7 Kenya

1 INTRODUCTION

The Republic of Kenya lies on the equator and overlies the East African Rift from Lake Victoria in the south-west to Lake Turkana in the north-west, and to the Indian Ocean, which forms its south-eastern border. Tanzania lies to the south, Uganda to the west, South Sudan to the north-west, Ethiopia to the north and Somalia to the north-east. The country covers some 581,000 km^2 and has an ethnically diverse population of about 47.3 million, 60% of whom are aged 24 years or younger. Kenya has two official languages – Kiswahili and English.

The Berlin Conference of 1884–85 divided Eastern Africa into territories of influence among European powers, leading Britain to found the East African Protectorate in 1895. Kenya officially became a British colony in 1920.

Resistance to colonialism was not long in coming. The Kenyan African Union (KAU) was formed in 1944 to campaign for independence, and in 1952 the Mau Mau guerrilla group launched an independence campaign against white settlers. The following year, the KAU was banned and its leader, Jomo Kenyatta, jailed for his links with the Mau Mau.

Though the rebellion was put down in 1956, the following year saw the first direct elections for Kenyans to the Legislative Council.[1] Kenyatta's party, now called the Kenya African National Union, won, as it did the general election in May 1963. Kenyatta became prime minister of the independent unitary state in December of the

same year. The constitution negotiated with Britain was amended less than a year later, however, making the country a republic with a president as head of the *de facto* one-party state and government.[2]

On his death in August 1978, Kenyatta was succeeded by former vice president, Daniel arap Moi. In June 1982, the National Assembly declared Kenya a *de jure* one-party state – a decision which prompted an attempted coup by Air Force personnel backed by university students to oust Moi, which was quickly suppressed by other military and police forces.[3] Following the coup attempt, Moi tightened his grip on the country, and his security forces subjected opposition leaders and pro-democracy activists to arbitrary arrest, detention without trial, abuse in custody and deadly force.[4]

In November 1991, concern over the denial of human rights led international donors to suspend new assistance pending economic and political reform. The following month Moi legalised multi-party politics and shelved threats to the freedom of the press and the independence of the judiciary.[5] Moi won elections in 1992 and 1997.

Constitutionally barred from running in the 2002 election, Moi retired. The election resulted in a landslide victory for opposition National Alliance Party leader and former vice president, Mwai Kibaki, an economist and long-serving finance minister under both Kenyatta and Moi.[6]

Though Kibaki's first term was hampered by ill health, he gained admiration for introducing a free primary education initiative designed to give more than a million children, who would not have been able to afford school, the chance to attend. Unfortunately, the promise failed to achieve its aims, largely because the pledge was not translated into policy supported by resources and skilled personnel.[7] In 2004 and again in 2006, drought and crop failure caused hunger on a scale that the government labelled 'national disasters'.[8]

In July 2005, Parliament approved a draft constitution despite days of violent protests by demonstrators, who said it would give too much power to the president. Later in the year voters rejected the draft in a referendum. Nevertheless, Kibaki was declared winner of the next presidential election in December 2007. The result sparked a political, economic and humanitarian crisis when supporters of the Orange Democratic Movement's Raila Odinga alleged electoral manipulation. Amid large-scale ethnic violence, former United Nations (UN) secretary general Kofi Annan arrived in the country about a month after the election and brought the two sides to the negotiating table. On 28 February 2008, Kibaki and Odinga signed a power-sharing agreement that established the Office of the Prime Minister and created a coalition government with Odinga as prime minister.[9]

The makeshift alliance was an uneasy one, and when Odinga suspended Agriculture Minister William Ruto and Education Minister Samuel Ongeri for suspected corruption, his order was quickly overturned by Kibaki.

Odinga, son of Kenya's first vice president, Oginga Odinga, ran for president in the March 2013 election, but lost to Uhuru Kenyatta, son of the country's first president, by a margin of 6.81% of votes cast.

