidence Act (CPEA), a public prosecutor, an accused or a magistrate may compel the attendance of any person at a preparatory examination to give evidence or to produce a book or other document by requiring the clerk of the court to issue the necessary subpoena.

In terms of section 66 of the CPEA, any person who fails to appear at proceedings in compliance with a subpoena issued under section 65, without a 'just excuse' for such failure, can be sentenced to a fine and imprisonment.

Furthermore, in terms of section 68 of the CPEA, any person who attends a preparatory examination in response to a subpoena but then refuses to answer questions or to produce any required document, without offering a 'just excuse' for such refusal, can be sentenced to successive periods of imprisonment for eight days at a time 'until the person consents to do what is required of him', see section 68(2) of the CPEA.

Criminal trial proceedings

In terms of sections 199 and 202 of the CPEA, a prosecutor, an accused or the court may compel the attendance of any person at a criminal trial to give evidence or to produce a book or other document.

In terms of sections 203 and 207 of the CPEA, any person who attends a criminal trial in response to a subpoena but then refuses to answer questions or to produce any required document, without offering a 'just excuse' for such refusal, can be sentenced to successive periods of imprisonment for eight days at a time 'until the person consents to do what is required of him'.

3.6.2 Internal Security (General) Act, 1984

Section 9(1) of the Internal Security (General) Act makes it an offence to fail to disclose any information that might be of material assistance in preventing 'subversive

activity' or in securing the apprehension, prosecution or conviction of a person for an offence involving subversive activity to a member of the police force. Anyone found guilty is liable to a fine or imprisonment in terms of section 12 of the Internal Security (General) Act. This provision might well conflict with a journalist's ethical obligation to protect his or her sources.

However, it is important to note that whether or not requiring a journalist to reveal a source is an unconstitutional violation of the right to freedom of expression will depend on the particular circumstances in each case, particularly whether or not the information is available from any other source. It is complicated to state that these provisions are, by themselves, a violation of the right to freedom of expression under the constitution.

Importantly, the 2009 Media Policy states that the Lesotho Law Commission would be tasked with proposing new legislation to ensure that media practitioners will not be required to reveal confidential sources of information, except where a court, after a hearing, determines that disclosure is necessary:

- ▶ to prevent serious injury to persons or property
- ▶ for the investigation or prosecution of a serious crime
- ▶ for the defence of a person accused of a criminal offence.

To date, however, no such legislation has been enacted.

3.7 Legislation that prohibits the publication of certain kinds of information

Several statutes contain provisions which, looked at closely, undermine the public's right to receive information and the media's right to publish information.

These statutes are targeted and prohibit the publication of certain kinds of information, including:

- ▶ prohibition on the publication of a minor's identity in legal proceedings
- ▶ prohibition on the publication of certain kinds of information relating to legal proceedings
- ▶ prohibition on the publication of state security-related information regarding defence, security, prisons, the administration of justice, public safety and public order and sedition
- ▶ prohibition on information that is obscene
- ▶ prohibition on information that violates fundamental rights;
- ▶ prohibition on information which denigrates on immutable grounds such as race;

- ▶ prohibition on information relating to financial institutions.

It is often difficult for journalists to find out how laws that would seem to have no direct relevance to the media can impact on their work. The key provisions of such laws are, therefore, set out below.

It is important to note that some of the laws outlined below constitute subordinate pieces of legislation, that is, they are regulations or orders (which are dealt with more specifically in section 4 of this chapter). They are included in this section.

3.7.1 Prohibition on the publication of a minor's identity in legal proceedings

Section 7(2) of the Subordinate Courts Order, 1988, provides that the trial of any person who less than 18 years of age may be held *in camera*, that is, without the public (including the media) being able to attend the court proceedings.

This is a departure from the general rule providing for court proceedings to take place in open court.

3.7.2 Prohibition on the publication of certain kinds of information relating to legal proceedings

Sexual Offences Act, 2003

Section 23(1) of the Sexual Offences Act specifically provides that in criminal proceedings under this Act (that is, criminal proceedings relating to sexual offences), a court shall direct that any person whose presence is not necessary at the proceedings, not be present, unless the complainant (the person who laid the charges) and the accused request otherwise. Where the complainant and the accused disagree on the above, the court must decide as it thinks fit, in terms of section 23(2). Furthermore, section 23(3) specifically requires the court to act in the best interests of the complainant when the complainant is a child in making these decisions.

Importantly, section 25 of the Sexual Offences Act provides as follows:

- ▶ Where a court has directed, in terms of section 23, that a person or class of persons not be present during sexual offences proceedings, no person may publish any information 'which may reveal the identity of a complainant or accused in the proceedings'.
- ▶ Section 25(2), however, allows a court to authorise the publication of information about proceedings (where a court has directed that a person or class of persons not be present), where publication is just and equitable, and where the complainant or the accused is 18 years or older.
- ▶ Section 25(3) prohibits the publication of any information which may reveal the identity of a complainant in the case of a sexual offence until the accused has pleaded to the charge.

- ▶ Section 25(4) makes it an offence to publish any information in contravention of section 25 and, on conviction, a person may be sentenced to a fine, imprisonment of not less than three months, or both a fine and imprisonment.

Criminal Procedure and Evidence Act, 1981

The Criminal Procedure and Evidence Act, at section 70(5), provides that if a preparatory examination is held on charges relating to:

- ▶ indecent assault; or
- ▶ extortion,

no person shall, at any time, publish (by radio, in a document or by any other means), any information relating to the preparatory examination, or any information disclosed at the preparatory examination, unless the magistrate has consented in writing to the publication after having consulted with the person against whom the offence is alleged to have been committed.

Failure to comply with section 70(5) of the Criminal Procedure and Evidence Act is an offence and, on conviction, a person can be sentenced to a fine and imprisonment.

3.7.3 Prohibition on the publication of state security-related information regarding defence, security, prisons, the administration of justice, sedition and public safety and order

Printing and Publishing Act, 1967

The Printing and Publishing Act, at section 10(1), makes it an offence to import, print, publish, sell, offer for sale, distribute or reproduce a statement (broadly defined as ‘anything in a visible form capable of communicating, expressing or suggesting a meaning, information, or an idea’) which is a ‘clear and present danger’ to, among others ‘public safety and public order’. Section 10(2) makes it an offence even to possess such material. Section 10(3) provides that such printed matter and any apparatus used to print it is liable to forfeiture to the state. The offences carry punishments of a fine, imprisonment or both in terms of section 15.

