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# Eritrea



## 1 INTRODUCTION

The State of Eritrea has a population of approximately 6.5 million people. Although there are no official languages in Eritrea, the languages of commerce and government are Tigrinya, Arabic and English, and there are a number of other local languages and dialects.<sup>1</sup> Literacy rates are approximately 66% for women and 82% for men.<sup>2</sup>

Eritrea was a colony of Italy until 1941, after which it was administered by Great Britain for 10 years. It gained independence as an autonomous region within the Ethiopian federation in 1952. In 1962, Ethiopia annexed Eritrea sparking a 30-year struggle for independence.<sup>3</sup>

Following a United Nations (UN)-sanctioned referendum on independence, Eritrea declared independence from Ethiopia and received international recognition in 1993.<sup>4</sup> Since that time it has been ruled by a so-called transitional government, which has deployed a perpetual state of emergency<sup>5</sup> to silence dissent and to curtail the media. No elections have been held since and the country has been described, accurately, as an ‘authoritarian presidential regime’.<sup>6</sup>

Although a new constitution was formally adopted on 23 May 1997, after being drafted by a constitutional commission whose members were appointed by the president,<sup>7</sup> it has never been implemented. The president announced in 2014 that a new constitution would be drafted<sup>8</sup> but at the time of writing this new constitution has not materialised.

Currently, the Eritrean government formally recognises only one political party, the People's Front for Democracy and Justice (PFDJ), which is largely made up of former Eritrean People's Liberation Front members, who fought Ethiopia's annexation of Eritrea.<sup>9</sup> While PFDJ links to Al-Shabbab are disputed, such a link has been recognised by the United Nations Security Council and UN-backed sanctions have been imposed on Eritrea since 2009.<sup>10</sup>

The country is poor with 69% of the population living in poverty and a gross national income per capita of US\$680 in 2014.<sup>11</sup> The country's level of electronic communications connectivity is extremely poor, with 1% teledensity in respect of fixed lines and 7% teledensity in respect of mobile penetration. Approximately 1% of the population has access to the internet; only 65,000 people as at June 2015.<sup>12</sup> It is important to note that while the government planned to introduce mobile internet capability in 2011, these plans were abandoned 'apparently because the government was fearful of the effect of the Arab Spring uprisings'.<sup>13</sup> Consequently it appears that most Eritreans who do access the internet do so via internet cafés.<sup>14</sup>

The media environment is, in a word, shocking.

In 2001 the shut-down of independent media took place when the last eight private newspapers were forced to close, and since then 'no independent media has existed in Eritrea'.<sup>15</sup> According to the international media freedom non-governmental organisation (NGO), Article 19, 'Eritrea is the only country in Africa with no privately-owned press, television broadcasters or radio stations, having banned the entire private press for "endangering national security" in 2001'.<sup>16</sup>

Further, 'the few remaining media are state owned and far from independent, essentially serving as a mouthpiece for the Ministry of Information. Alternative sources of information are limited given extremely low levels of internet penetration in the country'.<sup>17</sup>

In 2015, the Committee to Protect Journalists (CPJ) named Eritrea as 'the most censored country in the world'.<sup>18</sup> The CPJ, in its report on Eritrea, states that:

Eritrea has the most jailed journalists in Africa. None of those arrested are taken to court, and the fear of arrest has forced dozens of journalists into exile. Those in exile try to provide access to independent online news websites and radio broadcasts, but the opportunity to do so is limited because of signal jamming and tight online control by the sole state-run telecommunications company, EriTel. All mobile communications must go through EriTel and all internet service providers must use the government-controlled gateway.

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

- Media and the constitution
- Media-related legislation
- Media-related regulations
- Media self-regulation
- Media-related law based on decided cases

The aim of this chapter is to equip the reader with an understanding of the main laws governing the media in Eritrea and to understand the Eritrean media environment more generally. Key weaknesses and deficiencies in these laws and in their implementation will also be identified. The hope is to encourage media law reform in Eritrea, to better enable the media to fulfil its role of providing the public with relevant news and information, and to serve as a vehicle for government–citizen debate and discussion.

## **2 THE MEDIA AND THE CONSTITUTION**

In this section you will learn:

- The definition of a constitution
- What is meant by constitutional supremacy
- How a limitations clause operates
- Which constitutional provisions protect the media
- Which constitutional provisions might require caution from the media or might conflict with media interests
- What key institutions relevant to the media are established under the Constitution of Eritrea
- How rights are enforced under the Constitution
- What is meant by the ‘three branches of government’ and ‘separation of powers’
- Whether there are any clear weaknesses in the Constitution of Eritrea that ought to be amended 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, indeed, entire nations.

The Constitution of Eritrea was ratified by the Constituent Assembly on 23 May 1997 and sets out the foundational rules for the State of Eritrea. These are supposed to be the rules upon which the entire country operates; however, the provisions of the Constitution have not been implemented.<sup>19</sup>

The effect of this is that the Eritrean Constitution is literally a constitution on paper only and none of its provisions are in force to any practical effect. Nevertheless, we think it important to include the constitutional provisions in order to understand the kind of country that Eritrea, at one point, aspired to be.

The Constitution contains the underlying principles, values and laws of Eritrea although again, many of these have in fact been abrogated. Nevertheless, it is important to be aware of what the Constitution has committed the State of Eritrea to. A key constitutional provision in this regard is article 1(1), which states that ‘Eritrea is a sovereign and independent State founded on the principles of democracy, social justice and the rule of law’.

## **2.2 Definition of constitutional supremacy**

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

The Constitution of Eritrea makes provision for constitutional supremacy. Article 2(3) specifically states that ‘this Constitution is the supreme law of the country and the source of all laws of the State, and all laws, orders and acts contrary to its letter and spirit shall be null and void’. Further, article 2(4) provides that ‘all organs of the capital, all public and private associations and institutions and all citizens shall be bound by and remain loyal to the Constitution and shall ensure its observance’.

## **2.3 Definition of a limitations clause**

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

were absolute, the state would not be able to protect its citizens from hate speech or false defamatory statements made with reckless disregard for the truth. Clearly, governments require the ability to limit rights in order to serve important societal interests; however, owing to the supremacy of the constitution this can only be done in accordance with the constitution.

The Constitution of Eritrea makes provision for two types of legal limitations on the exercise and protection of rights contained in Chapter III of the Constitution of Eritrea, ‘Fundamental Human Rights, Freedoms and Duties’.

### 2.3.1 General limitations

Article 26(1) specifically provides that the fundamental rights and freedoms guaranteed under the Constitution may be ‘limited only in so far as is in the interests of national security, public safety or the economic well-being of the country, health or morals, for the prevention of public disorder or crime or for the protection of the rights and freedoms of others’. Further, article 26(2) provides that:

Any law providing for the limitation of the fundamental rights and freedoms guaranteed in this Constitution must:

- (a) be consistent with the principles of democracy and justice;
- (b) be of general application and not negate the essential content of the right or freedom in question;
- (c) specify the ascertainable extent of such limitation and identify the article or articles hereof on which authority to enact such limitation is claimed to rest.

Finally, article 26(3) provides that notwithstanding the provisions of sub-article 26(1) and other articles of the Constitution to the contrary, the rights and freedoms guaranteed under articles 14(1) and (2), 15, 16, 17(2), (5), (7) and (8), and 19(1) of the Constitution shall not be limited.

Article 26 contains a number of interesting provisions that require some explanation.

- It is clear that rights can be limited on a number of different grounds, namely, national security, public safety, the economic well-being of the country, health, morals, prevention of public disorder, prevention of crime or protection of the rights and freedom of others.
- A law of limitation, besides falling within one of the stated grounds, has to:
  - Be consistent with the principles of democracy and justice

- Be of general application
  - Not negate the essential content of the right or freedom in question
  - Specify the ascertainable extent of such limitation
  - Identify the constitutional article(s) upon which the authority to enact such a limitation is claimed.
- Further, certain rights are non-derogable, that is, they cannot be limited at all under any circumstances. These rights are:
- The right to equality before the law – article 14(1)
  - The right not to be discriminated against on account of race, ethnic origin, language, colour, sex, religion, disability, political belief or opinion, or social or economic status or any other factors – article 14(2)
  - The right to life and liberty, that is, the right not to be deprived of life or liberty without due process of law – article 15
  - The right to human dignity, including not being subjected to torture or to cruel, inhuman or degrading treatment or punishment and not being held in slavery or servitude or being required to perform forced labour not authorised by law – article 16
  - The right not to be tried or convicted for any act or omission which did not constitute a criminal offence at the time it was committed – article 17(2)
  - The right of *habeas corpus*, that is, the right of an arrested person to petition to be brought before a court – article 17(5)
  - The right to be presumed innocent and not to be punished unless found guilty by a court of law – article 17(7)
  - The right to an appeal and not to be tried twice for the same criminal offence – article 17(8)
  - The right to freedom of thought, conscience and belief – article 19(1).

### 2.3.2 Constitutional limitations

Article 27 is an example of a constitutional limitation. Article 27(1) provides that ‘[a]t a time when public safety or the security or stability of the State is threatened by external invasion, by civil disorder or by natural disaster, the President may by proclamation published in the Gazette of Eritrean laws declare that a state of emergency exists in Eritrea or any part thereof’.

Importantly, article 27(5) provides that any measures undertaken and all laws enacted pursuant to a declaration of a state of emergency shall not:

- (a) suspend articles 14(1) and (2); 16; 17(2); and 19(1) of the Constitution
- (b) grant pardon or amnesty to any person who, acting under the authority of the State, has committed illegal acts
- (c) introduce martial law where there is no external invasion or civil disorder.