Kenyatta had previously been named by International Criminal Court (ICC) prosecutor Luis Moreno Ocampo as being suspected of crimes against humanity for planning and funding the violence that followed the 2007 elections, in which some 1300 people are believed to have died. Kenyatta appeared before the ICC in The Hague on 8 October 2014, making history as the first sitting head of state to do so. Two months later, however, ICC prosecutors withdrew the charges saying that his government had refused to hand over evidence vital to the case.[10]

Kenyatta has prioritised economic development, signing major agreements with China, Italy, Rwanda, Uganda and the United States, and promoting infrastructure projects. His economic policies have been praised by the International Monetary Fund and the World Bank. With gross domestic product (GDP) of $63.4 billion, Kenya was the eighth ranked African country in 2015,[11] though with GDP per capita at $1800, the country ranks in the world's bottom 14%.[12] A further sign of progress, however, is a July 2016 Institute of Directors report ranking Kenya 14th in Africa in corporate governance; it said the country is one of the top five improving nations.[13]

Kenya has a diverse media scene, supported by a sizeable middle class that sustains a substantial advertising market. Television is the main news source in cities and towns, with the state-run Kenya Broadcasting Corporation, which is part funded by the government as well as advertising, dominant. The main satellite pay-TV platforms are the Wananchi Group, which operates Zuku TV, and South Africa's MultiChoice. The spread of viewing in rural areas has been slower, hampered by limited access to mains electricity. Accordingly, radio remains the main medium in rural areas, where most Kenyans live.

The highly competitive press sector is the most sophisticated in the region. Print media are dominated by two publishing houses, the Nation and the Standard. Reporters Without Borders ranked Kenya at 90th (out of 180 countries) in its 2014 global Press Freedom Index.[14]

Internet use is high by regional standards, and submarine cables have boosted Kenya's global connectivity. As of September 2015, the country had almost 32 million internet

users, 69.6% of the population, according to the Communications Authority of Kenya.[15] Widespread use of mobile phones enables millions to access the web, and the M-pesa mobile phone–based platform for money transfer and financial services has some 13 million active monthly users. In the 1914–15 financial year, transactions amounting to 4.2 trillion shillings, equivalent to 42% of Kenya's GDP, went through the system.[16]

Despite notable successes, however, numerous long-term problems remain. Even before independence, Kenya was beset by conflict with ethnic Somalis within its borders who want to unite with Somalia. Petty skirmishes have sometimes erupted into worse situations, including massacres of Somalis in 1980 and 1984.[17] Since late 2011, Kenya has been embroiled with al-Shabaab, a jihadist group that has also declared war on the Federal Government of Somalia. The group has carried out numerous attacks on Kenya since 2011, including the massacre of customers at Nairobi's Westgate shopping mall in September 2013, and students identified as Christians at Garissa University College in April 2015.[18]

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

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

The aim of the chapter is to equip the reader with an understanding of the main laws governing the media in Kenya. Key weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Kenya, 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 Kenya
- ❑ 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 Kenya 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 Kenya, revised edition 2010, sets out the foundational rules for the Republic of Kenya. These are the rules upon which the entire country operates. The Constitution contains the underlying principles and values of the laws of Kenya. A key provision is article 1, which gives sovereign power to the people of Kenya, and commits to it being exercised only in accordance with the Constitution. That power is delegated to the following state organs:

- Parliament and the legislative assemblies in the county governments
- The national executive and the executive structures in the county governments
- The judiciary and independent tribunals.

Sovereign power is exercised at national and county level.

Key constitutional provisions are articles 4(1) and 4(2), which state that 'Kenya is a sovereign Republic', and 'Kenya shall be a multi-party democratic State founded on the national values and principles of governance as referred to in article 10'. Article 10, 'National values and principles of governance', specifies the national values and principles, which include:

- Sharing and devolution of power
- The rule of law
- Democracy and participation of the people
- Human dignity and equality

- Human rights
- Non-discrimination and protection of the marginalised
- Good governance
- Integrity, transparency and accountability.