Official Secrets Act, 1967

Although not directed at the media itself, certain provisions of the Official Secrets Act are particularly draconian and could hamper the media’s ability to report on important issues of the day.

Section 4 of the Official Secrets Act, for example, makes it an offence for any person to communicate any information regarding a prohibited place or that is otherwise in contravention of the Official Secrets Act. If found guilty, such a person is liable to imprisonment or to a fine in the case of a juristic person, such as a company.

Internal Security (General) Act, 1984

Section 38 of the Internal Security (General) Act makes it an offence for a person to be in an area that has been declared a protected area by the minister. The offence is punishable by a fine, imprisonment or both. Reporting by the media on any activity in a protected area is therefore made difficult by this kind of prohibition.

Section 34 of the Internal Security Act makes it an offence to, among other things, publish words that might reasonably be expected to result in the commission of public violence and the offence is punishable by a fine, imprisonment or both.

Police Service Act, 1998

Although not directed at the media itself, it is essential for journalists to be aware that section 27 of the Police Service Act prohibits a police officer from disclosing any information acquired by him in the course of his duties, except as part of the performance of his duties or when lawfully required to do so by a competent court.

Prisons Proclamation of 1957

Although not directed at the media itself, journalists need to be aware that section 156 of the Prisons Proclamation declares the following conduct, among others, on the part of a prison officer, to be an offence against discipline:

- ▶ divulging any matter which it is his duty to keep secret
- ▶ communicating directly or indirectly with the press on any matter which may have become known to him in the course of his public duties
- ▶ publishing any matter or making any public pronouncement relating to prisons, prisoners or the administration of the prison services.

Sedition Proclamation 44 of 1938

The Sedition Proclamation makes it an offence to print, publish, sell, distribute or import any seditious publication. The offence is punishable by a fine, imprisonment or both for a first offence and imprisonment for subsequent offences.

One of the most problematic aspects of this proclamation is the very broad definition of sedition, which includes not only inciting 'disaffection' against the government but also promoting 'feelings of ill-will and hostility' between different classes of the population.

These terms are so broad that they could be used to hinder reporting.

Penal Code, Act 6 2010

Section 76 of the Penal Code makes it an offence to utter seditious words, print, publish, sell, offer for sale, distribute or reproduce a seditious publication. It is also an offence to import any seditious publication knowingly. The penalty, on conviction, is imprisonment, section 109 read with the Schedule to the Penal Code.

Section 85 of the Penal Code makes it an offence for any person to act or conduct him or herself in such a manner or speak or publish such words from which there is a real likelihood that the natural and probable consequence of his or her act, conduct or speech or publication will under the circumstances lead to the commission of public violence by members of the public generally, or by persons in whose presence the act or conduct takes place or to whom the speech or publication is addressed. The penalty, on conviction, is to be determined as the presiding officer sees fit in terms of section 109 of the Penal Code.

National Security Regulations, 2000

These regulations are not aimed at the media directly, but it is important to be aware that they impose a duty of secrecy on all employees in the National Security Service, which includes an obligation not to disclose classified information.

3.7.4 Prohibition on information that is obscene

The Printing and Publishing Act, 1967, at section 10(1), makes it an offence to import, print, publish, sell, offer for sale, distribute, or reproduce a statement (broadly defined as 'anything in a visible form capable of communicating, expressing or suggesting a meaning, information, or an idea') that is a 'clear and present danger' to, among others, 'public morality'.

Section 10(2) makes it an offence even to possess such material. Section 10(3) provides that such printed matter and any apparatus used to print such matter is liable to forfeiture to the state. The offences carry punishments of a fine, imprisonment or both, in terms of section 15.

3.7.5 Prohibition on information that violates fundamental rights

The Printing and Publishing Act, 1967, at section 10(1), makes it an offence to import, print, publish, sell, offer for sale, distribute, or reproduce a statement (broadly defined as 'anything in visible form capable of communicating, expressing or suggesting a meaning, information, or an idea') that is a 'clear and present danger' to, among others, 'fundamental rights and freedoms'.

Section 10(2) makes it an offence even to possess such material. Section 10(3) provides that such printed matter and any apparatus used to print such matter is liable to forfeiture to the state. The offences carry punishments of a fine, imprisonment or both, in terms of section 15.

3.7.6 Prohibition of information which denigrates on immutable grounds such as race

Section 79 of the Penal Code makes it an offence for a person to utter words or publish writing that expresses hatred, ridicule, or contempt of any person or group of persons, wholly or mainly, because of race, ethnic affiliations, gender, disability or colour. The penalty, on conviction, is to be determined as the presiding officer sees fit in terms of section 109 of the Penal Code.

3.7.7 Prohibition on information relating to financial institutions

The Financial Institutions Act, 1999, regulates financial institutions in Lesotho. Although none of its provisions relates directly to the media, it is essential to note that many secrecy-related provisions may indirectly affect the media, in particular, the following:

- ▶ Section 26 imposes a secrecy obligation on anyone working at the Central Bank of Lesotho, prohibiting them from disclosing any information of a non-public nature relating to their positions.
- ▶ Section 27 does allow the Central Bank of Lesotho to disclose basic licensing-related information in respect of institutions licensed under the Financial Institutions Act.

3.8 Legislation that specifically assists the media in performing its functions

In countries that are committed to democracy, governments pass legislation which specifically promotes accountability and transparency of both public and private institutions. Such statutes, while not specifically designed for use by the media, can be, and often are, used by the media to uncover and publicise information in the public interest.

Unfortunately, Lesotho has yet to enact access to information or whistleblower protection legislation. However, concerning three important aspects of public life: the conduct of elections and the operations of parliament and the courts, Lesotho has passed several important laws either in the form of legislation or subordinate legislation, such as regulations or orders.

3.8.1 Local Government Elections Act, 1998

The 2004 amendment to the Local Government Elections Act, 1998, introduced an Electoral Code of Conduct, which contains several provisions to protect the media so that it can fulfil its functions during election periods. Section 8 of the Electoral Code, headed Role of the Media, provides that:

Every registered party and candidate shall —

- (a) respect the role of the media before, during and after an election conducted in terms of this Act;
- (b) not prevent access by members of the media to public political meetings, marches, demonstrations and rallies; and
- (c) take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or supporters.