This is important because it means that during a state of emergency the following rights cannot be abrogated, namely:

- The right to equality before the law – article 14(1)
- The right not to be discriminated against on account of race, ethnic origin, language, colour, sex, religion, disability, political belief or opinion, or social or economic status or any other factors – article 14(2)
- The right to human dignity, including not being subjected to torture or to cruel, inhuman or degrading treatment or punishment and not being held in slavery or servitude or being required to perform forced labour not authorised by law – article 16
- The right not to be tried or convicted for any act or omission which did not constitute a criminal offence at the time it was committed – article 17(2)
- The right to freedom of thought, conscience and belief – article 19(1).

Further, those acting under state authority cannot act illegally with impunity and martial law can only be imposed in circumstances where there is an external invasion or civil disorder. Sadly, the term ‘civil disorder’ is not narrow and so it is likely that the declaration of emergency including martial law is not a particularly difficult threshold to cross.

Articles 27(2) and (3) provide for a number of procedural safeguards in respect of proclamations of states of emergency, including that such a declaration be approved by a resolution passed by a two-thirds majority vote of all members of the National Assembly, and that the first period of a state of emergency is six months and can be extended by a resolution of the National Assembly for three months at a time. However, the current state of emergency, which was not declared in terms of the Constitution of Eritrea, is effectively perpetual.

## **2.4 Constitutional provisions that protect the media**

The Constitution of Eritrea contains a number of important provisions in Part III,

‘Fundamental Rights, Freedoms and Duties’, which directly protect the media, including publishers, broadcasters, journalists, editors and producers.

### 2.4.1 Freedom of expression

The most important provision that protects the media is article 19(2) – the part of the article headed ‘Freedom of conscience, religion, expression of opinion, movement, assembly and organisation’, which sub-article states: ‘Every person shall have the freedom of speech and expression, which includes freedom of the press and other media’.

This provision needs some detailed explanation.

- This freedom applies to all persons and not just to certain people, such as citizens. Hence everybody (both natural persons and juristic persons, such as companies) enjoy 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 different examples of this, including physical expression, such as mime or dance, photography or art.
- Article 19(2) specifies that the right to freedom of speech and expression expressly guarantees the ‘freedom of the press and other media’, thereby protecting the media’s right to exist and to operate freely, including in respect of reporting and writing opinion pieces and commentary on important issues of the day.

### 2.4.2 Right of access to information

Another important provision that protects the media is article 19(3) – the part of the article headed ‘Freedom of conscience, religion, expression of opinion, movement, assembly and organisation’, which states: ‘Every citizen shall have the right of access to information’.

This provision needs some detailed explanation.

- Unlike the right to freedom of expression, this right applies only to citizens. Hence not everybody enjoys this fundamental right – only citizens have the right to information.
- No explanation is given as to what information, held by whom, does the right of access refer. Some constitutions explicitly limit the right of access to information



that is held by the state, while others broaden the right to provide a right of access to information held by private persons too. This provision is opaque and does not make it clear whose information citizens have a right to.

### **2.4.3 Privacy**

A third protection is contained in article 18 of the Constitution of Eritrea, ‘Right to privacy’. Article 18(1) specifies that ‘[e]very person shall have the right to privacy’. And article 18(2)(a) gives further content to the right to privacy by providing that ‘no person shall be subjected to body search, nor shall his premises be entered into or searched or his communications or correspondence, or other property be interfered with, without reasonable cause’. Article 18(2)(b) provides that ‘no search warrant shall be issued, save upon probable cause, supported by oath, and particularly describing the place to be searched, and the persons or things to be seized’.

This protection of correspondence and communications (which presumably would include letters, emails, telefaxes and telephone conversations) is an important right for working journalists, although the protection is not absolute as the term ‘without reasonable cause’ clearly shows that the right is not entirely protected.

### **2.4.4 Protection of freedom of conscience**

A fourth protection is contained in article 19(1) of the Constitution of Eritrea, which provides ‘every person shall have the right to freedom of thought, conscience and belief’. Freedom of thought is important for the media as it provides additional protection for commentary on public issues of importance.

### **2.4.5 Protection of freedom of assembly and organisation and to practise a profession**

Article 19(6) of the Constitution of Eritrea provides that ‘every citizen shall have the right to form organisations for political, social, economic and cultural ends’. Further, article 19(7) provides that ‘every citizen shall have the right to practice any lawful profession, or engage in any occupation or trade’.

This right not only guarantees the rights of journalists to join trade unions but also of the press to form press associations and of entrepreneurs to form media houses and conduct media operations.

Similarly, article 21(3) also provides that ‘every citizen shall have the right to participate freely in any economic activity and engage in any lawful business’. This sub-article falls under the title ‘Economic, social and cultural rights and responsib-

ilities'. It is important to note that these rights pertain only to citizens and not to all persons within the borders of Eritrea.

### 2.4.6 Right to freedom of movement

Article 19(8) provides that 'every citizen shall have the right to move freely throughout Eritrea or reside and settle in any part thereof'. Although this right does not appear to be obviously directed at journalists, it does in fact assist in ensuring that journalists are able to travel in order to report on issues happening in a particular town or region of the country. However, as this right is limited to citizens, foreign journalists do not enjoy freedom of movement.

### 2.4.7 Right to administrative justice

Article 24 of the Constitution of Eritrea is headed 'Administrative justice' and it provides for two separate administrative justice rights. In terms of article 24(1), 'any person with an administrative question shall have the right to be heard respectfully by the administrative officials concerned and to receive quick and equitable answers from them'. In terms of article 24(2), 'any person with an administrative question, whose rights or interests are interfered with or threatened, shall have the right to seek administrative redress'. This right requires explanation.

- The reason why this right is important for journalists and the media is that it protects them (as it does all people) from administrative officials who act unfairly and unreasonably and who do not comply with legal requirements. It also entitles journalists and the media to redress when administrative action results in their rights being adversely affected or threatened. It is important to note that an administrative body is not necessarily a state body; indeed, these bodies are often private or quasi-private institutions. So these constitutional requirements would apply to non-state bodies, too.
- Many decisions taken by bodies are 'administrative' in nature, and this requirement of administrative justice is a powerful one that prevents or corrects unfair and unreasonable conduct on the part of administrative officials. Furthermore, having a constitutional right to administrative redress is a powerful tool in ensuring rational and reasonable behaviour on the part of administrative bodies, and aids in ensuring transparency and, ultimately, accountability.

### 2.4.8 Right to a public trial

Article 17(6) of the Constitution of Eritrea provides that 'every person charged with

an offence shall be entitled to a fair, speedy and public hearing by a court of law; provided, however, that such a court may exclude the press and the public from all or any part of the trial for reasons of morals or national security, as may be necessary in a just and democratic society’.

The formulation of this right to ‘open justice’ in the Constitution of Eritrea is interesting because it provides that the press may be excluded from an otherwise public trial on the grounds of ‘morals’ or ‘national security’. However, these exceptions are narrowly cast as the exclusion of the press also has to be ‘necessary in a just and democratic society’. As a general rule, the press and the general public ought to have a right to attend judicial proceedings.

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

It is important to note that there are provisions in the Eritrean Constitution, apart from the fundamental rights provisions, that are important and assist the media in performing its functions.

#### **PROVISIONS REGARDING THE FUNCTIONING OF PARLIAMENT**

A number of provisions in the Constitution regarding the functioning of Parliament are important for the media, including the following:

- Article 38(3) specifically protects freedom of speech in the National Assembly as no member of the National Assembly may be charged for statements made or submitted by him or her at any meeting of the National Assembly or any meeting of its committees or any utterance or statement made outside the National Assembly in connection with his or her duty as a member thereof.
- Although not explained in any detail, article 36(5) of the Constitution refers to the National Assembly issuing rules and regulations concerning its operations and tasks as well as rules governing ‘the transparency of its operations’.

These provisions assist the media in two key ways.

- They protect parliamentarians by allowing members of Parliament to speak freely in front of the media without facing arrest or charges for what they say.
- Depending on the level of ‘transparency’ provided for in the National Assembly’s rules, a commitment to transparency might mean that the media has access to the workings of Parliament by being able to be physically in Parliament.

## PROVISIONS REGARDING PUBLIC PARTICIPATION

Article 7 is headed ‘Democratic principles’ and it appears in Chapter II of the Constitution which is headed ‘National Objectives and Directive Principles’. Article 7(2) provides that it is a ‘fundamental principle of the state of Eritrea to guarantee its citizens broad and active participation in all political, economic, social and cultural life of the country’. The concept of public participation is significant because meaningful political participation requires being sufficiently well-informed, and this in turn requires an independent media that is able to report on matters of public concern. Consequently, this provision is helpful to the media because of the relationship between public participation and a free press.

## PROVISIONS REGARDING PUBLIC ADMINISTRATION

Article 11 is headed ‘Competent civil service’ and it too is found in Chapter II of the Constitution, which is headed ‘National Objectives and Directive Principles’. Article 11(1) provides that the civil service in Eritrea ‘shall have efficient, effective and accountable administrative institutions dedicated to the service of the people’.

The reference to ‘accountable’ administrative institutions is useful to the media as the media plays a crucial role in educating the population, enabling citizens to participate meaningfully in a democracy and to force accountability on the part of the state and its organs. These provisions could therefore be interpreted as requiring media-friendly policies on the part of the state.

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

Just as there are certain rights or freedoms that protect the media, other rights or freedoms can protect individuals and institutions from the media. It is important for journalists to understand which provisions in the Eritrean Constitution can be used against the media.

### **2.5.1 Right to human dignity**

The right to human dignity is provided for in article 16, which provides that ‘the dignity of all persons shall be inviolable’. Dignity is a right that is often raised in defamation cases because defamation, by definition, undermines the dignity of the person being defamed. This right is often set up against the right to freedom of expression and freedom of the press, requiring a balancing of constitutional rights.