The Bill of Rights, Chapter Four of the Constitution of Kenya, is described in article 19(1) as 'the framework for social, economic and cultural policies'. Article 19(3)(a) states that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the state.

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 Kenya makes provision for constitutional supremacy. Article 2(1) states that '[t]his Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government'. Article 2(3) specifies that the validity or legality of the Constitution is not subject to challenge by or before any court or other state organ. Further, article 2(4) states that '[a]ny law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid'.

The Kenyan Constitution provides that any treaty or convention ratified by Kenya forms part of the law of Kenya – article 2(6).

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 be done only in accordance with the constitution.

The Kenyan Constitution makes provision for legal limitations on the exercise and protection of rights and fundamental freedoms contained in Chapter Four of the Constitution of Kenya, the Bill of Rights. Article 19(3)(c) specifically provides that the various rights provided for in the Bill of Rights 'are subject only to the limitations contemplated in this Constitution'.

The Constitution of Kenya makes provision for three kinds of legal limitations on the exercise and protection of rights contained in Chapter Four of the Constitution of Kenya, 'The Bill of Rights'.

2.3.1 Internal limitations

These are limitations that are right specific and contain limitations or qualifications to the particular right that is provided for in the constitution. These will be dealt with in more detail when discussing the applicable rights below.

It is not clear why it is necessary to have any internal limitations clauses if there is a general limitations clause as well. Often, internal limitations clauses undermine rights which appear to be substantive but which are actually not very effective, as a result.

2.3.2 General limitations

The second type of limitation is a general limitations provision. General limitations provisions apply to the provisions of a bill of rights or other statement setting out the fundamental rights. These types of clauses allow a government to pass laws limiting rights, generally provided this is done in accordance with the constitution.

The specifics of the general limitations clause are set out in article 24 of the Kenyan Constitution, which states that rights can be limited only by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- The nature of the right or fundamental freedom
- The importance of the purpose of the limitation
- The nature and extent of the limitation
- The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others

- The relation between the limitation and its purpose, and whether or not there are less restrictive means to achieve the purpose.

These factors are important because they show that the limitation of a right has to be narrowly tailored and that its purpose must be interrogated by a court when deciding whether or not the limitation of the right is constitutionally sound.

2.3.3 Constitutional limitations – state of emergency provisions

It is critically important to note the provisions of the Constitution of Kenya which deal with the terms of a state of emergency. In terms of article 58(1), a state of emergency may be declared by the president only under article 132(4)(d), and 'only when the State is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency'.

Further, the declaration has to be necessary to meet the circumstances for which the emergency is declared. It may not exceed a period of 14 days, and the first extension thereof requires a supporting vote of at least two-thirds of the National Assembly. Any subsequent extension requires a minimum of a three-quarters supporting vote. Such extensions can be for no more than two months at a time.

The method by which the initial proclamation of extension of the state of emergency is made known to the people is not stated in the Constitution of Kenya, although article 58(6)(b) does specify that '[a]ny legislation enacted in consequence of the state of emergency', including limitations of rights specified in the Bill of Rights, 'shall not take effect until it is published in the *Gazette*'.

Despite any other provision in the Constitution, there are rights and fundamental freedoms that are non-derogable. These are listed in article 25 and comprise: freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial; and the right to an order of *habeas corpus* (requiring a person to be brought to court). Unfortunately, many of the critical rights for the media, including the basic right to freedom of expression and the right to information, can be derogated from in a state of emergency.

Particularly important are the provisions of article 58(6)(a), which deal with derogations from fundamental rights during a declaration of a state of emergency.

A limit on a right or fundamental freedom in the Bill of Rights resulting from any legislation enacted in consequence of a declaration of a state of emergency is itself limited to the extent that the:

- Limitation is strictly required by the emergency, and
- Legislation is consistent with the Republic's obligations under international law applicable to a state of emergency – article 58(6).

Article 29, 'Freedom and security of the person', gives every person the right to freedom and security of the person, but article 29(b) adds a caveat: every person has the right not to be 'detained without trial, except during a state of emergency, in which case the detention is subject to article 58'.