3.8.2 National Assembly Election Order (No 10) 1992

The National Assembly Election Order governs elections to the National Assembly. The order contains several provisions regarding the conduct of elections, and campaigning therefor, which are important for the media:

- ▶ Section 47F, protects freedom of expression and information generally by providing that every political party and every representative member or supporter shall enjoy complete and unhindered freedom of expression and information in the exercise of the right to campaign and that no person shall be prosecuted for any statement made, an opinion held or campaign material produced, published or possessed while campaigning in the election.
- ▶ Section 47K, deals specifically with news broadcasts and reports. We focus on those provisions which set out the obligations of the state broadcaster concerning party political broadcasting. Section 47K provides that:
 - ▶ Although every party has the right to have the substance of its campaign covered in the news:
 - › the content of the news must be professional and determined by the media
 - › the media must maintain neutrality in its reporting and commentary
 - › the Independent Electoral Commission must monitor news broadcasts to ensure coverage of all political parties
 - ▶ Time must be allocated on radio and television during which political parties are allowed to campaign, as determined by the Independent Electoral Commission.
 - ▶ No political party may broadcast commercial advertisements for its campaign on state-owned media.

3.8.3 Parliamentary Powers and Privileges Act, 1994

The Parliamentary Powers and Privileges Act makes provision for certain privileges and immunities given to parliament. Some of these are important for the media and assist it in performing its function of providing the public with news and information:

- ▶ Section 3 provides that no civil or criminal proceedings may be instituted against a senator or member (of the National Assembly) for words spoken before, or written in a report to, the Senate or National Assembly or to a committee thereof. However, this only applies to words that are:
 - ▶ relevant and reasonably appropriate to the proceedings
 - ▶ not spoken or written maliciously or with the object of exposing another person to hatred, contempt or undue ridicule.
- ▶ Section 23 provides that in any proceedings instituted for publishing a report

or summary or extract or abstract of anything done in the Senate or National Assembly, the defence is that this was done in good faith and without malice. Although this provision is somewhat unclear, it allows the media to report (in good faith) on the activities of the Senate or National Assembly without the fear of litigation as a result.

3.8.4 National Assembly Standing Orders, 2008

The National Assembly Standing Orders have been adopted by the National Assembly to govern its operations, according to section 81(1) of the constitution. The National Assembly Standing Orders contain several provisions that will assist the media as it performs its task of keeping the public informed about political matters, including:

- ▶ Section 76(b) of the National Assembly Standing Orders, which obliges the National Assembly to ‘facilitate public participation in its legislative and other processes through implementing the following ... Conducting public hearings as and when necessary’;
- ▶ Section 77, which provides that ‘committee proceedings shall be open to the public’. There are certain exceptions to this, namely:
 - ▶ the speaker can regulate public and media access to the National Assembly and can order the refusal of entry to, or the removal of, the media ‘where appropriate’;
 - ▶ the chairperson of any committee can regulate public and media access to the committee and can order the refusal of entry to, or the removal of, the media ‘where appropriate’.

3.8.5 High Court Act, 1978

The High Court Act contains provisions that are useful for the media, namely section 13, which provides that the pleadings (the documents that cases are based on such as notices of motion, summons, affidavits, heads of argument, and so on) and proceedings (the actual trial or motion proceedings taking place before a judge) of the High Court ‘shall be carried on and the sentences, decrees, judgments and orders thereof, pronounced and declared in open court’.

This is important because it guarantees the media (like every other person) the right to be present in court during important hearings and to have access to the court documents. This is subject, as is normal, to the judge having the right to clear the court or otherwise remove anyone from the court if the judge sees fit at any time during the proceedings.

3.8.6 Subordinate Courts Order, 1988

Like the High Court Act, the Subordinate Courts Order provides at section 7 that subordinate court proceedings (in both civil and criminal cases) shall be carried on in open court, subject to certain exceptions, which are dealt with elsewhere in this

chapter. Furthermore, section 8 of the Subordinate Courts Order provides that the records and proceedings of the court shall be accessible to the public in all cases.

4 Regulations affecting the media

In this section, you will learn:

- ▷ definition of regulations
- ▷ regulations governing broadcasting licences
- ▷ regulations governing broadcasting content
- ▷ other aspects of broadcasting-related regulations

4.1 Definition of regulations

Regulations and rules are types of subordinate legislation. They are legal rules that are made in terms of a statute. In Lesotho, broadcasting regulations and rules are legal mechanisms that allow the minister responsible for communications or the LCA to make legally binding rules governing the broadcasting sector, without requiring parliament to pass a specific statute thereon. As is more fully set out elsewhere in this chapter, the empowering statute (in this case, the Communications Act, 2012) empowers:

- ▶ the minister to make regulations (in consultation with the LCA) to bring into effect the provisions of the Communications Act in terms of section 55;
- ▶ the LCA to make administrative orders and rules for exercising its powers and performing its duties in the implementation of policy under the Communications Act in terms of section 5(1)(c).

4.2 Regulations governing broadcasting licences

Broadcasting Classification Regulations 2007

The Broadcasting Classification Regulations are contained in Notice 19 published in the Lesotho Extraordinary Government Gazette No 10 (Vol. LII) dated 14 February 2007. These regulations, made by the minister for communications, specify four categories of broadcasting services:

- ▶ A public broadcaster shall:
 - ▶ provide coverage for the whole country at all times

- ▶ provide services that realise the aspirations of the nation as regards democracy, development and nation-building
 - ▶ serve all sectors of society equally
 - ▶ be accessible to all political parties and independent candidates on a fair and non-discriminatory basis, particularly during election campaigns
 - ▶ contribute to bridging the digital divide by providing transmission access to other broadcasters where possible
 - ▶ be a platform for voter education
 - ▶ be funded by parliament and additional funds raised in the course of its business.
- ▶ A private broadcaster shall:
 - ▶ be owned and controlled by any individual or organisation so permitted by law
 - ▶ operate on a non-profit basis
 - ▶ have a right to provide coverage as they deem desirable provided there is available spectrum.
 - ▶ A commercial broadcaster shall:
 - ▶ be owned and controlled by an individual or organisation
 - ▶ operate to generate a profit
 - ▶ have a right to provide coverage as they deem desirable, provided there is available spectrum.
 - ▶ A community broadcaster shall:
 - ▶ be owned and controlled by a specific community
 - ▶ transmit programmes that are determined by and realise the aspirations of that community
 - ▶ operate on a non-profit basis
 - ▶ provide coverage to enable access by members of the community.