## 2.5.2 Right to privacy

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

## 2.5.3 Constitutional provisions allowing for the derogation of rights – States of emergency

Although this has been discussed above, it is important to restate the impact of article 27(1), which provides that ‘[a]t a time when public safety or the security or stability of the State is threatened by external invasion, by civil disorder or by natural disaster, the President may by proclamation published in the Gazette of Eritrean laws declare that a state of emergency exists in Eritrea or any part thereof.’ Importantly, article 27(5) provides that any measures undertaken and all laws enacted pursuant to a declaration of a state of emergency shall not:

- (d) suspend articles 14(1) and (2); 16; 17(2); and 19(1) of the Constitution;
- (e) grant pardon or amnesty to any person who, acting under the authority of the State, has committed illegal acts; or
- (f) introduce martial law where there is no external invasion or civil disorder.

This is important because it means that during a state of emergency the following rights cannot be abrogated, namely:

- The right to equality before the law – article 14(1)
- The right not to be discriminated against on account of race, ethnic origin, language, colour, sex, religion, disability, political belief or opinion, or social or economic status or any other factors – article 14(2)
- The right to human dignity, including, not been subjected to torture or to cruel, inhuman or degrading treatment or punishment and not being held in slavery or servitude or being required to perform forced labour not authorised by law – article 16
- The right not to be tried or convicted for any act or omission which did not constitute a criminal offence at the time it was committed – article 17(2)

- The right to freedom of thought, conscience and belief – article 19(1).

Further, those acting under state authority cannot act illegally with impunity, and martial law can only be imposed in circumstances where there is an external invasion or civil disorder. Sadly, the term ‘civil disorder’ is not narrow and so it is likely that the declaration of emergency including martial law is not a particularly difficult threshold to cross.

Articles 27(2) and (3) provide for a number of procedural safeguards in respect of proclamations of states of emergency, including that such a declaration be approved by a resolution passed by a two-thirds majority vote of all members of the National Assembly, and that the first period of a state of emergency is six months and can be extended by a resolution of the National Assembly for three months at a time. Again, however, the country is currently under a perpetual state of emergency and has been for years.

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

While there are no media-specific institutions established under the Constitution of Eritrea, the Constitution does establish two institutions that indirectly affect the media, namely, the judiciary and the Judicial Service Commission (JSC).

### **2.6.1 The judiciary**

The judiciary is an important 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 a 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.

Article 10 of the Eritrean Constitution which appears in Chapter II ‘National Objectives and Directive Principles’, is headed ‘Competent justice system’, and article 10(1) provides that the justice system of Eritrea ‘shall be independent, competent and accountable pursuant to the provisions of the Constitution and laws’.

Chapter VI of the Constitution of Eritrea is headed ‘The Administration of Justice’. In terms of article 48(1), judicial power is vested in the Supreme Court and such other lower courts as shall be established by law. In terms of article 48(2), in exercising

judicial power, ‘courts shall be free from the direction and control of any person or authority. Judges shall be subject only to the law, to a judicial code of conduct determined by law and to their conscience’. In terms of the Constitution, the judiciary of Eritrea consists of:

■ *The Supreme Court*

- In terms of article 49(1) of the Constitution of Eritrea, the Supreme Court is the ‘court of last resort’ and is presided over by the chief justice.
- In terms of article 49(2), the jurisdiction of the Supreme Court is as follows:
  - It has sole jurisdiction for interpreting the Constitution and for determining the constitutionality of any law enacted or action taken by government.
  - It has sole jurisdiction for hearing and adjudicating upon charges against a president who has been impeached by the National Assembly.
  - It has jurisdiction to hear and adjudicate cases being appealed from lower courts pursuant to law.
- In terms of article 49(4), the tenure and number of justices of the Supreme Court shall be determined by law.
- In terms of article 42(8) of the Eritrean Constitution, the president appoints justices of the Supreme Court upon proposal of the JSC and approval of the National Assembly.

■ *The local courts*

- In terms of article 50, the jurisdiction, organisation and function of lower courts and the tenure of their judges shall be determined by law.
- In terms of article 42(9) of the Eritrean Constitution, the president appoints judges of the lower courts upon proposal of the JSC.

In terms of article 52 of the Constitution of Eritrea, a judge may be removed from office by the president only, acting on the recommendation of the JSC after an investigation on the grounds of physical or mental incapacity, violation of the law or breach of the judicial code of conduct. Further, the president may suspend a judge who is under investigation, on the recommendation of the JSC.

## 2.6.2 The Judicial Service Commission

The JSC is a constitutional body that is established in terms of article 53(1) of the

Eritrean Constitution and which is responsible for submitting recommendations for the recruitment of judges and the terms and conditions of the services. It is also responsible for recommending the removal of judges.

The JSC is relevant to the media because of its critical role in the appointment of senior judges to the judiciary, the proper functioning and independence of which are essential for democracy. Unfortunately, the Eritrean Constitution does not specify how the JSC is to be appointed and how it is to function. Its level of independence is therefore open to question and is not guaranteed by the Constitution itself. In any event it has never been established or become operational, and currently it appears that the Minister of Justice makes all judicial appointments.<sup>20</sup>

## **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.

Article 28 of the Constitution of Eritrea, ‘Enforcement of fundamental rights and freedoms’, specifically states in article 28(1) that the National Assembly or any subordinate legislative authority shall not make any law, and the executive and the agencies of government shall not take any action that abolishes or abridges the fundamental rights and freedoms conferred by this Constitution, unless so authorised by this Constitution. Any law or action in violation thereof shall be null and void. Further, article 28(2) provides that any aggrieved person who claims that a fundamental right or freedom guaranteed by this Constitution has been denied or violated shall be entitled to petition a competent court for redress, and the court shall have the power to make all such orders as shall be necessary to secure for such petitioner the enjoyment of such fundamental rights or freedoms and, where such applicant suffers damage, to include an award of monetary compensation.

Ordinarily, one of the most effective ways in which rights are protected under a constitution is through the provisions of the constitution that entrench the rights contained in Chapter III, ‘Fundamental Rights, Freedoms and Duties’. The Eritrean Constitution does not specifically entrench Chapter III but there are provisions regarding amendments to the Constitution. Article 59 of the Eritrean Constitution requires that a proposal for the amendment of any provision of the Constitution may be initiated and tabled by the president or 50% of all the members of the National Assembly.

Further, the procedure for actually voting to amend the Constitution is as follows:



- The National Assembly must, by a three-quarters majority vote of all its members, make the proposed amendments to a specific article tabled to be amended.
- One year later, the National Assembly must approve the same amendment by a four-fifths majority vote of all its members.

This is, of course, an extremely complex procedure which would make any constitutional amendment difficult unless it had the support of four-fifths of the members of the National Assembly.

## **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, namely: the executive; the legislature; and the judiciary.

#### **THE EXECUTIVE**

Article 39(2) of the Constitution of Eritrea provides that the executive authority of Eritrea vests in the president and shall be exercised by him ‘in consultation with the Cabinet’. Although not defined anywhere in the Constitution, a general definition of executive authority is essentially the role of executing the business of government.

Article 39(1) of the Constitution of Eritrea provides that the president of Eritrea shall be the head of state and government of Eritrea as well as the commander-in-chief of the Eritrean defence forces. In terms of article 45, the President’s Oath requires him to swear that he will uphold and defend the Constitution of Eritrea and strive, to the best of his ability and conscience, to serve the people of Eritrea.

In terms of article 40, only a member of the National Assembly who is a citizen of Eritrea ‘by birth’ can be a candidate for president of Eritrea.

In terms of article 41(1), the president is elected from among the members of the National Assembly by an absolute majority vote of its members. Further, a candidate for president must be nominated by at least a 20% vote of all the members of the National Assembly. In terms of article 42(2), the term of the president shall be five

years, and in terms of article 42(3) no person shall be elected to hold the Office of the President for more than two terms.

Article 41(4) provides that the chairperson of the National Assembly shall assume the Office of the President when the Office of the President becomes vacant due to death, resignation or removal from office by the National Assembly in terms of article 41(6). The grounds for removing a president are:

- Violation of the Constitution or grave violation of the law
- Conduct which brings the authority or honour of the Office of the President into ridicule, content and disrepute
- Being incapable of performing the functions of his office by reason of physical or mental incapacity.

Article 41(7) empowers the National Assembly to determine the procedures for the election and removal of the president.

Article 41(4) of the Eritrean Constitution also provides that the chairperson of the National Assembly may act in the capacity of president for not more than 30 days, pending the election of another president to serve the remaining term of his predecessor.

Article 42 of the Eritrean Constitution sets out the powers and duties of the president. We have dealt with certain of these in other parts of this chapter, for example, appointing judges as proposed by the JSC. Other powers and duties include ordinary powers of state such as: delivering the state of the country speech annually in the National Assembly; ensuring the execution of laws and resolutions of the National Assembly; signing international agreements; appointing and receiving ambassadors and diplomatic representatives; appointing high-ranking members of the armed and security forces; establishing government ministries and departments necessary for good governance in consultation with the Public Service Administration; reprieving offenders and granting pardons or amnesties; presenting legislative proposals and the national budget to the National Assembly; conferring medals or other honours on citizens, residents and friends of Eritrea; and appointing, with the approval of the National Assembly, ministers, commissioners, the auditor general, governor of the National Bank, the chief justice and any other person required to be appointed by the president in terms of the Constitution or any other law.

Besides these, there are powers which apply in extraordinary circumstances, for

example: declaring a state of emergency and, when the defence of the country requires, martial laws; and summoning the National Assembly to an emergency meeting and to present his views to it.

