3 Media law: Pitfalls and protections for the media

In this chapter you will learn:

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

1 INTRODUCTION

It is clear that freedom of the press is not absolute. This chapter looks in some detail at the internationally accepted standards for restricting the media. It outlines the legitimate grounds upon which the media can be restricted and how such restrictions are implemented. This chapter identifies 14 instruments, charters, resolutions or declarations adopted by international bodies such as the United Nations (UN), the European Union (EU), and the African Union (AU), as well as those adopted at significant conferences held under the auspices of international bodies such as United Nations Education, Scientific and Cultural Organisation UNESCO. Others have been established by non-governmental organisations (NGOs) with long-standing records of work in the area of freedom of expression and freedom of the press, such as the international NGO, Article 19. These instruments (many of which have a particular focus on Africa) deal with, among other things, the legitimate grounds for regulating or restricting certain forms of expression.

Since this handbook is aimed at journalists and other media practitioners as opposed to lawyers, the content of the instruments, charters and declarations is not set out as a whole, as these typically deal with a wide range of topics besides the media. Instead, we detail the key grounds upon which expression, including by the media, may be regulated. It is also important to note that the list of instruments referred to does not purport to contain every instrument, charter or declaration relevant to democratic

media restriction. Rather, it is a selection of the key instruments, charters or declarations made by bodies of international standing, some of which have particular (but not exclusive) relevance for Africa.

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

- **The African Charter on Broadcasting:** The African Charter on Broadcasting was adopted in 2001 by participants at a UNESCO conference to mark the 10th anniversary of the Windhoek Declaration. While the Windhoek Declaration focuses mainly on the print media, the African Charter on Broadcasting focuses on the broadcast media.

- **The African Principles of Freedom of Expression Declaration:** The Declaration of Principles on Freedom of Expression in Africa was adopted in 2002 by the African Commission on Human and Peoples' Rights (ACHPR), a body established under the auspices of the AU.

- **The American Convention on Human Rights:** The American Convention on Human Rights, otherwise known as the Pact of San José, was adopted by the nations of the Americas in 1969 and came into force in 1978.

- **The Camden Principles on Freedom of Expression and Equality:** The Camden Principles on Freedom of Expression and Equality were prepared by Article 19 on the basis of an international conference held in 2009 to discuss freedom of expression and equality issues. They aim to promote greater consensus about the proper relationship between freedom of expression and the promotion of equality.

- **The European Convention for the Protection of Human Rights and Fundamental Freedoms:** The European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in 1950 under the auspices of the Council of Europe.

- **The International Convention on the Elimination of All Forms of Racial Discrimination:** The International Convention on the Elimination of All Forms of Racial Discrimination was adopted by the UN General Assembly in 1965 and came into force in 1969.

- **The International Covenant on Civil and Political Rights:** The ICCPR was adopted by the UN General Assembly in 1966 and came into force in 1976.

- **The Johannesburg Principles:** The Johannesburg Principles on National Security, Freedom of Expression and Access to Information were adopted in October 1995 by a panel of experts in international law, national security and human rights, and convened by Article 19, the International Centre Against Censorship and the Centre for Applied Legal Studies of the University of the Witwatersrand. The Johannesburg Principles have been endorsed by the UN Committee on Human Rights and the UN Special Rapporteur on Freedom of Opinion and Expression.

- **Midrand Declaration:** The Midrand Declaration on Press Freedom in Africa was adopted by the Pan African Parliament (PAP) in 2013 and launched the PAP's campaign on Press Freedom for Development and Governance: Need for Reform, in all five regions in Africa and called upon the AU member states to use the Model Law on Access to Information drafted by the ACHPR.

- **Resolution on Press Freedom for Development and Governance: Need for Reform:** This resolution was adopted by the PAP in 2012. Among other things it urges AU member states to: contribute positively in reform efforts that relate to media freedom; repeal laws that oppress journalists and adopt the Model Law on Access to Information drafted by the ACHPR.

- **Resolution 169:** Resolution 169 on Repealing Criminal Defamation Laws in Africa was adopted by the ACHPR in 2010. Resolution 169 calls on state parties to the African Charter on Human and Peoples' Rights to repeal criminal defamation laws or insult laws which impede freedom of speech.