Lesotho Communications Authority (Classification and Fees) Rules, 2018

Application fees for licences as well as the initial, renewal and annual fees for broadcasting licensees are set out in the Second Schedule of the Lesotho Communications Authority (Classification and Fees) Rules, 2018 (the Fees Rules) published in Volume 63 of the Government Gazette No 22 dated 23 March 2018.

It must be noted that in terms of section 14 of the Third Schedule of the Fees Rules, radio frequency spectrum licences are issued following the Lesotho national frequency allocation plan. Section 14(f) provides that holders of individual

broadcasting licensees have to apply for radio frequency spectrum separately as this is not included in their broadcasting licences.

Lesotho Communications Authority (Administrative) Rules, 2016

The LCA is empowered by section 5(1)(c) of the Communications Act to make their own administrative rules for the implementation of the provisions of the Communications Act. These rules are contained in the Lesotho Communications Authority (Administrative) Rules published in Vol 61, Gazette No 36 dated 24 June 2016 (the Administrative Rules). In brief, these provide as follows:

Part II of the administrative rules outlines the procedure required to be followed by the LCA, persons wishing to apply for a communications licence and licensees, in matters relating to communications licences.

- ▶ Applications for a licence — section 3
 - ▶ The LCA is empowered to prescribe application requirements for classes of licences and shall make them readily available to prospective applicants.
 - ▶ An applicant shall submit an application with payment of the relevant application fees (individual licences shall be applied for on an invitational basis).
 - ▶ Within 90 days of receipt of an application, the LCA shall approve or reject the application, on condition that no additional information is required from the applicant.
 - ▶ Where the LCA requires additional information from the applicant, it shall inform the applicant accordingly, and the 90 days shall be adjusted to commence after submission the additional information.
 - ▶ Where the applicant fails to provide the required additional information within 90 days, the application shall automatically expire, the applicant may submit a new application.
 - ▶ The LCA shall, before issuance of a licence to an applicant, satisfy itself that the applicant has the financial and technical capability to construct, own or make available a network, or provide the services associated with the licence.
 - ▶ Where the LCA determines, during the consideration of an application, that there has been misinformation relating to a material aspect of the application, or that the applicant has withheld material information, it may reject the application.
 - ▶ The LCA shall hold public consultations in respect of a licence application for public comment.
 - ▶ On completion of the evaluation of an application, where an application has been rejected, the LCA shall inform the applicant of the rejection and the reasons thereof.

- ▶ On completion of the evaluation of an application, where an application has been approved, the applicant shall be issued with a licence on payment of applicable fees.
- ▶ Following the issuance of a licence, a licensee shall commence operations within one year for broadcasting licensees.
- ▶ Where a licensee fails to commence operations within the specified period, the licence shall automatically expire. The LCA may extend the period on request by the applicant, but the extension shall not exceed six months for broadcasting licensees.
- ▶ Licence Conditions — section 4
 - ▶ The LCA may include conditions in a licence which outline the rights and obligations of a licensee. These licensing conditions, which are technology-neutral, and in the absence of compelling justification, shall not require a licensee to use, or prohibit a licensee from using, any specific technology to provide a particular communications service, provided that licensees use technologies that comply with standards set by the LCA.
 - ▶ The LCA may not prescribe licence conditions that prohibit a licensee from providing multiple services over the same infrastructure.
- ▶ Amendment of a licence — section 5
 - ▶ The LCA may, of its own volition, or at the request of a licensee, amend any condition in a licence which it has granted. Prior to making any licence amendment of its own volition, the LCA must provide the licensee with a written notice which outlines:
 - › the terms of the proposed amendment
 - › the reasons for the proposed amendment
 - › the timeframe and procedures for the licensee to make representations to the LCA on the proposed amendment.
 - ▶ The LCA shall give due consideration to any representations made by the licensee.
 - ▶ A licensee may request to have their licence amended, clearly stating the requested amendment and giving reasons for the request. The request shall not be unreasonably denied.
 - ▶ Where the LCA denies a licensee's request for amendment, it shall give reasons for its decision, taking into account the reasons advanced in support of the request.
 - ▶ The LCA may hold a public consultation before deciding on any licence amendment.
- ▶ Renewal of a licence — section 6
 - ▶ The LCA may renew a licence on application by a licensee.

- ▶ In the case of an individual licence, the licensee shall submit a renewal application to the LCA not less than two years before the expiry of the term of their current licence justifying the renewal. The justification shall include:
 - › performance under the current licence
 - › compliance with licence terms, laws and regulatory directives
 - › contribution to Lesotho’s socio-economic development
 - › corporate social investment
 - › future business projections
 - › any other information the licensee may deem appropriate.
- ▶ The LCA shall approve a renewal application if it concludes that the licensee has met all requirements of the expiring licence and it is in the public interest to renew such a licence.
- ▶ The LCA may request additional information it may need to decide on the renewal of a licence.
- ▶ In the case of a class licence, renewal shall be automatic on payment of prescribed fees unless there is a compelling reason for non-renewal.
- ▶ Transfer or assignment of a licence — section 7
 - ▶ Without prior approval of the LCA, a licensee shall not:
 - › transfer its right and obligations under a licence
 - › transfer control over the licensee’s operation to another person
 - › assign a licence to another person, regardless of whether there is any payment in exchange.
 - ▶ The LCA shall not reject any request to transfer or assign a licence unless the LCA determines that:
 - › the proposed transferee or assignee does not meet the established qualifications for the licence
 - › the transfer or assignment would substantially restrict competition in any communications market in Lesotho.
- ▶ Licence suspension and revocation — section 8
 - ▶ The LCA may suspend or revoke a licence if it concludes that the licensee
 - › is in breach of regulatory obligations, including licence conditions, the act or rules or any subsidiary legislation
 - › is not able to comply with regulatory requirements
 - › has failed to comply with the directives of the LCA

- › is engaged in anti-competitive practices
- › has lost the ability to provide licensed services
- › has failed to pay applicable fees as prescribed by the rules
- › threatens national security and public safety.
- ▶ The LCA shall give a licensee 30 days' notice of its intention to suspend or revoke a licence during which the licensee may make representations to the LCA.
- ▶ After due consideration of any representations by the licensee, the LCA may:
 - › prescribe a time during which the licensee is required to remedy the offending act or conduct
 - › impose a financial penalty on the licensee payable within a stipulated period.
- ▶ Where the licensee fails to comply with a required remedy or pay the penalty imposed by the LCA, or the representations are found not compelling to warrant a different determination, the LCA may:
 - › suspend the licence for a specified period
 - › revoke the licence.
- ▶ Where a licence is suspended or revoked, the fees paid in respect of the licence shall be forfeited.