Article 46 deals with the Cabinet. The president presides over the Cabinet and selects ministers. Note that in terms of article 46(2), the president has discretion to choose persons who are or are not members of the National Assembly. The president also issues the rules and regulations for the organisation, function, operations and code of conduct relating to members of the Cabinet and the secretariat of the presidential office – article 46(4). The Cabinet’s essential role is set out in article 46(3) and this is to assist the president in: directing, supervising and coordinating the affairs of government; preparing the national budget; conducting studies on and preparing draft laws to be presented to the National Assembly; and conducting studies on and preparing the policies and plans of government.

Members of Cabinet, that is the ministers, are individually accountable to the president for the administration of their own ministries, and collectively accountable to the National Assembly for the administration of the work of the Cabinet in terms of article 47(1).

## THE LEGISLATURE

Legislative or law-making power in Eritrea, in terms of the Constitution, vests in the National Assembly which is, in terms of article 31(1), ‘the supreme representative and legislative body’.

The National Assembly is composed of representatives elected by secret ballot by all citizens qualified to vote – articles 31(2) and (3). Of concern is that the Eritrean Constitution does not specify the precise number of members who are to sit in the National Assembly nor does it specify their necessary qualifications or voting procedures. In terms of article 31(6), these matters and others such as conditions for vacating their seats, ‘shall be determined by law’. This is extremely problematic because it means that the foundational event of a democracy, namely the exercise of universal suffrage, is determined by ordinary law and not by the Constitution itself. Thus the concept of supremacy of the constitution is rendered largely ineffectual in relation to the detailed processes in terms of which elections are to take place. In any event there have been no elections in Eritrea since 1993.

Article 32 sets out the powers and duties of the National Assembly. Critically, article 32(1)(a) empowers the National Assembly to enact laws. Article 32(1)(b) essentially provides that the National Assembly is the only authority capable of making decisions

having the force of law unless otherwise authorised by the Constitution or laws enacted by the National Assembly itself. Other functions of the National Assembly include: approving the national budget; ratifying international agreements; approving government borrowing; approving a state of peace, war or national emergency; and electing or impeaching the president.

Besides law-making, another critically important and common function of a legislature is performing oversight functions in respect of the executive. Article 32(7) specifies that the National Assembly has the power to oversee the execution of laws. This is in addition to its oversight function of Cabinet as a collective in terms of article 47(1). Article 47(2) empowers the National Assembly or any of its committees, through the Office of the President, to summon any minister to appear before them to question him concerning the operation of his ministry.

## THE JUDICIARY

Judicial power, as discussed previously in this chapter, vests in the courts. Essentially, 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 governmental power between different organs of the state in order 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 Constitution of Eritrea has provided for, is to separate the functions of the three branches of government – the executive, the legislature and the judiciary – so that no single branch is able to operate alone, assume complete state control and amass centralised power. While each branch performs a number of different functions, each also plays a ‘watchdog’ role in respect of the other. This helps to ensure that public power is exercised in a manner that is accountable to the general public and in accordance with the constitution.

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

There are a number of respects in which the Constitution of Eritrea is extremely weak. The most obvious weakness, of course, is that the Constitution has not been implemented and is effectively suspended and Eritrea has no democratic credentials at all to speak of.

Nevertheless, we think it instructive to consider what improvements ought to be made to the Eritrean Constitution were its implementation to become a reality or another Constitution to be drafted.

### **2.9.1 Provide more detail for exactly how members of the National Assembly are to be elected**

The Constitution of Eritrea contains no clear provisions on exactly how the members of the National Assembly are to be elected and even how many members are required to be in the National Assembly.

Providing for democratically elected representatives in the legislature is a foundational function of a democratic constitution, and this significant gap in the Eritrean Constitution ought to be dealt with in order to ensure the country's eventual transition to democracy.

### **2.9.2 Independent broadcasting regulator and public broadcaster**

There is no doubt that the broadcasting sector would be greatly strengthened if the Eritrean Constitution gave constitutional protection to an independent broadcasting regulator and for a public broadcaster. Given the importance of both of these institutions for ensuring access to news and information by the public, it is suggested that such amendments to the Constitution would be in the public interest and would serve to strengthen both the media and democracy more generally in Eritrea.

### **2.9.3 Strengthen the independence of institutions**

While it is laudable that the Eritrean Constitution makes provision for institutions such as the JSC, the fact that the structural independence and appointments procedures of the JSC are not provided for sufficiently in the Constitution is a weakness and undermines its independence.

## **3 THE MEDIA AND LEGISLATION**

In this section you will learn:

- What legislation is and how it comes into being
- Legislation governing the print media
- Legislation governing the online media
- Legislation governing journalists
- Legislation governing the making of films

- Legislation governing the broadcasting media generally
- Legislation governing the state broadcasting sector
- 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 is legislation?**

Legislation is a body of law consisting of acts properly passed by the National Assembly. As we know, legislative authority in Eritrea vests in the National Assembly. Both the National Assembly and the president are involved in passing legislation. Article 33 of the Constitution deals with the approval of draft legislation. The process provided for is that a draft law approved by the National Assembly must be transmitted to the president, who is required to sign it and have it published in the Official Gazette within 30 days of receipt from the National Assembly.

#### **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 article 33 of the Constitution of Eritrea, if a bill is passed by the National Assembly it becomes an act once it is signed by the president and published in the Official Gazette. However, as has already been stated, the Constitution is not implemented. As a result, the real process for passing legislation is opaque, and it is alleged that sometimes key legislative provisions are simply approved by the president without the National Assembly's involvement.<sup>21</sup>

### **3.2 Legislation governing the print media**

Unfortunately, in terms of the Press Proclamation No. 90 of 1996 (Press Proclamation), there are a number of constraints on the ability to operate a print media publication in Eritrea.

In particular, Eritrea requires the licensing of newspapers (which are defined to include magazines), which is out of step with international best practice – sections 7(2) and (3) of the Press Proclamation. Secondly, in terms of section 6(1), only Eritreans may own newspapers and minimum capital thresholds therefore are determined by the Ministry of Information. These kinds of restrictions effectively impinge upon the public's right to know by setting barriers to print media operations.

There are certain key requirements laid down by the Press Proclamation in respect of a newspaper. The definition of a newspaper is broad and is defined in section 3 of the Press Proclamation as meaning ‘any printed matter containing news, reports and analyses issued regularly or periodically for general circulation, and includes cultural, literary, scientific, artistic, sports and other magazines’.

The key aspects of the Press Proclamation are discussed below.

- Section 4(1) of the Press Proclamation is headed ‘Freedom of press’. Its first subsection (a) provides that freedom of the press ‘is guaranteed pursuant to this proclamation’. However, the very next subsection (b) makes it clear that censorship, suspension or banning of newspapers can be effected under the proclamation or with the approval of the High Court. Further, subsection (c) specifically allows for governmental censorship of all publications ‘under special circumstances, where the country, or part of it, is faced with a danger threatening public order, security and general peace caused by war, armed rebellion and public disorder or where a natural disaster ensues’.
- The Press Proclamation makes provision for two parts of the Eritrean press in section 4(3):
  - State press – that is, press owned by the state
  - Private press – that is, press owned by political associations, juridical persons (for example, companies) and individuals – for example, a newspaper.
- Section 7(2) provides that no person may, without a permit, publish newspapers. In terms of section 15(2), any person who publishes a newspaper without a permit is liable, upon conviction, to having his business licence, which is issued by the Business Licensing Office, suspended, having his copies confiscated and the owner of the newspaper shall be liable, upon conviction, to a fine of up to US\$5000 as well as being prohibited from having a business licence for a year. The editor-in-chief shall be prohibited from heading any publication for a year, in terms of section 15(3). Any person who prints a newspaper which does not have a permit is liable, upon conviction, to imprisonment for up to one year, a fine of up to US\$5000 and to having the newspaper confiscated.
- Section 7(6) sets out the requirements of the application for a permit to publish a newspaper, which is to be submitted to the Minister of Information. These requirements include: the applicant’s full name; the name and address in Eritrea of the newspaper; the nature of the publication; the language and timed schedule of the publication; the editor’s name; the financial resources; the publisher’s name

and address; that the applicant has no tax liabilities and is not prohibited from publishing a newspaper in terms of section 7(5).

- The Press Proclamation contains a list of persons ‘prohibited from publishing newspapers’ or even participating therein (such as being engaged in journalism) in section 7(5). These include: persons prohibited from establishing political associations; persons deprived of their political rights; persons who oppose the principles of national unity or advocate for division and disintegration; and those convicted of moral crimes and crimes of corruption and misappropriation. It is clear therefore that the Press Proclamation aims to ensure that newspapers are published only by those who are in favour with the state.
- The Minister of Information is required to issue the necessary permit within two months of receipt of an application. However, if the permit is not issued then it is deemed to have been rejected – section 7(3). One can appeal to the High Court.
- It is clear that the publication of a newspaper is subject to ongoing ministerial oversight as section 7(9) requires that the publishers submit financial accounts to the Ministry of Information annually.
- Further, it is critical to note that a transfer of private press ownership requires the permission of the Minister of Information and must be done in accordance with the modes and restrictions provided for in the Transitional Commercial Code of Eritrea – section 6(3) of the Press Proclamation.
- Besides the newspaper permit requirements set out above, section 13 of the Press Proclamation also requires every Eritrean printer or publisher to submit two free copies of every publication that he publishes or disseminates to the Ministry of Information. Further, section 7(11) requires the printer’s name, the chief editor’s name, and the place and date of publication to be written on a newspaper or publication. The distributor or seller of a newspaper or publication has the obligation to ensure the said information is contained therein.
- An interesting provision is section 11, which provides that whenever a publication disseminates inaccurate news or information, the chief editor or journalist concerned shall, on the basis of the request of the person to whom the matter concerns, publish a reply or correction in its earliest publication after receipt of the request, and that the reply or correction shall be published free of charge in exactly the same column on the same page and in identical lettering. A failure to publish a reply or correction as required in terms of section 11 is punishable, upon



conviction, with a fine, and the court may also suspend all the activities of the newspaper unless and until it publishes a reply or correction – section 15(7).