- **The Table Mountain Declaration:** The Table Mountain Declaration was adopted in 2007 by the World Association of Newspapers and the World Editors' Forum. It contains a number of important statements on African media issues made by a civil society forum of newspaper publishers and editors.

- **UNESCO's Media Development Indicators:** UNESCO's International Programme for the Development of Communications published a document in 2008 entitled 'Media Development Indicators: A Framework for Assessing Media Development'. This set of indicators clearly articulates appropriate grounds for limiting the media's freedom of expression.

- **The WSIS Geneva Principles:** The WSIS Geneva Principles were adopted in Geneva in 2003 at the World Summit on the Information Society (WSIS) held by the UN in conjunction with the International Telecommunications Union. While the WSIS Geneva Principles mainly cover issues concerning universal access to

information and communications technology, they do contain some important statements on the media more generally.

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

2 RESTRICTING FREEDOM OF EXPRESSION

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

The specific grounds for restriction are examined in the next section.

2.1 Relevant provisions in international instruments

- Article 3 of the American Convention provides that '[t]he right to freedom of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communications and circulation of ideas and opinions'.

- Article II(2) of the African Principles of Freedom of Expression Declaration provides that '[a]ny restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society'.

- Article XIII(1) of the African Principles of Freedom of Expression Declaration provides that '[s]tates shall review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society'.

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

- The UNESCO Media Development Indicators provide that the state 'may not place unwarranted legal restrictions on the media such as legal provisions dictating who may practice journalism or requiring the licensing or registration of journalists'.

- The UNESCO Media Development Indicators provide that neither broadcasting nor print content may be 'subject to prior censorship, either by government or by regulatory bodies', and require that 'sanctions for breaches of regulatory rules relating to content are applied only after the material has been broadcast or published'.

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

- Principle 11 of the Camden Principles provides that states should not impose any restrictions on freedom of expression '... [unless these are] provided by law' and '[are] necessary in a democratic society to protect [legitimate] interests. This implies ... that restrictions [must be]':
  - Clearly and narrowly defined and respond to a pressing social need
  - The least intrusive measure available, in the sense that there is no other measure which would be effective and yet less restrictive of freedom of expression
  - Not overbroad, in the sense that they must not restrict speech in a wide or untargeted way or beyond the scope of harmful speech and rule out legitimate speech
  - Proportionate, in the sense that the benefit to the protected interest outweighs the harm to freedom of expression, including in respect to the sanctions they authorise.

2.2 Summary

- The right to freedom of expression may not be restricted by indirect methods, in particular by:
  - The abuse of control over access to media-related materials such as newsprint, printing materials, printing facilities, distribution networks, radio broadcasting frequencies and equipment, including through the imposition of import duties and other means
  - Requiring the licensing or registration of journalists.

- Legitimate restrictions on freedom of expression must be clearly set down in law and must:

  - Be narrowly defined and targeted
  - Serve a legitimate interest. In other words, serve a pressing social need (these legitimate interests or social needs are dealt with in the next section)
  - Be necessary in a democratic society
  - Be the least intrusive measure available
  - Be proportionate
  - Be in accordance with international law
  - Be subject to a public interest override where appropriate.

- Illegitimate legal restrictions on freedom expression include those that:
  - Require prior censorship. In other words, a process of approval of content by a government or regulatory body prior to publication. (Although, as will be dealt with in more detail in the next section, there are certain limited circumstances when prior censorship would be acceptable, namely, to determine age restrictions for films or during wartime or a state of emergency)
  - Give special protections to officials and institutions.

2.3 Comment

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

- It is important to bear in mind that the cumulative tests for a legitimate restriction on the media's right to publish or broadcast information are that the restriction must be clearly set down in law and must:
  - Be narrowly defined and targeted
  - Serve a legitimate interest, that is, serve a pressing social need
  - Be necessary in a democratic society

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

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

3 REGULATING AND PROHIBITNG THE DISSEMINATION OF CERTAIN FORMS OF EXPRESSION BY THE MEDIA

It was noted in the previous section that states must have legitimate grounds for regulating and restricting freedom of expression, including by the media. This section looks at the 14 internationally accepted specific grounds for such regulations or restrictions.

These are the 14 grounds upon which there is broad international agreement on the legitimacy of restricting the media's publication of such content or otherwise regulating the media. Each ground is dealt with, setting out the relevant provisions of the applicable international instruments, statements and declarations. A summary and/or comment are provided where necessary.