Importantly, article 58(7) holds government, its agents and all people accountable for actions taken during the state of emergency: '[a] declaration of a state of emergency, or legislation enacted or other action taken in consequence of any declaration, may not permit or authorise the indemnification of the State, or of any person, in respect of any unlawful act or omission.'

2.4 Constitutional provisions that protect the media

The Constitution of Kenya contains a number of important provisions in Chapter Four, 'The Bill of Rights', which directly protect the media, including publishers, broadcasters, journalists, editors and producers. There are, however, provisions elsewhere in the Constitution that assist the media as it goes about its work of reporting on issues in the public interest, and we include these in this section too.

2.4.1 Rights that protect the media

RIGHT TO FREEDOM OF THE MEDIA

Article 34(1) specifies that '[f]reedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in article 33(2)', which reads:

> 33(2) The right to freedom of expression does not extend to –
> (a) propaganda for war;
> (b) incitement to violence;
> (c) hate speech; or
> (d) advocacy of hatred that –
> (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or
> (ii) is based on any ground of discrimination specified or contemplated in Article 27(4).

All the clauses in article 34 emphasise the intention that the media should be independent of state interference.

- Article 34(2) specifically precludes the state from interfering with 'any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium' and further forbids the state to penalise 'any person for any opinion or the content of any broadcast, publication or dissemination'. This is a fundamental aspect of freedom of the media as it protects the media's right to write opinion pieces and comment on important issues of the day.

- Article 34(3) allows broadcasting and other electronic media freedom of establishment, subject only to licensing procedures that are:
  - Necessary to regulate the airwaves and other forms of signal distribution
  - Independent of control by government, political interests or commercial interests.

Article 34(1), the right to freedom of the media, is limited by an internal limitation to the right which is set out in article 33(2) and which states:

> The right to freedom of expression does not extend to –
> (a) propaganda for war;
> (b) incitement to violence;
> (c) hate speech; or
> (d) advocacy of hatred that –
> (i) constitute ethnic incitement, vilification of others or incitement to cause harm; or
> (ii) is based on any ground of discrimination specified or contemplated in Article 27(4).

The provisions of article 34(1) read with article 33(2) of the Constitution, the internal limitation to the right to freedom of the media, require some explanation.

- While the provisions of article 33(2) are not in themselves controversial, it is noteworthy that the internal limitation provides that the right to freedom of the media does not extend to both hate speech – article 33(2)(c) and to the advocacy of hatred – article 33(2)(d). However, no indication is given as to what the difference is between hate speech and the advocacy of hatred as provided for in article 33(2)(c) and (d).

- The effect of the internal limitation is that hate speech and the advocacy of hatred are not protected expression and any legislation designed to regulate hate speech or the advocacy of hatred in terms of article 33(2)(c) and (d) would not have to meet the requirements of the general limitations clause provided for in section 24 of the Constitution.

The provisions regarding advocacy of hatred in article 33(2)(d) are extremely broadly framed. In this regard:

- They include wording such as 'vilification of others', the effect of which is that 'vilification' accordingly constitutes advocacy of hatred, irrespective of the basis for such vilification or level of vilification, which term is undefined

- They include incitement to cause 'harm' on whatever basis without giving an indication as to what is meant by 'harm'. One can assume that 'harm' is less than 'violence', as incitement to violence is already provided for in article 33(2)(b)

- They include advocacy of hatred based on any ground of discrimination specified or contemplated in article 27(4), namely race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth

- The provisions of article 33(2)(d)(i) and (ii) are not cumulative. They are framed in the alternative. This is unusual as hate speech provisions usually require that advocacy of hatred be based on certain specified grounds AND constitute incitement to cause harm.

The effect of this is that a wide range of expression could conceivably fall within the definition of 'advocacy of hatred' and/or 'hate speech' therefore be unprotected in terms of the constitutional right to freedom of expression.