### **3.3 Legislation governing the online media**

The Press Proclamation No. 90 of 1996 also includes a number of constraints on the ability to publish information online. The definition of ‘press products’ in section (3) is extremely broad and it means ‘all writings, pictures, video and tape cassette, musical notes, photographs and products disseminated to the public by means of new techniques, technology and others’. This is sufficiently broad to include SMSes, blogs, Facebook posts, tweets, and information posted on websites.

What is of particular concern is that the provisions which relate to the ownership and control of newspapers also apply to press products as defined above.

In particular, Eritrea requires the licensing of press products, which is entirely out of step with international best practice – sections 7(2) and (3) of the Press Proclamation. Second, in terms of section 6(1), only Eritreans may own press products, and minimum capital thresholds therefore are determined by the Ministry of Information. These kinds of restrictions effectively impinge upon the public’s right to know by setting barriers to print and other media operations.

There are certain key requirements laid down by the Press Proclamation in respect of a press product. These are discussed below.

- Section 4(1) of the Press Proclamation is headed ‘Freedom of press’. Its first subsection (a) provides that freedom of the press ‘is guaranteed pursuant to this proclamation’. However, the very next subsection (b) makes it clear that censorship, suspension or banning of press products can be effected under the proclamation or with the approval of the High Court. Further, subsection (c) specifically allows for governmental censorship of all publications ‘under special circumstances, where the country, or part of it, is faced with a danger threatening public order, security and general peace caused by war, armed rebellion and public disorder or where a natural disaster ensues’. Note that no mention is made of the state of emergency provisions in the Constitution. It is clear therefore that censorship is routine and that constitutional guarantees mean very little and are not referred to in the Press Proclamation.
- Section 7(2) provides that no person may, without a permit, publish press products. In terms of section 15(2), any person who publishes without a permit is liable, upon conviction, to having his business licence, which is issued by the

Business Licensing Office, suspended, and the owner of the publication shall be liable, upon conviction, to a fine of up to US\$5000 and being prohibited from having a business licence for a year.

- Section 7(6) sets out the requirements of the application for a permit to be submitted to the Minister of Information for such permission. These requirements include: the applicant's full name; the name and address in Eritrea of the publication; the nature of the publication; the language and timed schedule of the publication; the editor's name; the financial resources; the publisher's name and address; that the applicant has no tax liabilities and is not prohibited from publishing a press product in terms of section 7(5).
- The Press Proclamation contains a list of persons 'prohibited from publishing ... press products' or even participating therein (such as being engaged in online communication) in section 7(5). These include: persons prohibited from establishing political associations; persons deprived of their political rights; persons who oppose the principles of national unity or advocate for division and disintegration; and those convicted of moral crimes and crimes of corruption and misappropriation. It is clear therefore that the Press Proclamation aims to ensure that all online information is published only by those who are in favour with the state.
- It is clear that the publication of a press product is subject to ongoing ministerial oversight as section 7(9) requires that the publishers submit financial accounts to the Ministry of Information annually.
- Further, it is critical to note that a transfer of private press product ownership requires the permission of the Minister of Information and must be done in accordance with the modes and restrictions provided for in the Transitional Commercial Code of Eritrea – section 6(3) of the Press Proclamation.
- Besides the press product permit requirements set out above, section 13 of the Press Proclamation also requires every Eritrean printer or publisher to submit two free copies of every publication that he publishes or disseminates to the Ministry of Information. Further, section 7(11) requires the printer's name, the chief editor's name, and the place and date of publication to be written on a publication. The distributor or seller of a publication has the obligation to ensure the said information is contained therein. It is unclear how internet-based publications are supposed to comply with these provisions.
- An interesting provision is section 11, which provides that whenever a publication

disseminates inaccurate news or information, the chief editor or journalist concerned shall, on the basis of the request of the person to whom the matter concerns, publish a reply or correction in its earliest publication after receipt of the request and that the reply or correction shall be published free of charge in exactly the same column, on the same page and in identical lettering. A failure to publish a reply or correction as required in terms of section 11 is punishable, upon conviction, with a fine, and the court may also suspend all the activities of the press product unless and until it publishes a reply or correction – section 15(7).

### **3.4 Legislation governing journalists**

The Press Proclamation No. 90 of 1996 also includes a number of constraints on the ability to practise the profession of journalism. A journalist is defined in section 3 of the Press Proclamation as being ‘a natural person engaged in the profession of the Press as his main source of revenue and working in the mass media or news services in Eritrea or abroad and whose name is registered in the register of journalists in the Ministry [of Information]’. Consequently, the very definition of a journalist involves being registered with the Ministry of Information.

Section 5(1) of the Press Proclamation deals ostensibly with the rights of journalists, but these are often framed in such a way that they contain significant limitations on those rights. Examples include the following:

- Subsection (a): ‘A journalist shall have the right to obtain news and information from any official or unofficial source and disseminate same after verifying the truth thereof.’ The effect of this is that only if the journalist is able to prove the truth of any information obtained may he or she disseminate it. This is, of course, extremely limiting.
- Subsection (b): ‘Except on the basis of law, a journalist’s security may not be encroached upon, nor may he be exposed to pressure by any party or official on account of the opinion he expresses or the correctness of the information he disseminates.’ Again this is limiting in that only the dissemination of ‘correct’ information entitles the journalist not to be exposed to pressure from parties or officials.
- Subsection (d) entitles only ‘Eritrean journalists registered in the Ministry’s Register’ to establish a journalists’ association.

Section 5(2) of the Press Proclamation sets out the duties of journalists. Certain of these are innocuous, for example, subsection (a) which requires a journalist to be

bound by ‘the rule of law, professional ethics and his conscience’, and subsection (b) which requires a journalist ‘to be bound by all the laws of Eritrea with respect to whatever he writes or disseminates.’ However, other duties contain significant restrictions on a journalist’s ability to do his or her work. For example:

- Subsection (c) requires a journalist to ‘respect the private life, dignity and prestige of all families and individuals where he raises matters related to [the] public interest’. While respect must be accorded to people, the implication appears to be that this might trump matters relating to the public interest. If this were to be the case, reporting would be extremely difficult.
- Subsection (d) prohibits a journalist from:
  - Disseminating information where the veracity of the information has not been ascertained
  - Distorting information.

Again, it is extremely problematic for journalists to publish only truthful or correct information as it is impossible for a journalist to guarantee the accuracy of his or her information in all cases. What is required are ‘best efforts’ to ensure accuracy, truthfulness, correctness and the like. Otherwise, the journalist is effectively unable to publish what may be an important public interest story that deserves widespread dissemination but cannot be independently verified at the time of publishing.

- Subsection (g) prohibits journalists from infringing upon national safety and security and supreme national interests, promoting division and dissension or ideas inciting violence and terrorism. Unfortunately, terms such ‘national interests’ and ‘division and dissension’ are extremely broad so it is difficult to know when a piece of investigative journalism into differing political views and organisations, or into corruption within the armed services, for example, might run afoul of these provisions.

Significantly, the Press Proclamation has specific provisions governing foreign journalists working in Eritrea.

Section 10(1) provides that in order to work in the country as a resident correspondent of one or more foreign news agencies, a foreign journalist must first obtain permission and a foreign correspondent’s press card from the Minister of Information. In terms of section 10(2), a foreign correspondence permit is to be renewed annually and the minister may without giving reasons reject or refuse applications. These provisions are extremely problematic because of the failure to require the minister to act justifiably or reasonably, and there are no specified rights

to appeal to the courts. Note also the provisions of section 10(6) empowering the minister to issue directives clarifying the preconditions to be met by a foreign journalist wanting to work in Eritrea. Once a foreign correspondent is duly permitted to work, he can be ‘subjected to measures by the Minister for other discrepancies or infractions he may commit’ in terms of section 10(7) of the Press Proclamation. Again, this wording is extremely vague as journalism often involves discrepancies when reporting.

### **3.5 Legislation governing the exhibition of films**

Section 8 of the Press Proclamation deals with artistic press products (which term is not defined), and section 8(1) provides that the export and import, lease, sale, reproduction, display or distribution of artistic goods such as films, cinema, tape cassettes or video cassettes without a permit from the Ministry of Information and licence from the Business Licensing Office is prohibited. In terms of section 15(8), a person found guilty of dealing in artistic goods without a permit – that is, of violating section 8(1) – is liable to a fine and to having his goods confiscated.

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

#### **3.6.1 Legislation that regulates broadcasting generally**

It is noteworthy that the Press Proclamation provides at section 4(1)(d) that radio and television ownership ‘is reserved for the Government’. It contains no other mention of broadcasting.

Part Four of the Communications Proclamation 102 of 1998 (Communications Proclamation) is headed ‘Broadcasting’ and it makes provision for a number of broadcasting-related matters. Further, section 54 of the Communications Proclamation is headed ‘Repeal’ and it states that: ‘Any provisions of any proclamation ... concerning matters provided for in this Proclamation are hereby repealed and replaced by this Proclamation.’ Consequently, it appears that with respect to broadcasting the provisions of the Communications Proclamation have superseded those of the Press Proclamation.

#### **3.6.2 Establishment of the regulator**

Section 4(1) of the Communications Proclamation states that the Ministry of Transport and Communications shall be the only government agency vested with the regulatory authority of the communications sector. In relation to communications it acts through the Ministry’s Communications Department.