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

- Licensing and regulation of broadcasting and cinema
- Protection of reputations
- Protection of rights of others generally
- Protection of privacy
- Obscenity and the protection of children and morals
- Propaganda for war
- Hate speech or discriminatory speech
- National security or territorial integrity
- War or state of emergency
- Protection of public order or safety
- Protection of public health
- Maintaining the authority and impartiality of the judiciary
- For the prevention of crime
- Preventing the disclosure of information received in confidence.

3.1 Legitimate licensing and regulation of broadcasting and cinema

3.1.1 Relevant provisions in international instruments

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

3.1.2 Comment

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

3.2 Protecting reputations

3.2.1 Relevant provisions in international instruments

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

- Article 19(3)(a) of the ICCPR specifically provides in its relevant part that the exercise of the right to freedom of expression 'may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of the ... reputations of others'.

- Article 2(a) of the American Convention provides that the right to freedom of expression 'shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure respect for the ... reputations of others'.

- Article XII(1.) of the African Principles of Freedom of Expression Declaration

provides in its relevant part that '[s]tates should ensure that their laws relating to defamation conform to the following standards':

- No one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances.
- Public figures shall be required to tolerate a greater degree of criticism.
- Sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.

- The Table Mountain Declaration provides that African states must abolish 'insult and criminal defamation laws'.

- Resolution 169 of the ACHPR calls on state parties to the AU Charter to 'repeal criminal defamation or insult laws which impede freedom of speech'.

- UNESCO's Media Development Indicators provide that defamation laws must 'impose the narrowest restrictions necessary to protect the reputation of individuals'. In this regard, UNESCO's Media Development Indicators set out the characteristics of appropriate defamation laws, including that:
  - They do not inhibit public debate about the conduct of officials or official entities
  - They provide for sufficient legal defences such as:
    - The statement was an opinion not an allegation of fact
    - The publication/broadcasting was reasonable or in the public interest
    - That it occurred during a live transmission
    - That it occurred before a court or elected body
  - They provide for a regime of remedies that allow for proportionate responses to the publication or broadcasting of defamatory statements
  - The scope of defamation laws is defined as narrowly as possible, including as to who may sue
  - Defamation law suits cannot be brought by public bodies, whether legislative, executive or judicial
  - The burden of proof falls upon the plaintiff in cases involving the conduct of public officials and other matters of public interest
  - There is a reasonable cut-off date after which plaintiffs can no longer sue for an alleged defamation.

3.2.2 Summary

- While protecting the reputations of others is a legitimate ground for regulating or even prohibiting expression by the media, laws relating to defamation:
  - Must not:
    - Criminalise defamation but instead ought to impose post-publication civil sanctions, such as damages awards. It is interesting to note that the African Court of Human and Peoples' Rights[1] has recently held that '[a]part from serious and very exceptional circumstances … violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences'.[2] The effect of this judgment is to echo the international standards that financial penalties are an appropriate mechanism for punishing defamatory statements
    - Inhibit public debate about the conduct of officials or official entities who are required to tolerate a greater degree of criticism than ordinary members of the public
    - Allow defamation law suits to be brought by public bodies, whether legislative, executive or judicial.

  - Must:
    - Provide for legal defences to a defamation suit including that:
      - The statement was true and was made in the public interest
      - The statement was an opinion not an allegation of fact
      - Publication/broadcasting was reasonable or in the public interest
      - It occurred during a live transmission
      - It occurred before a court or elected body
    - Provide for a range of appropriate and proportionate remedies for the publication of defamatory material
    - Ensure the burden of proof falls upon the plaintiff in cases involving the conduct of public officials and other matters of public interest
    - Ensure there is a reasonable cut-off period after which plaintiffs can no longer sue for an alleged defamation.

3.2.3 Comment

The summary of the contours of internationally accepted standards for defamation law clearly lays out a progressive vision which puts the public interest ahead of the

reputations of, particularly, public figures. The reality, however, is that all Eastern African countries' defamation laws fall far short of these standards, as will be seen in the country chapters.

3.3 Protecting the rights of others generally

3.3.1 Relevant provisions in international instruments

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

- Article 19(3)(a) of the ICCPR specifically provides in its relevant part that the exercise of the right to freedom of expression 'may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of the rights ... of others.'