FREEDOM OF EXPRESSION

Another important provision that protects the media is article 33(1)(a), part of the article headed 'Freedom of expression', which states:

> Every person has the right to freedom of expression, which includes freedom to seek, receive or impart information or ideas.

This provision needs explanation.

- These freedoms apply to all persons and not just to certain people, such as citizens.

- The freedom is not limited to speech (whether oral or written) but extends to non-verbal and non-written 'expression', such as physical expression (including mime, dance or theatre), photography or graphic art.

- Article 33(1)(a) specifies that the right to freedom of expression includes the 'freedom to seek, receive or impart information or ideas'. This freedom of everyone to receive and impart ideas and information is a fundamental aspect of freedom of expression, and this subsection effectively enshrines the right to the free flow of information. Thus, the information rights of audiences, for example, as well as the expression rights of the media, are protected.

- Article 33(1)(a) specifies that the right to freedom of expression includes the 'freedom to … impart information or ideas'. This is a vitally important provision because it protects the right to communicate information and ideas *to the public* – a critically important role of the press and the media more generally. Therefore, although the Constitution of Kenya does not specifically mention the press or the media in this provision, the freedom to perform that role – namely, to communicate information to the public – is protected.

Article 33(1), the right to freedom of expression, is limited by an internal limitation to the right which is set out in article 33(2) and which states:

> The right to freedom of expression does not extend to –
> (a) propaganda for war;
> (b) incitement to violence;
> (c) hate speech; or
> (d) advocacy of hatred that –
> (i) constitute ethnic incitement, vilification of others or incitement to cause harm; or
> (ii) is based on any ground of discrimination specified or contemplated in Article 27(4).

The provisions of article 33(1) read with article 33(2) of the Constitution, the internal limitation to the right to freedom of expression, require some explanation.

- While the provisions of article 33(2) are not in themselves controversial, it is noteworthy that the internal limitation provides that the right to freedom of expression does not extend to both hate speech – article 33(2)(c) and to the

advocacy of hatred – article 33(2)(d). However, no indication is given as to what the difference is between hate speech and the advocacy of hatred as provided for in article 33(2)(c) and (d).

- The effect of the internal limitation is that hate speech and the advocacy of hatred are not protected expression and any legislation designed to regulate hate speech or the advocacy of hatred in terms of article 33(2)(c) and (d) would not have to meet the requirements of the general limitations clause provided for in section 24 of the Constitution.

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- They include wording such as 'vilification of others', the effect of which is that 'vilification' accordingly constitutes advocacy of hatred, irrespective of the basis for such vilification or level of vilification, which term is undefined

- They include incitement to cause 'harm' on whatever basis without giving an indication as to what is meant by 'harm'. One can assume that 'harm' is less than 'violence', as incitement to violence is already provided for in article 33(2)(b)

- They include advocacy of hatred based on any ground of discrimination specified or contemplated in article 27(4), namely race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth

- The provisions of article 33(2)(d)(i) and (ii) are not cumulative. They are framed in the alternative. This is unusual as hate speech provisions usually require that advocacy of hatred be based on certain specified grounds AND constitute incitement to cause harm.

The effect of this is that a wide range of expression could conceivably fall within the definition of 'advocacy of hatred' and/or 'hate speech', and could therefore be unprotected in terms of the constitutional right to freedom of expression.

RIGHT OF ACCESS TO INFORMATION

Another critically important provision that protects the media is article 35(1), which enshrines the right of every citizen to access to information held by the state, as well as to information held by another person which is required for the exercise or protection of any right or fundamental freedom.

This right requires some explanation.

- Article 35 essentially provides for access to two types of information:
  - Any information held by the state
  - The second type is, paradoxically, both broader and narrower. It is broader because it grants every citizen the right to information 'held by another person' – other than the state, that is. Essentially, this grants citizens the right to information held by private persons whether individuals or institutions. However, this type is more narrowly tailored as one has the right to information held by a non-state person only where access to the information is 'required for the exercise or protection of any right or fundamental freedom'. Thus one needs to demonstrate that the information is required in order to protect or exercise a right or fundamental freedom.