### 3.6.3 Main functions of the Communications Department

The Communications Department of the Ministry of Transport and Communications has a number of objectives set out in section 5 of the Communications Proclamation.

In relation to broadcasting, those that are particularly relevant include:

- Creating a regulatory environment for the supply of communications networks and services
- Promoting fair competition and efficient market practice in the communications sector. Note ‘communications’ is defined in section 2 of the Communications Proclamation as ‘telecommunications, broadcasting and post’
- Facilitating the entry into markets for communications services of persons wishing to supply such networks and services
- Ensuring that standard broadcasting services are supplied as efficiently and economically as possible, and at such performance standards which reasonably meet the social, industrial, and commercial needs of the community
- Ensuring that the Eritrean public have growing access to communications.

### 3.6.4 Appointment of the regulator

As the regulator is the Communications Department of the Ministry of Transport and Communications, it is clear that the minister will be appointed by the president. Section 11(1) of the Communications Proclamation is silent as to who the head of the Department of Communications will be, but it does state that the Department of Communications may select such number of personnel as it needs for its regulatory functions ‘from among civil servants’.

### 3.6.5 Funding for the regulator

Section 10 of the Communications Proclamation is headed ‘Funding of the Department’s regulatory functions’ and makes provision for a range of funding sources, namely:

- Government budgetary appropriations
- Amounts paid to the Communications Department for regulatory tasks performed

- Amounts paid to the department as levies for regulatory documents
- Such sums as may vest in the Communications Department from time to time in connection with the department's regulatory functions
- Financial assistance from any other funding source.

### **3.6.6 Making broadcasting regulations**

Section 6(1) of the Communications Proclamation provides that the Department of Communications shall have responsibility for 'economic and technical regulation of the communications industry'.

### **3.6.7 Licensing regime for broadcasters in Eritrea**

#### **BROADCASTING LICENCE REQUIREMENT**

Section 28(1) of the Communications Proclamation provides that an operator's permit must be obtained by any person desiring to:

- Establish and/or operate installations for broadcasting or the retransmission of broadcasting
- Broadcast nationally
- Broadcast locally, that is, within a geographically delimited area.

The Communications Proclamation is unclear with regard to the process to be followed in cases of non-compliance with the Proclamation. Section 48 is headed 'Sanctions', and provides for a range of sanctions to be imposed by the Communications Department if a person fails to comply with the requirements laid down in or under the Communications Proclamation or in regulatory documents, which term is defined in section 2 of the Communications Proclamation as meaning 'permits, equipment, approvals, certificates, assignments of frequency and other approvals and documents issued by the Department'. These sanctions include:

- Coercive fines
- The publication of an apology
- The payment of a fine determined by the Department, to the Department

- A reduction of the period of exclusive rights in regards to licensed services
- A reduction of the period of validity of the relevant regulatory document, alternatively the suspension or revocation of such regulatory document.

However, section 50 is headed ‘Penalties’ and provides that any person who violates the provisions of this proclamation or regulations issued thereunder shall be punished in accordance with the Penal Code of Eritrea.

The Communications Proclamation is entirely silent as to which sanctions provision, namely section 48 or section 50, is to be used in particular circumstances or which takes precedence over the other. It does appear, however, that the Penal Code is reserved for criminal activities and that section 48 deals with non-criminal sanctions but nowhere is this made explicit.

## CATEGORIES OF BROADCASTING LICENCES

It appears from section 28(1) of the Communications Proclamation that there are three types of broadcasting-related permits, called an operator’s permit, namely: a permit to establish and/or operate installations for broadcasting or the retransmission of broadcasting; a permit to broadcast nationally; and a permit to broadcast locally. In terms of section 28(2), the Communications Department shall determine which of the above types of broadcasting-related activities shall be defined as:

- *Exclusive rights activities*: Defined in section 2(e) as ‘an activity for which a permit may be issued to one person only granting him for a stipulated term of years the exclusive privilege of engaging in the activity specified in his permit.’
- *Limited competition activities*: Defined in section 2(g) as ‘an activity for which permits may be issued to a limited number of persons in accordance with criteria and conditions stipulated by the Communications Department, granting the persons for a stipulated term of years the right to engage in the activity specified in the permit.’

## BROADCASTING LICENSING PROCESS

The Communications Proclamation does not contain a licensing or permit procedures process. However, section 2(j) makes it clear that a business licence issued under the Business Licensing Office Establishment Proclamation No. 72 of 1995 is required in addition to a permit issued by the Communications Department under the Communications Proclamation.



## FREQUENCY SPECTRUM LICENSING

Part Five of the Communications Proclamation is headed ‘Radio Activities and Frequency Management’.

Section 33 empowers the Communications Department to assign radio frequencies for radio activities within the framework of actual or planned use of frequencies. In terms of section 34, radio equipment may only be possessed, established or used in terms of a certificate issued by the Communications Department.

### 3.6.8 Responsibilities of broadcasters under the Communications Proclamation

The Communications Proclamation contains no substantive provisions setting out responsibilities of broadcasters, and indeed section 3(1) provides that the Communications Proclamation ‘does not apply to programme activities of broadcasting (radio broadcasting and television)’. The responsibilities appear to be to comply with permits and conditions as determined by the Communications Department.

### 3.6.9 Is the Communications Department an independent regulator?

The Communications Department can in no way be said to be independent. It is explicitly an arm of the Ministry of Transport and Communications and is part and parcel of the executive branch of government.

### 3.6.10 Amending the legislation to strengthen the broadcast media generally

There are a number of weaknesses with the legislative framework for the regulation of broadcasting generally in Eritrea:

- Only the bare bones of the broadcasting regulatory environment are set down in law. Far more legal detail is required of a broadcasting regulatory statute.
- No provision is made for an independent regulator. An independent regulator ought to be established by law and appointments thereto ought to be made by the president on the recommendation of the National Assembly, following a public nominations, interview and short-listing process.
- The broadcasting law makes no mention of three tiers of broadcasters: public; commercial; and community. Indeed, it is clear that commercial and community broadcasters have not been licensed in Eritrea.

- It is clear that there is a state broadcaster (for both television and radio) and that it has not been transformed into a public broadcaster.
- No public participation is provided for in the broadcasting service licensing process.

### **3.7 Legislation governing the state broadcast media**

It is noteworthy that the Press Proclamation No. 90 of 1996 provides at section 4(1)(d) that radio and television ownership ‘is reserved for the Government’. It contains no other mention of broadcasting. The Communications Proclamation 102 of 1998 does regulate broadcasting but it makes no specific mention of public or state broadcast media. Consequently, it appears that Eritrean television and radio is entirely controlled as a governmental activity which is operated by the executive branch of government. There are no laws or regulations setting out its mandate, its control structures, funding and the like. Presumably these matters are determined within the executive branch of government acting alone.

### **3.8 Legislation that undermines a journalist’s duty to protect sources**

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

#### **❖ Press Proclamation No. 90 of 1996**

Section 5(1)(c) of the Press Proclamation specifies that the rights of journalists (note this only applies to registered journalists) include the right ‘to preserve the secrecy of the source of his information and not to be compelled to disclose it’. However, this is subject to the proviso ‘except by the order of court’. The clear effect of this is that a court can order a journalist to reveal his or her sources.

Clearly, these provisions 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 in fact an unconstitutional violation of the right to freedom of expression will be dependent on the particular circumstances in each case, particularly on whether the information is available from any other source. Consequently, it is extremely difficult to state that these provisions are, by themselves, a violation of the right to freedom of expression under the Constitution.

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

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

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

- Prohibition of publications relating to legal proceedings
- Prohibition of publications relating to in camera governmental proceedings
- Prohibition of publications relating to state security
- Prohibition of publications that insult the national flag of Eritrea and other countries
- Prohibition of publications that vilify the Eritrean struggle
- Prohibition of publications that promote division and dissension
- Prohibition of publications that are obscene or contrary to public morality
- Prohibition of publications that constitute defamation, defamation of government institutions or that encroach upon the dignity of minors
- Prohibition of publications that constitute blackmail
- Prohibition of publications that invade privacy
- Prohibition of publications that constitute confidential information of public authorities
- Prohibition of publications that constitute false news
- Prohibition of publications that promote religious or ethnic divisions.

### 3.9.1 Prohibition of publications relating to legal proceedings

#### CLOSED JUDICIAL PROCEEDINGS

##### ❖ Press Proclamation No. 90 of 1996

Section 12 of the Press Proclamation is headed ‘Matters not to be disseminated’. The English translation of the Press Proclamation is not excellent but section 12(8) essentially provides that: ‘All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters ... cases which have been suspended from publication and dissemination by courts, prosecutors and investigation organs or cases at the investigations or trial stages, the publication of which may be prejudicial to the process of justice.’

Article 15(10) provides that a person who violates section 12(8) shall be liable, upon conviction, to a punishment under the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015.

The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply. Article 15(10) of the Press Proclamation also provides that where the offence is committed for a second time, the newspaper shall be banned, and its licence shall be cancelled.

##### ❖ Penal Code, 2015

Article 172 of the penal code provides that a person who makes public a report or any document or information of a judicial proceeding that has been lawfully declared and conducted as a closed judicial proceeding is guilty of a violation of closed judicial proceedings, which is punishable with a term of imprisonment or a fine.

#### FALSE OR FORBIDDEN REPORTING ON JUDICIAL PROCEEDINGS

##### ❖ Penal Code, 2015

Article 173 of the Penal Code provides that a person who publishes any false or forbidden information or report concerning judicial proceedings which are pending, proceeding or concluded, is guilty of an offence, which is punishable with a term of imprisonment or a fine.