- Article 58 of the WSIS Geneva Principles provides that the '[t]he use of ICTs and content creation should respect human rights and fundamental freedoms of others, including ... the right to freedom of thought, conscience and religion in conformity with relevant international instruments'.

3.3.2 Comment

- The wording of this ground is extremely vague and usually will be subsumed under other more specific grounds, such as reputation, privacy or morality. It is included here because it features in at least three international instruments.

3.4 Protecting privacy

3.4.1 Relevant provisions in international instruments

- Article XII(2) of the Principles of African Freedom of Expression Declaration provides that privacy laws 'shall not inhibit the dissemination of information of public interest'.

- Article 58 of the WSIS Geneva Principles provides that '[t]he use of ICTs and content creation should respect human rights and fundamental freedoms of others, including personal privacy ... in conformity with relevant international instruments'.

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

- In paragraph (xiii) of the Resolution on Press Freedom for Development and Governance: Need for Reform, the PAP resolves to 'contribute to the process of drafting clear policies for ensuring the privacy … aspects that are related to the media'.

3.4.2 Comment

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

3.5 Regulating obscenity and protecting children and morals

3.5.1 Relevant provisions in international instruments

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

- Article 19(3)(b) of the ICCPR specifically provides in its relevant part that the exercise of the right to freedom of expression 'may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for the protection of ... morals ...'.

- Article 2(b) of the American Convention provides in its relevant part that the right to freedom of expression 'shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure ... the protection of ... morals'.

- Article 3 of the American Convention specifically provides that 'public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence'.

- Article 59 of the WSIS Geneva Principles provides that '[a]ll actors in the Information Society should take appropriate actions and preventive measures as determined by law, against abusive uses of ICTs such as ... all forms of child abuse,

including paedophilia and child pornography, and trafficking in, and exploitation of, human beings'.

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

3.5.2 Summary

- While protecting children and morality are both legitimate grounds for regulating or even prohibiting expression, particularly of obscene materials, by the media, this cannot prevent the publication of information in the public interest.

- Regulating access to public entertainments (such as films, whether to be shown in cinemas or broadcast) to prevent access for the moral protection of children and adolescents is a legitimate ground for prior censorship. In other words, a government or regulatory body can rule on whether or not and, if so, how the publication or exhibition of public entertainments is to take place – for example, imposing age restrictions on films.

3.5.3 Comment

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

- Many countries are moving away from regulating the publication or broadcasting of materials based on the ground of 'morality' due to the difficulty of setting a national standard for morality. This is often a highly subjective matter, particularly in multicultural societies.

3.6 Propaganda for war

3.6.1 Relevant provisions in international instruments

- Article 20(1) of the ICCPR provides that '[a]ny propaganda for war shall be prohibited by law'.

- Article 5 of the American Convention provides in its relevant part that '[a]ny propaganda for war ...' shall be considered an offence punishable by law.

3.6.2 Summary

- Propaganda for war is prohibited and engaging therein is an offence.

3.6.3 Comment

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

3.7 Hate speech or discriminatory speech

3.7.1 Relevant provisions in international instruments

- Article 4(a) of the Convention on the Elimination of Racial Discrimination provides in its relevant part: '[s]tates parties condemn all propaganda ... which ... [is] based on ideas or theories of superiority of one race or group of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to ... such discrimination and to this end ... [s]hall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin ... .'

- Article 20(2) of the ICCPR provides that '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.

- Article 5 of the American Convention provides in its relevant part that '... any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offenses punishable by law'.

- Article 59 of the WSIS Geneva Principles provides that '[a]ll actors in the Information Society should take appropriate actions and preventive measures, as

determined by law, against abusive uses of ICTs, such as illegal and other acts motivated by racism, racial discrimination, xenophobia, and related intolerance, hatred, violence ...'.

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

- Principle 12 of the Camden Principles provides that states 'should adopt legislation prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.

3.7.2 Summary

- Hate speech is the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

- Discriminatory speech is propagating the idea of the superiority of one race or group of one colour or ethnic origin.

- Dissemination of hate speech should be an offence.

- Preventing hate speech or discriminatory speech are both legitimate grounds for regulating or even prohibiting expression by the media.