Part III of the administrative rules provide the procedures to be followed by the LCA in the assignment of radio frequency spectrum.

- ▶ Application for radio frequency spectrum — section 9
 - ▶ Requirements for a radio frequency spectrum assignment application can be obtained at the office of the LCA. A person who wants spectrum assignment must apply to the LCA and provide such information as the LCA requires.
 - ▶ The LCA shall assign radio frequency spectrum within 30 days where an applicant is eligible and meets all requirements.
- ▶ Radio frequency spectrum assignment — section 10
 - ▶ The LCA may assign radio frequency spectrum required to provide licensed services or for experimentation.
 - ▶ The LCA may not refuse to assign radio frequency spectrum unless there are compelling reasons founded on technical demand, national security, public safety or other reasonable justifications which shall be communicated to the applicant.
 - ▶ The LCA shall assign available radio frequency spectrum:

- › in accordance with the national frequency allocation plan on a first-come-first-served basis
- › on condition that harmful interference is not caused
- › considering all the technical data of the equipment of the applicant.
- ▶ The LCA may revoke the assignment of any spectrum if it determines that such spectrum is:
 - › not used efficiently or at all
 - › being utilised for purposes other than those for which it was assigned
 - › held to distort or prevent competition
 - › needed for reassignment based on technological development and international agreements.
- ▶ The LCA shall stipulate conditions of use in respect of both licensed and licence-exempt spectrum.
- ▶ Assigned spectrum shall be used on payment of applicable fees as prescribed by the LCA.
- ▶ An assignee shall not transfer control over the assigned spectrum, either by sale or lease.
- ▶ An assignee may relinquish spectrum.

4.3 Regulations governing broadcasting content

Broadcasting Rules 2004

The Broadcasting Rules were made by the Lesotho Telecommunications Authority (the forerunner to the LCA) and are contained in Notice No 7 published in the Lesotho Extraordinary Government Gazette No 38 (Vol XLIX) dated 14 April 2004. This is the critical set of rules governing broadcasting content in Lesotho. The Broadcasting Rules pre-date the Communications Act and were established pursuant to section 16(2) of the now-repealed Lesotho Telecommunications Act, 2000. They are however still in effect pursuant to section 5(1)(c) of the Communications Act. We focus on the main aspects of the Broadcasting Rules.

Code of Practice (Broadcasting Code)

Part III of the Broadcasting Rules contains a Code of Practice with which all broadcasters are required to comply. The Broadcasting Code lays down content restrictions on broadcasters in accordance with section 39(8) of the Communications Act which empowers the BDRP to establish the Broadcasting Code. Critical aspects of the Broadcasting Code include the following:

- ▶ *Community standards — section 6:* A licensee shall not broadcast content which, measured by contemporary community standards:

- ▶ offends against good taste and decency
- ▶ contains the gratuitous use of offensive language, including blasphemy
- ▶ presents sexual matters in a gratuitous, explicit and offensive manner
- ▶ glorifies violence
- ▶ is likely to incite crime or lead to disorder
- ▶ is likely to incite or perpetuate hatred or gratuitous vilification of a person or section of the community on account of race, ethnicity, nationality, gender, marital status, sexual preference, age, disability, religion or culture.
- ▶ *Protection of children — section 7:* When broadcasting programmes where a large number of children may be expected to be listening (taking account of available audience research as well as the time of broadcast), a licensee shall exercise due care in avoiding content which may disturb or be harmful to children including:
 - ▶ offensive language
 - ▶ explicit sexual or violent materials, including music with violent or sexually explicit lyrics.
- ▶ *Fairness, accuracy and impartiality in news and information programming — section 8:*
 - ▶ Licensees shall report news and information accurately, fairly and impartially.
 - ▶ News and information shall be presented in the correct context and in a balanced manner without intentional or negligent departure from the facts, including by:
 - › distortion, exaggeration or misinterpretation
 - › material omissions
 - › summarising or editing.
 - ▶ A licensee may present as fact only matters which may reasonably be true, having regard to the source of the information.
 - ▶ Opinions must be clearly presented as such.
 - ▶ Where there is reason to doubt the correctness of a report, it shall be verified, and where this is not practical, this fact must be mentioned in the report.
 - ▶ Corrections of factual errors must be broadcast as soon as reasonably possible, and the degree of prominence and timing must be appropriate and fair and shall include an apology where appropriate.
- ▶ *News and information programmes on controversial issues — section 9:*
 - ▶ When reporting on controversial political, industrial or public importance

issues, an appropriate range of views must be reported, either within a single programme or a series of programmes. Similarly, phone-in programmes on these issues must allow for a wide range of opinions to be represented.

- ▶ Any person or organisation whose views have been criticised in a programme on a controversial issue of public importance is entitled to a reasonable opportunity to reply.
- ▶ *Conduct of interviews — section 10:*
 - ▶ Persons who are to be interviewed by a licensee must be given prior notice of the subject of the interview and whether or not it is to be recorded or broadcast live.
 - ▶ Written parental permission must be obtained before interviewing children.
 - ▶ Due sensitivity must be exercised when interviewing bereaved persons or witnesses of traumatic incidents.
- ▶ *Comment — section 11:*

Comment must be indicated and must be an expression of opinion based on fact.
- ▶ *Privacy — section 12:*
 - ▶ A licensee shall not present material which invades a person's privacy and family life unless there are identifiable public interest reasons for doing so.
 - ▶ A licensee shall not use information acquired without a person's consent unless:
 - › the information is essential to establish the credibility and authority of a source
 - › the programme for which the information is acquired is clearly of important public interest.
 - ▶ The protection of confidential sources shall be respected, subject to the laws of Lesotho.
 - ▶ The identity of a victim of a sexual offence must not be broadcast without his or her written consent, and the identities of child victims of sexual offences may not be broadcast under any circumstances.
 - ▶ A licensee shall avoid gratuitous and repetitive detail in covering sexual offences.
- ▶ *Payment for information obtained from criminals — section 13:*
 - ▶ A licensee shall not pay criminals for information unless there is a compelling public interest in doing so.