#### BIASED PUBLICATIONS INTENDED TO PERVERT THE COURSE OF JUSTICE

##### ❖ Penal Code, 2015

Article 174 of the Penal Code provides that a person who, with the intent to inflame the court, court officials, witnesses or the parties, publishes news or reports known

to be biased or which distort the facts and which have been drawn up for the purpose of influencing a judicial decision in the case being tried or pending, is guilty of perverting the course of justice by biased publications, which is punishable with a term of imprisonment of between one and six months or a fine.

### **3.9.2 Prohibition of publications relating to in camera governmental proceedings**

#### **❖ Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed 'Matters not to be disseminated'. The English translation of the Press Proclamation is not excellent but section 12(7) essentially provides that: 'All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters ... namely, the in-camera meetings of high officials and organs of the state.' Section 15 does not contain a specific offences and penalty provision in respect of violations of section 12(7), but this will be determined in accordance with the new Penal Code, 2015.

### **3.9.3 Prohibition of publications relating to state security**

#### **TREASONOUS DISCLOSURES IN A TIME OF WAR OR EMERGENCY**

#### **❖ Penal Code, 2015**

Essentially, article 112(2) read with article 112(1)(a) provides that an Eritrean citizen or any other person entrusted with the protection of the national interests of Eritrea who discloses or communicates to a foreign power, state, organisation, individual or other persons or unauthorised members of the Eritrean public, a state secret or documents officially not required to be divulged in order to protect the interests of Eritrea, in a time of war or state emergencies, is guilty of treason during times of war or state emergencies, which is punishable by life imprisonment, or, in cases of exceptional gravity, with death or with a term of imprisonment of between 19 and 23 years.

#### **ORDINARY TREASONOUS DISCLOSURES**

#### **❖ Penal Code, 2015**

Essentially, article 112(1)(a) provides that an Eritrean citizen or any other person entrusted with the protection of the national interests of Eritrea who discloses or communicates to a foreign power, state, organisation, individual or other persons or unauthorised members of the Eritrean public, a state secret or documents officially not required to be divulged in order to protect the interests of Eritrea, is guilty of treason, which is punishable by a term of imprisonment of between 13 and 16 years.

## ESPIONAGE

### ❖ Penal Code, 2015

Essentially, article 114(1)(a) provides that any person who, without being formally recruited by such entities, intentionally and without lawful authority, communicates or makes available to a foreign state or organisation hostile to Eritrea documents, plans or other items of information that he knows should be kept secret and that he knows may be used for a purpose prejudicial to the interests of Eritrea is guilty of espionage, which is punishable by a term of imprisonment of between 13 and 16 years. Note that in terms of article 114(2), where the person performing the espionage is formally recruited by such a foreign state or organisation hostile to Eritrea, the term of imprisonment is increased to between 16 and 19 years.

## GENERAL SECURITY-RELATED INFORMATION

### ❖ Press Proclamation No. 90 of 1996

Section 12 of the Press Proclamation is headed ‘Matters not to be disseminated’. The English translation of the Press Proclamation is not excellent but section 12(2) essentially provides that: ‘All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters...namely, any document or secret information on the supreme interests of the nation and people, as well as national security and defence secrets.’

Section 15(10) provides that a person who violates section 12(2) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015.

The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation. Section 15(10) of the Press Proclamation also provides that where the offence is committed for a second time, the newspaper shall be banned and its licence cancelled.

## SEDITIONOUS LIBEL

### ❖ Penal Code, 2015

Article 122 of the Penal Code provides that a person who knowingly publishes any writing that advocates the use of force as a means of accomplishing a governmental change within Eritrea is guilty of seditious libel, which is punishable with a term of imprisonment.

## INCITEMENT

### ❖ **Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed ‘Matters not to be disseminated’. The English translation of the Press Proclamation is not excellent but section 12(3) essentially provides that: ‘All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters ... namely, any matter which incites ... violence and terrorism.’ Note that again, no definition of ‘terrorism’ is contained in the Press Proclamation but it can be inferred that these include ethnic differences.

Section 15(11) provides that a person who violates section 12(3) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015. The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation.

Section 15(11) of the Press Code also provides that where the offence is committed for a second time, the newspaper shall be banned, and its licence cancelled.

### ❖ **Penal Code, 2015**

Article 189 of the Penal Code provides that a person who incites others to commit acts of violence or offences against the community, individuals, groups or properties, or to disobey orders or laws issued by lawful authority, is guilty of public incitement, which is punishable with a term of imprisonment or a fine.

Article 190 of the Penal Code provides that a person who commits the offence of incitement under article 189 with an appeal to religious or ethnic hatred is guilty of aggravated public incitement, which is punishable with a term of imprisonment.

## GEOGRAPHIC INFORMATION

### ❖ **Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed ‘Matters not to be disseminated’. The English translation of the Press Proclamation is not excellent but section 12(10) essentially provides that: ‘All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters...namely, shapes, pictures and maps of Eritrean territory without first obtaining permission from the governmental agency concerned.’ Section 15 does not contain a specific offences and penalty provision in respect of violations of section 12(10).

## TERRITORIAL INTEGRITY AND SOVEREIGNTY AND INDEPENDENCE OF THE NATION

### ❖ **Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed ‘Matters not to be disseminated’. The English translation of the Press Proclamation is not excellent but section 12(4) essentially provides that: ‘All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters ... namely, any matter which undermines the territorial integrity and sovereignty and independence of the nation.’ Section 15(10) provides that a person who violates section 12(4) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015. The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation. Section 15(10) also provides that where the offence is committed for a second time, the newspaper shall be banned, and its licence shall be cancelled.

## ALARMING THE PUBLIC

### ❖ **Penal Code, 2015**

Article 194 of the Penal Code provides that a person who, with the intent to alarm the public, threatens to cause a catastrophe or other harm to the community or starts or spreads false rumours concerning impending catastrophes or disasters or other harm to society, thereby inflaming public opinion or causing a danger of public disturbance, is guilty of alarming the public, which is punishable by a term of imprisonment or a fine.

Note that if the offence of alarming the public was committed with the intent to undermine governmental authority, the punishment is imprisonment or a fine.

### **3.9.4 Prohibition of publications that insult the national flag of Eritrea and of other countries**

#### ❖ **Penal Code, 2015**

Article 123(1) of the Penal Code provides that a person who intentionally insults the national flag of Eritrea is guilty of insults to the national flag of Eritrea, which is punishable with a term of imprisonment or a fine.

Article 123(2) of the Penal Code provides that a person who intentionally insults the national flag of any other country is guilty of insults to the national flag of a country other than Eritrea, which is punishable with a term of imprisonment or a fine.



### **3.9.5 Prohibition of publications that vilify the Eritrean struggle**

#### **❖ Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed ‘Matters not to be disseminated’. The English translation of the Press Proclamation is not excellent but section 12(3) essentially provides that: ‘All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters...namely, any matter which...vilifies the Eritrean people’s tradition of struggle.’ Section 15(11) provides that a person who violates section 12(3) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015. The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation. Section 15(10) of the Press Proclamation also provides that where the offence is committed for a second time, the newspaper shall be banned, and its licence shall be cancelled.

### **3.9.6 Prohibition of publications that promote division and dissension**

#### **❖ Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed ‘Matters not to be disseminated’. The English translation of the Press Proclamation is not excellent but section 12(3) essentially provides that: ‘All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters...namely, any matter which...promotes the spirit of division and dissension among the people.’

Section 15(11) provides that a person who violates section 12(3) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015. The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation. Section 15(10) of the Press Proclamation also provides that where the offence is committed for a second time, the newspaper shall be banned, and its licence shall be cancelled.

### **3.9.7 Prohibition of publications that are obscene or contrary to public morality**

#### **❖ Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed ‘Matters not to be disseminated’. The English translation of the Press Proclamation is not excellent but section 12(5) essen-

tially provides that: ‘All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters...namely, any matter which contravenes general morality.’

Section 15(10) provides that a person who violates section 12(5) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015.

The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation. Section 15(10) of the Press Proclamation also provides that where the offence is committed for a second time, the newspaper shall be banned, and its licence shall be cancelled.

#### ❖ Penal Code, 2015

Article 313(1) provides that a person who publicly distributes writings, images, posters, films, objects or other communications that are obscene or grossly indecent is guilty of obscenity, which is punishable by a term of imprisonment of between six and 12 months or a fine. Note, however, that article 313(2) provides that there is no offence under article 313(1), where the conduct takes place in private or where the material is artistic, literary or scientific in character.

### **3.9.8 Prohibition of publications that constitute defamation, defamation of government institutions or that encroach upon the dignity of minors**

#### DEFAMATION

#### ❖ Press Proclamation No. 90 of 1996

Section 12 of the Press Proclamation is headed ‘Matters not to be disseminated’. The English translation of the Press Proclamation is not excellent but section 12(6) essentially provides that: ‘All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters...namely, any defamation.’

Section 15(10) provides that a person who violates section 12(6) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015.

The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation. Section 15(10) of the Press Proclamation also provides

that where the offence is committed for a second time, the newspaper shall be banned, and its licence shall be cancelled.

#### ❖ Penal Code, 2015

It is important to note, however, that the new Penal Code itself provides for the crime of defamation. Article 301(1) of the Penal Code provides that a person who intentionally causes injury to the honour or reputation of another person by communicating to a third party or parties, directly or indirectly, any imputation of an act of fact or conduct that is false, is guilty of defamation, which is punishable with a term of imprisonment of between one and six months or a fine.

Further, article 301(2) of the Penal Code provides that a person who communicates to a third party or parties any imputation of an act of fact or conduct that is true solely with the intention to injure the honour or reputation of another person, is guilty of malicious injury to honour or reputation, which is punishable with a term of imprisonment of up to one month or a fine.