3.7.3 Comment

- As was the case for propaganda for war, the international community uses particularly strong language in relation to hate speech, and it requires that the dissemination thereof be made an offence under national law.

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

3.8 Protection of national security or territorial integrity

3.8.1 Relevant provisions in international instruments

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

- Article 19(3)(b) of the ICCPR specifically provides in its relevant part that the exercise of the right to freedom of expression 'may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for the protection of national security ...'.

- Article 2(b) of the American Convention provides that the right to freedom of expression 'shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure ... the protection of national security ...'.

- Principles 1(c) and (d) read together with principles 2(a) and (b) and Principle 6 of the Johannesburg Principles provide that the exercise of the right to freedom of expression 'may be subject to restrictions ... for the protection of national security. No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restrictions rests with the government ... A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government. In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology or to suppress industrial unrest'.

- Principle 23 of the Johannesburg Principles provides that '[e]xpression shall not be subject to prior censorship in the interest of protecting national security, except in a time of public emergency which threatens the life of the country ...'.

- Article XIII(2) of the Principles of African Freedom of Expression Declaration provides that '[f]reedom of expression should not be restricted on ... national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression'.

- In paragraph (xiii) of the Resolution on Press Freedom for Development and Governance: Need for Reform, the PAP resolves to 'contribute to the process of drafting clear policies for ensuring … the security aspects that relate to the media'.

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

- The UNESCO Media Development Indicators provide that 'national security restrictions must not inhibit public debate about issues of public concern'.

3.8.2 Summary

- Protecting national security or territorial integrity are both legitimate grounds for regulating or even prohibiting expression by the media. This cannot inhibit public debate on matters of public concern.

- Restricting the media's right to freedom of expression on the basis of a national security interest is not legitimate:

    - Unless it can be shown that:
        - The restriction will protect a country's existence or its territorial integrity against the threat of force, whether external or internal
        - There is a causal link between the expression and the risk of the threat of force.
    - If it protects interests unrelated to national security, including, for example:
        - Protecting a government from embarrassment or exposure of wrongdoing
        - Concealing information about the functioning of its public institutions
        - Entrenching a particular ideology
        - Suppressing industrial unrest.

3.8.3 Comment

- It is interesting to note that the international instruments go into a great deal of detail as to when resorting to 'national interest' restriction would not be legitimate. This is undoubtedly due to the history of the near-systematic abuse of this otherwise legitimate ground for media restriction by many government officials, particularly in the security forces.

- It is noteworthy that the international instruments detail the nature of the threat to national security and its relationship to the proposed restricted expression that must exist before such a ground will be legitimate.

- Very few national laws, particularly in Eastern African countries, comply with these requirements.

3.9 War or state of emergency

3.9.1 Relevant provisions in international instruments

- Article 15(1) of the European Convention on Human Rights provides that '[i]n a time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'.

- Article 27(1) of the American Convention provides in its relevant part that '[i]n a time of war, public danger or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation ...'.

- Principle 3 of the Johannesburg Principles provides that '[i]n time of public emergency which threatens the life of the country and the existence of which is officially and lawfully proclaimed in accordance with both national and international law, a state may impose restrictions on freedom of expression and information but only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government's other obligations under international law'.

- Principle 23 of the Johannesburg Principles provides that '[e]xpression shall

not be subject to prior censorship in the interest of protecting national security, except in a time of public emergency which threatens the life of the country ...'.

- The UNESCO Media Development Indicators expressly provide that laws must 'not allow state actors to seize control of broadcasters during an emergency'.

3.9.2 Summary

- War or a state of emergency are both legitimate grounds for regulating or even prohibiting expression by the media, including by means of prior censorship, provided that this is done only for the period of time strictly necessary in the circumstances.

- Emergency laws must not allow state actors to seize control of broadcasters during an emergency.

3.9.3 Comment

- Comments are confined to the state of emergency ground.

- Many governments abuse emergency powers and use these to stifle dissent rather than to protect the population. One of the most important aspects of the internationally articulated standards for emergency restrictions is the requirement that these last for a limited period only. Consequently, states of emergency that are said to be 'indefinite' or which in practice last for years or decades clearly do not meet international standards of legitimacy.