- ▶ *Party political broadcasts and advertisements — section 14:*
 - ▶ A licensee is not required to broadcast party-political advertising. However, if it elects to do so, it must afford all political parties the same opportunity on a non-discriminatory, non-preferential and non-prejudicial basis.
 - ▶ A licensee may accept party-political advertising only from duly authorised party representatives.
 - ▶ A party-political advertisement shall be wholly under the editorial control of the political party placing the advertisement.
 - ▶ In relation to programming dealing with political parties:
 - › The licensee must provide reasonable opportunities for the discussion of conflicting views and must treat all political parties equitably.
 - › Political parties must be given a reasonable opportunity to reply to criticism.

Advertisement and Sponsorship Code

Part IV of the Broadcasting Rules contains the Advertising and Sponsorship Code applicable to all broadcasters. The Advertising and Sponsorship Code lays down advertising and sponsorship restrictions on broadcasters.

Key aspects of the Advertising and Sponsorship Code include the following:

- ▶ *Community standards, accuracy and fairness in advertising — section 15:*
 - ▶ A licensee shall ensure that broadcast advertisements are decent and conform to the principles of fair competition in business.
 - ▶ A licensee shall ensure that advertisements do not contain any misleading descriptions or claims.
 - ▶ A licensee must be satisfied that the advertiser has substantiated all descriptions or claims prior to accepting the advertisement.
 - ▶ A licensee must ensure that advertisements do not attack or discredit other products or advertisements unfairly.
 - ▶ A licensee shall not discriminate unreasonably against or in favour of any particular advertiser.
- ▶ *Scheduling of advertisements — section 16:*
 - ▶ Advertisements must be clearly distinguishable from programming.
 - ▶ A licensee must exercise reasonable judgment in the scheduling of advertisements that may be unsuitable for children when children may be expected to be listening.
 - ▶ Indirect broadcasting is not permitted during live or phone-in programmes.
 - ▶ Presenters shall refrain from commenting on advertisements.

▶ *Sponsorship — section 17:*

- ▶ A licensee may accept sponsorship for news bulletins, weather, financial or traffic reports and any other programme provided it retains editorial control of the sponsored programmes.
- ▶ Sponsorship must not compromise the impartiality and accuracy of the programme.
- ▶ Sponsors must not be allowed to advertise or endorse their goods and services within the editorial content of the sponsored programme.
- ▶ Sponsorships must be acknowledged before and after the sponsored programme, and any link between the programme's subject matter and the sponsor's commercial activities must be clear.
- ▶ A licensee must not discriminate unreasonably against or in favour of any particular sponsor.

Record-keeping obligations

- ▶ In terms of Part II of the Broadcasting Rules, licensees are required to keep a range of records and produce these on request by the LCA. Such records include:
 - ▶ company incorporation documents and shareholder agreements
 - ▶ audited financial statements
 - ▶ board resolutions
 - ▶ employee records
 - ▶ weekly programme schedules
 - ▶ daily programme logs showing categories of programming and timing thereof
 - ▶ advertising and sponsorship logs
 - ▶ music records detailing percentages of Sotho and African music played
 - ▶ complaints received and responses thereto
 - ▶ retaining original recordings of all programmes broadcast for a period of three months.

Compliance Issues

The LCA may impose a fine or direct the licensee to broadcast a correction or an apology or both, for failure to comply with the Broadcasting Rules, in terms of section 26 of the Broadcast Rules.

4.4 Other broadcasting-related regulations

Broadcasting Rules 2004

Complaints and Investigations

Part V of the Broadcasting Rules provides the regulations for the handling of complaints and investigations procedures that must be followed by the LCA. Part V also provides for the rights of licensees and complainants.

In terms of section 18 of the Broadcasting Rules, licensees are required to advise complainants that they have the right to refer the complaint to the LCA if they are dissatisfied with the licensee's response to the complaint.

In terms of section 19 of the Broadcasting Rules, any person who has reason to believe that he or she has been unfairly treated in any programme may request a copy of the relevant programme. Licensees may not unreasonably turn down such requests.

In terms of section 20 of the Broadcasting Rules, licensees must abide by, and cooperate with, all such complaints, monitoring and investigation procedures initiated by the LCA from time to time by:

- ▶ submitting, on request, any recordings or documentation required by the LCA
- ▶ responding to queries from the LCA relating to allegations of non-compliance with licence conditions, rules, regulations or the Communications Act
- ▶ appearing, when requested, before the LCA during any adjudication of a complaint or investigation inquiry into alleged non-compliance with licence conditions, rules, regulations or the Communications Act.

In terms of section 21 of the Broadcasting Rules, when the LCA intends to hold an investigation into a suspected breach of a licence condition, or investigate any dispute relating to a licensee's failure, or refusal, to deal with any complaint, or the unsatisfactory handling of any complaint by a member of the public, the LCA shall invite the licensee to make a written or oral representation within a period specified by the LCA.

In terms of section 22 of the Broadcasting Rules, should a licensee fail to comply with, or breach a licence condition, the LCA may impose a fine or penalty and make such directives as it deems necessary.

The Administrative Rules, 2016

In terms of section 46 of the Administrative Rules, the LCA may impose penalties as set out in section 47 of the Communications Act, where there is a contravention of any provision of the Communications Act, the Administrative Rules or licences, as the case may be.

5 Media self-regulation

One of the greatest problems facing the media in Lesotho is the lack of self-regulatory mechanisms for 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

In this section, you will learn about:

- ▷ common law
- ▷ civil defamation
- ▷ criminal defamation
- ▷ invasion of privacy
- ▷ contempt of court
- ▷ scandalising the court
- ▷ sedition

6.1 Definition of common law

The common law is judge-made law. It is made up of judgments handed down in cases adjudicating on disputes brought by people, whether natural (individuals) or juristic (for example, companies).

In common law legal systems such as Lesotho's, judges are bound by the decisions of higher courts and also by the rules of precedent, which require rules laid down by the court in previous cases to be followed, unless they were clearly wrongly decided. Legal rules and principles are, therefore decided on an incremental, case-by-case basis.