It is important to note that the effect of these provisions is to make defamation a criminal offence. Although the Penal Code does not repeal the Press Proclamation expressly, article 5(2)(a) of the Penal Code specifically states that the definition of the offences shall be that provided in the Penal Code. Consequently, it seems clear that defamation will effectively be dealt with in terms of the Penal Code and not the Press Proclamation, although it has not been expressly repealed.

In most democratic countries defamation is dealt with as a civil matter in which damages can be paid for unlawful defamation and there is no threat of arrest, imprisonment and a criminal record attaching to defamation. Criminal defamation has a very serious chilling effect on media activities given the criminal sanctions that can be imposed and, consequently, are not conducive to a free press.

What is particularly startling about this formulation in the Eritrean Press Proclamation is that the law contains few defences to defamation, such as a privileged occasion, for example, reporting on court proceedings, having published in good faith after making reasonable attempts to establish the truth, etc. This is entirely out of step with general tenets of defamation law internationally.

## DIGNITY OF MINORS

#### ❖ Press Proclamation No. 90 of 1996

Section 12 of the Press Proclamation is headed 'Matters not to be disseminated'. The English translation of the Press Proclamation is not excellent but section 12(5)

essentially provides that: ‘All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters...namely, any matter which encroaches upon the dignity of minors.’

Section 15(10) provides that a person who violates section 12(5) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015. The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation. Section 15(10) of the Press Proclamation also provides that where the offence is committed for a second time, the newspaper shall be banned, and its licence shall be cancelled.

Again, these terms are not defined and it is not clear what kind of issues would be covered. Usually the identity of minors in custody battles and sexual offences cases are protected and so it can be assumed that these are also covered here, but it is not entirely clear as the wording is not explicit.

## DEFAMATION OF GOVERNMENT INSTITUTIONS

### ❖ Penal Code, 2015

Article 154 of the Penal Code provides that a person who publicly disseminates fabricated or false facts, knowing them to be such, in order to cast disparagement upon legislative, executive or judicial institutions is guilty of defamation of governmental institutions, which is punishable with a prison term.

## INSULTING BEHAVIOUR AND OUTRAGE

### ❖ Penal Code, 2015

Article 302(1) of the Penal Code provides that a person who, by addressing himself to another person or by referring to another person, offends the honour of that other person by:

- Distastefully touching upon the latter’s physical or mental impairment, or the latter’s ethnic, religious or racial background
- Use of grossly obscene words or utterances
- Reference to the victim’s profession
- Any other words or utterances of similar severity

is guilty of insulting behaviour and outrage, which is punishable with a term of imprisonment or a fine.

### **3.9.9 Prohibition of publications that constitute blackmail**

#### **❖ Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed ‘Matters not to be disseminated’. The English translation of the Press Proclamation is not excellent but section 12(6) essentially provides that: ‘All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters...namely, any...blackmail.’

Section 15(10) provides that a person who violates section 12(6) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015. The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation. Section 15(10) of the Press Proclamation also provides that where the offence is committed for a second time, the newspaper shall be banned, and its licence shall be cancelled.

Note that blackmail is not defined in the Press Proclamation.

### **3.9.10 Prohibition of publications that invade privacy**

#### **❖ Press Proclamation No. 90 of 1996**

Section 12 of the Press Proclamation is headed ‘Matters not to be disseminated’. The English translation of the Press Proclamation is not excellent but section 12(5) essentially provides that: ‘All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters...namely, any matter which...encroaches upon the personal liberties and the private lives of citizens.’

Section 15(10) provides that a person who violates section 12(5) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015. The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation. Section 15(10) of the Press Proclamation also provides that where the offence is committed for a second time, the newspaper shall be banned, and its licence shall be cancelled. Note that these terms are not defined in the Press Proclamation and that there is no public interest defence in respect of such publications, as is the norm internationally.

### 3.9.11 Prohibition of publications that constitute confidential information of public authorities

#### ❖ Penal Code, 2015

Article 157 provides that a person who, not being authorised to do so, intentionally publishes reports, deliberations or decisions of a public authority, the content of which he knows must be kept confidential, is guilty of a breach of a prohibition of publication, which is punishable with a term of imprisonment or a fine.

### 3.9.12 Prohibition of publications that constitute false news

#### ❖ Press Proclamation No. 90 of 1996

Section 12 of the Press Proclamation is headed ‘Matters not to be disseminated’. The English translation of the Press Proclamation is not excellent but section 12(9) essentially provides that: ‘All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters...namely, inaccurate information and news intentionally disseminated to influence economic conditions, create commotion and confusion and disturb general peace.’

Section 15(9) provides that a person who violates section 12(9) shall be liable, upon conviction, to a punishment in terms of section 580 of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015. The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation.

### 3.9.13 Prohibition of publications that promote religious or ethnic divisions

#### ❖ Press Proclamation No. 90 of 1996

Section 12 of the Press Proclamation is headed ‘Matters not to be disseminated’. The English translation of the Press Proclamation is not excellent but section 12(1) essentially provides that: ‘All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters...namely, any matter which vilifies or belittles humanitarian and religious beliefs.’

Further, section 12(3) essentially provides that: ‘All those participating in the public or private press in general, especially the chief editors and journalists, are prohibited from publishing and disseminating the following matters...namely, any matter which incites religious and sub-national differences.’ Note that again, no definition of ‘sub-

national' is contained in the Press Proclamation but it can be inferred that these include ethnic differences.

Section 15(11) provides that a person who violates section 12(1) and/or (3) shall be liable, upon conviction, to a punishment in terms of the Transitional Penal Code of Eritrea, which has since been repealed by the Penal Code, 2015.

The new Penal Code contains an array of potential penalties with guidelines as to how these are to apply but it is unclear how these penalties are to apply to offences under the Press Proclamation. Section 15(11) of the Press Proclamation also provides that where the offence is committed for a second time, the newspaper shall be banned, and its licence shall be cancelled.

#### ❖ Penal Code, 2015

Article 195 of the Penal Code provides that a person who intentionally and publicly asserts fabricated or distorted facts, knowing them to be such, in order to cast disparagement upon any religion or ethnic group is guilty of defamation of or interference with religious and ethnic groups, which is punishable by a term of imprisonment or a fine.

Article 196 of the Penal Code provides that a person who intentionally and publicly disparages the ceremony or rite of any lawful religious group, or profanes a place, image or object used for such religious ceremonies or ceremonies relating to any ethnic group is guilty of disturbance of religious or ethnic feelings, which is punishable by a term of imprisonment or a fine.

### **3.10 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 as access to information and whistleblower protection legislation. Such statutes, while not specifically designed for use by the media, can and often are used by the media to uncover and publicise information in the public interest. We have not been provided with any legislation that can be said to assist the media.

## **4 REGULATIONS AFFECTING THE MEDIA**

In this section you will learn:

- What regulations are
- Key regulations governing the media

## 4.1 Definition of regulations

Regulations are subordinate legislation. They are legal rules that are made in terms of a statute. Regulations are legal mechanisms for allowing a body other than parliament to make legally binding rules governing an industry or sector, without needing parliament to pass a specific statute thereon.

## 4.2 Key regulations governing the media

We are not aware of any regulations which have been passed affecting the media by any minister or by the Information Commission.

## 5 MEDIA SELF-REGULATION

In this section you will learn:

- What self-regulation is
- Key self-regulatory provisions intended to govern the media in Eritrea

### 5.1 Definition of self-regulation

Self-regulation is a form of regulation that is established voluntarily. A grouping or body establishes its own mechanisms for regulation and enforcement that are not imposed, for example, in a statute or regulation. Media bodies often introduce self-regulation in the form of codes of media ethics and good governance.

### 5.2 Self-regulatory provisions intended to govern the media in Eritrea

As, in practice, there is no independent media in Eritrea, whether print or broadcasting, there are no self-regulatory bodies with their own codes of ethics, etc., which are governed by such self-regulatory bodies. This is obviously symptomatic of the basic lack of freedom of the press in Eritrea.

## 6 CASE LAW AND THE MEDIA

### 6.1 Eritrea's legal system

Eritrea's legal system is a combination of civil law, customary law and Sharia law systems.<sup>22</sup> Consequently, the case law is not as strictly based on precedent as common law systems (often found in former British colonies) are. Further, we have not been able to find any case law dealing with media law issues as at the date of writing.



## 6.2 African Commission on Human and Peoples' Rights – Complaint involving Eritrean journalists

This section focuses on a complaint that has a bearing on Eritrean media law or freedom of expression in some way and that has been dealt with by the African Commission on Human and Peoples' Rights (ACHPR).

In *Article 19 vs Eritrea* (No.275/03), the ACHPR found that the ongoing incommunicado detention of at least 18 journalists was contrary to the provisions of articles 5 (right to be free from torture and cruel, inhuman or degrading punishment or treatment), 6 (right to personal liberty and security of the person), 7.1.c (right to be defended by counsel), 9 (right to receive information and freedom of expression), and 18 (right to protection of family life) of the African Charter on Human and Peoples' Rights. Further, the ACHPR held that article 9 of the African Charter on Human and Peoples' Rights protects the right to freedom of expression and that:

- The imprisonment of journalist 'deprives not only the journalists of their rights to freely express and disseminate opinions, but also the public, of the right to information. This action is in breach of Article 9 of the Charter'.
- Banning the entire private press on the grounds that it constitutes a threat to the incumbent government 'is a violation of the right to freedom of expression, and is the type of action that Article 9 is intended to proscribe. A free press is one of the tenets of a democratic society and a valuable check on potential excesses by government'.

### NOTES

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