- Another noteworthy aspect is the requirement that emergency laws not allow state organs to seize control of broadcasters during an emergency. Many national broadcasting laws allow for broadcasters to be required to broadcast public service announcements by government during public emergencies. This is obviously very different from governments taking over a broadcaster altogether.

3.10 Protection of public order or safety

3.10.1 Relevant provisions in international instruments

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

conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of ... public safety ... [and] for the prevention of disorder ...'.

- Article 19(3)(b) of the ICCPR specifically provides in its relevant part that the exercise of the right to freedom of expression 'may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for the protection of ... public order ...'.

- Article 2(b) of the American Convention provides that the right to freedom of expression 'shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure the protection of ... public order ...'.

- Article XIII(2) of the Principles of African Freedom of Expression Declaration provides that '[f]reedom of expression should not be restricted on public order ... grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression'.

3.10.2 Summary

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

3.10.3 Comment

- As is the case with emergency provisions, governments often abuse the grounds of public order or public safety to restrict the publication of legitimate expressions of dissent. National laws often do not comply with internationally articulated standards in regard to these grounds.

3.11 Protection of public health

3.11.1 Relevant provisions in international instruments

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

- Article 19(3)(b) of the ICCPR specifically provides in its relevant part that the exercise of the right to freedom of expression 'may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for the protection of ... public health ...'.

- Article 2(b) of the American Convention provides that the right to freedom of expression 'shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure the protection of ... public health ...'.

3.11.2 Summary

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

3.12 Maintaining the authority and impartiality of the judiciary

3.12.1 Relevant provisions in international instruments

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

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

3.12.2 Summary

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

3.12.3 Comment

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

- *The rule against scandalising the court:* This is where attacks on the judiciary are

such that they undermine the administration of justice. This obviously goes far beyond fair and reasonable comment and criticism of judgments and judges, which does not undermine the administration of justice.

- *The sub judice rule:* This is where the outcome of a judicial proceeding is effectively preempted or prejudiced through the publication of information which also undermines the administration of justice.

3.13 For the prevention of crime

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

3.14 Preventing the disclosure of information received in confidence

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

4 LAWS THAT HINDER THE MEDIA IN PERFORMING ITS ROLE

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

- Democratic media regulation
- Democratic broadcasting regulation
- Restricting publication or broadcasting by the media.

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

- Unreasonably restrict market entry – that is, which act as a barrier to establishing independent media sources

- Provide for prior censorship

- Favour individual rights, particularly of public officials, over the public's right to know
- Do not comply with internationally accepted restrictions upon the publication of obscene materials
- Do not comply with internationally accepted restrictions upon the publication of propaganda for war or hate speech
- Do not comply with internationally accepted restrictions upon the publication of information which threatens national security, territorial integrity and public order
- Do not comply with internationally accepted restrictions upon the publication of information which threatens law enforcement
- Provide for indefinite states of emergency
- Do not comply with internationally accepted restrictions upon the publication of information which undermines the judiciary.

4.1 Laws that unreasonably restrict market entry

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

Note that licensing is in fact required in respect of broadcasting due to the need to regulate frequency spectrum use effectively.

4.2 Laws that provide for prior censorship

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

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

In an effort to guard against embarrassing public revelations in the media, governments sometimes enact (or deliberately fail to repeal) laws which provide a great deal of protection for private and even public figures at the expense of the media's right to publish or broadcast and the public's right to know. Thus, criminal defamation laws, insult laws or civil defamation laws – whether provided for in a statute or in the common law, as determined by the judiciary – that do not comply with internationally accepted standards for laws protecting privacy or reputations, or the rights of others hinder the media greatly in its operations.

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

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

Generally, the mainstream media does not often fall foul of laws that regulate obscenity, morality or which aim at protecting children. However, in the recent past, there have been a number of examples in Africa where obscenity laws have been invoked by officials to try to prevent the publication of news and information that is clearly in the public interest. In one instance, a journalist who was working on a story about the state of public health care in Zambia faced obscenity charges for circulating to public officials (not even publishing) photographs of a woman giving birth on the pavement outside a hospital.

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

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

Although one generally associates the passage of hate speech legislation with progressive governments anxious to protect citizens from racism or other discrimination, governments have made, and sometimes do make, use of such

legislation to stifle dissent and prevent the publication of material in the public interest.