- This right is limited to citizens. In 2012, the High Court of Kenya held (see elsewhere in this chapter for a full discussion of the case) that the effect of the use of the word 'citizen' in article 35 of the Constitution is that all juristic persons (such as companies, which would include media houses or NGOs, which would include media freedom organisations), whether foreign registered or controlled, or registered and controlled in Kenya itself, are denied this right of access to information. This was a devastating blow to the usefulness of the right of access to information as it severely constrained who may access information, limiting the right of access only to Kenyan natural persons. However, the recently passed Access to Information Act, 2016 (also discussed elsewhere in this chapter) has defined 'citizen' as including 'any private entity that is controlled by one or more Kenyan citizens'. This is welcome as it restores the right of access to information to juristic persons controlled by Kenyan citizens.

- The right of access to information is vital in the information age in which we live. When states wield enormous power, particularly with regard to the distribution of resources, the right of access to information is one of the most important rights in ensuring transparency and holding government accountable. If one considers that the media plays an enormous role in ensuring transparency and government accountability through providing the public with information, having this right of *access* to information is critical to enable the media to perform its functions properly.

RIGHT TO FAIR ADMINISTRATIVE ACTION

Another important provision that protects the media is article 47, 'Fair administrative

action'. Article 47(1) provides that every person 'has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair', and article 47(2) provides that '[i]f a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action'.

This right requires explanation.

- The reason why this provision 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 written reasons when administrative action results in their rights being adversely affected.

- An administrative body is not necessarily a state body; indeed, these bodies are often private or quasi-private institutions. These constitutional requirements would therefore apply to non-state bodies too, such as an independent broadcasting regulator.

- 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 written reasons is a powerful tool in ensuring rational and reasonable behaviour on the part of administrative bodies, and aids in ensuring transparency and, ultimately, accountability.

Importantly, article 47(3) provides that legislation must be enacted to give effect to the right to just administrative action and that the legislation shall provide for the review of administrative action by a court or independent and impartial tribunal. This legislation has been passed and is dealt with below in this chapter.

RIGHT TO PRIVACY

Article 31 enshrines the right to privacy in the Constitution of Kenya. It gives every person the right not to have:

- Their person, home or property searched
- Their possessions seized
- Information relating to their family or private affairs unnecessarily required or revealed

- The privacy of their communications infringed.

This last provision, article 31(d), protects communications (including letters, emails, telefaxes and telephone conversations) and is an important right for working journalists.

RIGHT TO FREEDOM OF THOUGHT AND OPINION

Article 32(1) gives every person the right to freedom of thought and opinion. Freedom of thought and opinion are especially important for the media as they protect commentary on public issues of importance.

RIGHT TO FREEDOM OF ASSOCIATION

Article 36(1) of the Constitution of Kenya gives every person the right to freedom of association, which includes the right to 'form, join or participate in the activities of an association of any kind'.

Article 36(3)(a) specifies that registration of an association may not be withheld or withdrawn unreasonably where such a requirement is legislated, and 36(3)(b) entitles an association to a fair hearing before a registration is cancelled.

Similarly, article 41 of the Constitution of Kenya deals with the rights to form and join trade unions and employers' organisations, with article 41(5) enshrining the right to collective bargaining.

Article 41(2)(c) entitles every worker 'to form, join or participate in the activities and programmes of a trade union'.

Article 41(3) entitles every employer:

- To form and join an employers' organisation
- To participate in the activities and programmes of an employers' organisation.

Article 41(4) protects the right of every trade union and employers' organisation to organise and to form and join a federation.

Article 36(2) states that '[a] person shall not be compelled to join an association of any kind', which implies that non-membership of an association should not prohibit a content creator from having his or her content published in the media.

These rights not only guarantee 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.

RIGHT TO FREEDOM OF MOVEMENT

The right in article 39(1) of the Constitution of Kenya applies to 'all persons', and entitles them to freedom of movement. This right is important because it permits journalists to travel throughout the country in the course of their duties.