Elsewhere in this chapter, we have already examined two cases dealing with

seditious publications. This section focuses on three areas of common law of particular relevance to the media, namely defamation, privacy and contempt of court.

6.2 Civil Defamation

6.2.1 Definition of defamation

Lesotho's common law is primarily influenced by South African law and, like South African law, defamation is part of the common law of Lesotho. As is the case in South Africa, defamation is essentially the unlawful publication of a statement about a person, which lowers his or her standing in the mind of an ordinary, reasonable and sensible person. An action for defamation 'seeks to protect one of the personal rights to which every person is entitled, that is, the right to a good name, unimpaired reputation and esteem by others'.

Once it is proved that a defamatory statement has been published, two legal presumptions arise.

- ▶ That the publication was unlawful: this is an objective test which determines the lawfulness of a harmful act based on considerations of fairness, morality, policy and by the court's perception of the legal convictions of the community.
- ▶ That the person publishing same had the intention to defame.

The person looking to defend against a claim of defamation must then raise a defence against the claim.

6.2.2 Defences to an action for defamation

There are several defences to a claim based on defamation:⁸

- ▶ truth in the public interest
- ▶ absolute privilege — for example, a member of the National Assembly speaking in parliament
- ▶ statements made in the discharge of a duty, for example, the duty to provide information in connection with the investigation of a crime, enquiries as to the creditworthiness of a person and soon
- ▶ statements made in judicial or quasi-judicial proceedings
- ▶ reporting on proceedings of a court, parliament or certain public bodies
- ▶ fair comment on true facts and which are matters of public interest
- ▶ self-defence (to defend one's character, reputation or conduct)
- ▶ consent.

The most relevant here is the defence of truth in the public interest. Truth in the

public interest is where an action for damages is defended by asserting that the defamatory statement was true and, furthermore, that it is in the public interest to publicise the information.

It is important to note that public interest does not mean what is interesting to the public, but rather what contributes to the greater public good. Therefore, it may be in the public interest to publish true, albeit defamatory, material about public representatives. This is due to the importance of the public having accurate information to engage effectively in democratic practices such as voting.

Before South Africa transitioned to democracy and a new constitutional order, the media (publishers, printers, editors, newspaper owners, broadcasting companies) were strictly liable for the publication of defamatory material. This meant that in the absence of one of the recognised defences set out above (for example, truth in the public interest), the media was not entitled to raise a lack of intention or absence of negligence argument.

In other words, the courts were not required to find fault on the part of the media in the publication of a defamatory statement.³ In the ground-breaking case of *National Media Ltd and Others v Bogoshi* [1998] 4 All SA 347 (A), the Appellate Division (as it was then called) overruled its earlier *Pakendorf*⁹ decision as being clearly wrong and adopted the approach taken in England, Australia and the Netherlands.

The new legal principle is stated at page 361-62 of the *Bogoshi* judgment:

The publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time. In considering the reasonableness of the publication, account must obviously be taken of the nature, extent and tone of the allegations. We know that greater latitude is usually allowed in respect of political discussion ... and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper.

The effect of the *Bogoshi* judgment is to make it possible for the media to escape liability for publication of false, defamatory statements if the media acted reasonably in the publication of the false statements. As is stated in the judgment, key factors in determining whether the media's conduct is reasonable will include the:

- ▶ nature and tone of the allegations

- ▶ nature of the information on which the allegations were based, for example, if the information related to an important political issue or not
- ▶ reliability of the source of the allegations
- ▶ steps taken to verify the allegations
- ▶ general standard of care adopted by the media in the particular circumstances.

It is important to note that in a 2000 judgment *Ramainoane v Sello* LAC (2000-2004) 165, the Lesotho Appeal Court upheld a High Court finding of defamation. The appeal was dismissed on a technical issue; however, the Appeal Court made some observations about defamation that are important for those working in the media to be aware of.

The facts of the case involved a newspaper that published excerpts from a book, which alleged that a senior named politician had misappropriated party funds, dealt illicitly in diamonds and engaged in bribery or attempted bribery. The High Court found that there was no truth to the allegations, and this was not contradicted by the defendant. The editor, however, appealed and argued that the publication was nevertheless reasonable.

In its judgment, the Court of Appeal made some important comments on the reasonableness of the newspaper editor's conduct. It seems the editor had not read the book in question but had been referred to it by another senior politician and 'for that reason no further enquiry was necessary'. The court was, correctly, scathing in its criticism of such conduct. The court found that, at the very least, the journalist (and the editor if necessary) was required to check on the veracity of the highly defamatory allegations before proceeding to publish same.

6.2.3 Remedies for defamation

There are three main remedies in respect of defamation in the absence of a defence:

- ▶ *The publication of a retraction and an apology by the media organisation concerned:* Where it has published a false, defamatory statement, a newspaper or broadcaster will often publish a retraction of a story or allegation in a story, together with an apology. Whether or not this satisfies the person who has been defamed will depend on many factors including the seriousness of the defamation, how quickly the retraction and apology are published and the prominence that is given to the retraction and apology (this is a combination of the size of the retraction, but also its positioning in the newspaper).
- ▶ *An action for damages:* This is when a person who has been defamed sues for monetary compensation. This takes place after publication has occurred. Damages (money) are paid to compensate for the reputational damage caused by the defamation in circumstances where there are no defences to defamation. The amount to be paid in compensation will depend on several factors, including whether or not an apology or retraction was published, as well as the

standing or position in society of the person being defamed.

- ▶ *An action for prior restraint:* This is where the alleged defamatory material is prevented from being published in the first place. Where a person is aware that defamatory material is going to be published, he or she may go to court to, for example, obtain an interdict prohibiting the publication, thereby preventing the defamation from occurring. Prior restraints are dangerous because they deny the public (such as readers of a publication or audiences of a broadcaster) the right to receive the information that would have been publicised had it not been for the interdict. Prior restraints are seen as a last resort mechanism. The legal systems of countries that protect the right to freedom of expression usually prefer to allow publication and to deal with the matter via damages claims, in other words, using 'after publication' remedies.

6.3 Criminal Defamation

Criminal defamation, unlike civil defamation, is where the state charges a person with the crime of defamation. Defamation has been decriminalised in many countries worldwide by statutory means, in other words, the crime of defamation has been repealed, that is, removed from the statute books by the parliament or other legislative authority. However, another way of effectively repealing these crimes is when courts declare them unconstitutional. This has happened in Lesotho in an important case which removed all references to criminal defamation from the Penal Code, Act 6 of 2012.