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

Unfortunately, governments often confuse national security with government popularity. Thus, a threat to a government's standing or popularity among citizens is seen as a threat to 'national security' or 'public order'. This means that governments often abuse the legitimate grounds for limiting media expression of national security or territorial integrity for their own, as opposed to the public's, interests. Unfortunately, a large number of national laws relating to security issues – such as defence, intelligence, classified information, terrorism and the like – often do not comply with internationally accepted standards for such legislation, which standards are set out in chapters 2 and 3.

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

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

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

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

4.8 Laws that provide for indefinite states of emergency

Internationally, the ability of governments to restrict the media during a time of national crisis, such as a state of emergency, is widely recognised. However, this is

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

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

As a general rule it is rare that the judiciary acts in such a way as to unreasonably prevent the media from publishing information in the public interest. However, laws such as the *sub judice* rule in common law can be abused in ways that harm the media and prevent it from carrying out its functions. For example, sometimes public officials involved in court proceedings cite the *sub judice* rule as a reason for providing no information to the media, even if the case is on a matter of public importance and the publication of information would not prejudice the outcome of the case.

4.10 Laws that criminalise defamation

Although all the Eastern African countries considered in this book continue to have criminal defamation laws on their statute books, it is important to note that international best practice standards clearly indicate that the most appropriate way of protecting against defamation is through civil sanctions, such as damages awards, rather than criminal sanctions, such as imprisonment.

5 LAWS THAT ASSIST THE MEDIA TO PERFORM ITS VARIOUS ROLES

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

- Democratic media regulation
- Democratic broadcasting regulation
- Restricting publication or broadcasting by the media.

There are also other kinds of laws that greatly assist the media, if only indirectly, in its day to day operations, as well as in terms of building long-term support for media freedom. While it is difficult to give a definitive or even comprehensive list of the kinds of laws that assist the media, seven types of laws have been selected, which are commonly seen as supporting the functioning of the media, namely:

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

5.1 Constitutions

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

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

- The independence of the public broadcaster and the fact that it is to act in the public interest ought to be specifically guaranteed in constitutional provisions.

- An independent judiciary that has the final say over the legal interpretation of the provisions of the constitution should be provided for in the constitution.

- General public watchdog bodies to protect the public from abuses of power and to preserve constitutional values should be established by the constitution. Bodies that can perform these roles include human rights commissions, public protectors or a public ombudsman.

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

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

- Ensuring that regulation does not result in the public being unreasonably denied access to news and information in the public interest

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

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

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

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

5.4 Laws that comply with internationally accepted standards for restricting publication or broadcasting by the media

If all laws that restrict what the media may publish or broadcast were to comply with internationally accepted standards for restricting publication or broadcasting by the media (set out previously in this chapter), this would assist the media to perform its

roles effectively by ensuring that regulation does not result in the public being unreasonably denied access to news and information in the public interest.

5.5 Access to information legislation

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

Access to information statutes almost always provide for grounds upon which disclosure of the information or access to the records requested can be denied. Generally, these grounds are there to protect important societal interests, such as crime prevention, national security, privacy or information provided in confidence. Progressive access to information laws will contain a public interest override clause, allowing for the information to be disclosed if there is an overwhelming public interest in the information being made public (for example, if this will provide evidence of a crime or of public wrongdoing), even if the information falls within one of the grounds for non-disclosure.

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

It is important to recognise that the issue of access to information has been taken up by the ACHPR and also by the PAP; both of these institutions have called on state parties to the African Charter to implement the Model Law on Access to Information which has been developed by the ACHPR.

5.6 Whistleblower protection or anti-corruption laws

Other laws that are often particularly useful for journalists are statutes designed to promote good governance by supporting anti-corruption measures. Thus, anti-corruption statutes or statutes that provide 'whistleblower' protection for those who alert the authorities (or the media) to public wrongdoing, particularly criminal activities by public officials, help to provide an environment in which the media is able to access sources of public interest information without those sources suffering abuse or retaliation as a result.

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

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

NOTES

1 *Konate v Burkina Faso* (Application No. 004/20013) http://www.african-court.org/en /images/documents/Judgment/Konate%20Judgment%20Engl.pdf, last accessed on 31 July 2015.
2 Ibid, paragraph 165 of the Konate judgment.