In the Constitutional Court of Lesotho, case No 11/2016, in the matter between *Basildon Peta* (Applicant) *v The Minister of Law, Constitutional Affairs and Human Rights, the Attorney General and the Director of Public Prosecutions*, the court struck down all of the sections of the Penal Code dealing with criminal defamation, namely sections 101-104, on the basis of deleterious effects of criminal defamation in these sections, as the means used to achieve the purpose of protecting reputation interests are overbroad and vague in relation to the freedom of expression guaranteed in section 14 of the constitution. Furthermore, having concluded that criminal defamation laws have chilling effects on freedom of expression and that civil remedies for reputational encroachment are more suited to redressing such reputational harm, the court concluded that the extent of encroachment on the freedom of expression in this section was 'not reasonable and demonstrably justified in a free and democratic society.'

In terms of section 22(1)(6) of the constitution, the court 'may make such orders, issue such process and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 4 to 21 (inclusive) of this Constitution'. The Constitutional Court relied on this provision to strike down these sections saying that the crime of defamation has no place in the current constitutional dispensation of Lesotho.

6.4 Privacy

In 2003, the Lesotho Appeal Court in *Makakole v Vodacom Lesotho (Pty) Ltd* LAC (2000-2004) 831 held that Lesotho's law recognises 'a personality interest, of which privacy is a component' [at 830D]. The personality interest is the concept of *dignitas*, which: 'embraces privacy' [At 830E].

The facts of this case involved an action for damages arising from the release of certain cell phone records. The action was not successful, but the court elaborated on what must be proved in an action for damages arising out of an alleged invasion of privacy, namely, that 'a plaintiff must prove both a wrongful and intentional infringement of another's right to privacy' [At 830F].

6.5 Contempt of Court

In general terms, the common law crime of contempt of court is made up of two distinct types of contempt, namely the *sub judice* rule and the rule against scandalising the court.

6.5.1 The *sub judice* rule

The *sub judice* rule guards against people trying to influence the outcome of court proceedings while legal actions are underway.

In *MoAfrica Newspaper Re: RULE NISI (R v Mokhantso and Others)* 2003 (5) BCLR 534 (LesH), the High Court of Lesotho held that the:

main purpose of the common law sub judice rule is to protect the fair administration of justice against any statement that has the substantial effect of prejudicing the impartiality, dignity, or authority of the court which is seized with pending court proceedings [at paragraph 9].

The facts of this case were as follows. During the course of a criminal trial in the High Court in which certain persons were charged with having murdered one Selometsi Baholo, a caption appeared in a newspaper that read: 'Ntsu Mokhele and PB Mosisile, who assassinated SM Baholo, 434 weeks ago, on April 14 1994? The assassins of Selometsi Baholo have not yet been arrested and charged.' This implied that the wrong people had been arrested and charged and that the true culprits (by implication the late former Prime Minister Mokhele and the then-current Prime Minister Mosisili) were still at large.

The court found that while the caption 'looks or sounds unfortunate or mischievous, there is no real likelihood that it may prejudice the fairness in these proceedings' [at paragraph 25].

Importantly, Judge Peete stressed that the *sub judice* rule 'is an important and useful process whereby the proper administration of justice is protected against ... statements [made outside of court] which have a substantial risk of prejudicing or

interfering with pending court proceedings' [at paragraph 28]. Judge Peete went on to elaborate on the respective responsibilities of courts and the media in this regard:

Modern courts today should interpret cases where this limitation is on the freedom of expression somewhat restrictively save in cases where real and substantial risk exists. When publishing critical comments over pending proceedings, the media should do so advisedly and with a full sense of responsibility without creating any risk or prejudice to those pending court proceedings [at paragraph 28].

6.5.2 Scandalising the court

Scandalising the court is criminalised to protect the institution of the judiciary. The point is to prevent the public undermining the dignity of the courts.

Again, there is a distinction between fair criticism and scandalising the court. In *MoAfrica Newspaper Re: RULE NISI (R v Mokhantso and Others)* 2003 (5) BCLR 534 (LesH) the High Court of Lesotho (per Justice Peete) made some important statements about the relationship between the freedom of expression provisions in the Lesotho Constitution and the judiciary:

I am a firm holder of the view ... that the freedom of press as a guaranteed right under our Constitution must be held in high regard and esteem more so by the courts of law themselves. This will serve to show that the courts do not exist in 'an ivory tower' and are not unassailable or their decisions unimpugnable and above criticism.

6.5.3 Sedition

Two recent cases have dealt with sedition, and the courts, therefore, had no need to enquire more deeply into whether or not the definitions are overbroad in a constitutional democracy. In *R v Thakalekoala* (unreported), a Lesotho radio journalist was found guilty by the High Court of sedition under the Sedition Proclamation for claiming on air that the prime minister was not a Lesotho citizen and calling on the commissioner of police and the commander of the Lesotho Defence Force to arrest him.

In *Monyau v R*, the Lesotho Appeal Court dismissed an appeal against conviction on a charge of sedition by a priest who assisted disaffected members of the Lesotho Defence Force in the 1998 Lesotho uprising.

Notes

- 1 <https://www.bbc.com/news/world-africa-52707752> [Last accessed on 01 June 2020]
- 2 <https://www.worldometers.info/world-population/lesotho-population/>[Last accessed on 13 April 2020]
- 3 <https://tradingeconomics.com/lesotho/access-to-electricity-percent-of-population-wb-data.html>[Last Accessed on 13 April 2020]
- 4 <https://www.internetworldstats.com/africa.htm#ls>[Last Accessed on 13 April 2020]
- 5 <https://www.itu.int/en/ITU-D/Spectrum-Broadcasting/DSO/Pages/dataminer.aspx>[Last accessed on 13 April 2020]
- 6 The state of ICT in Lesotho, commissioned by the Lesotho Communications Authority and The International Telecommunication Union, Published by the Lesotho Communications Authority, March 2017
- 7 <https://www.lca.org.ls/frequently-asked-questions/> [Last accessed on 1 June 2020]
- 8 Ibid, paras 245ff.
- 9 See *Pakendorf en Andere v De Flamingh* 1982 (3) SA 146 (A)