RIGHT TO OPEN JUSTICE

Article 50(1) gives every person the right to have any dispute that can be resolved by the application of law decided in a public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

This right to 'open justice' in the Constitution of Kenya is important because it is not just important for the protection of litigants; it is also important to secure public faith in the judiciary. In other words, the public (and, as part of that, the media) generally have the right to attend judicial proceedings.

As discussed previously, constitutional rights are never absolute. As specified in article 50(8), 'this article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security'.

2.4.2 Other constitutional provisions that assist the media

It is important to note that there are provisions in the Kenyan Constitution, apart from the Bill of Rights provisions, that are important and that 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 117(1) specifically states that there shall be freedom of speech and debate in Parliament.

- Article 118 specifies that Parliament shall conduct its business in an open manner, and its sittings and those of its committees are required to be open to the public. Further, Parliament must facilitate public participation and involvement in the legislative and other business of Parliament and its committees. Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances which the speaker determines justify the exclusion.

- Article 124(4)(c) specifies that when a house of Parliament considers any appointment for which approval is required under the Constitution or an act of Parliament, the proceedings of the committee and the house have to be open to the public.

These provisions assist the media in two key ways. First, they ensure that the media has a great deal of access to the workings of Parliament – that is, the media is physically able to be in Parliament. Second, they protect parliamentarians. The provisions allow members of Parliament (MPs) and other people participating in parliamentary proceedings to speak freely during parliamentary proceedings, in front of the media, without facing arrest or civil proceedings for what they say.

PROVISIONS REGARDING THE FUNCTIONING OF COUNTY ASSEMBLIES

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

- Article 196(1) specifies that a county assembly has to conduct its business in an open manner, and hold its sittings and those of its committees, in public.

- Article 196(2) specifies that neither the public, nor any media, may be excluded from any sitting unless in exceptional circumstances which the speaker determines justify the exclusion.

- Article 196(3) requires Parliament to enact legislation providing the powers, privileges and immunities of county assemblies, their committees and members.

These provisions assist the media in two key ways. First, they ensure that the media has a great deal of access to the workings of the county government – that is, the media is physically able to be in the assemblies. Second, they protect members of the assemblies. The provisions allow assembly members and other people participating in county assembly proceedings to speak freely during assembly proceedings, in front of the media, without facing arrest or civil proceedings for what they say.

PROVISIONS REGARDING 'CULTURE'

The Constitution of Kenya recognises culture 'as the foundation of the nation' in article 11(1), and specifies that '[t]he state shall promote all forms of national and cultural expression through literature, the arts, … communication, information, mass media, publications …' in article 11(2). The recognition of the role of the media in promoting Kenyan culture is important.

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 Constitution can be used against the media. The Constitution of Kenya has several provisions that could be used against the media.

2.5.1 The right to human dignity

Constitutional article 10(2)(b) in Chapter Two, which relates to the republic, specifies human dignity as one of the national values and principles of governance. 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 the press, requiring a balancing of constitutional rights.

The right to human dignity is provided for in several sections in Chapter Four, 'The Bill of Rights', in the Kenyan Constitution:

- 'The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities …' – article 19(2).

- 'In interpreting the Bill of Rights, a court, tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity …' – article 20(4)(a).

- 'Every person has inherent dignity and the right to have that dignity respected and protected' – article 28.

The right to freedom of expression is specifically limited by the provisions of article 33(3), which states that in exercising the right to freedom of expression, 'every

person shall respect the rights and reputation of others'. This limitation could be used to justify defamation claims, including the right to claim damages for defamation. Defamation suits, whether civil or criminal, are a significant worry for journalists personally and for the media houses that employ them. Journalists therefore need to be aware of the right to dignity and need to ensure that a person's right to his or her reputation is not unlawfully undermined in the course of reporting a story.

2.5.2 Privacy

A second right that requires caution from the media is contained in article 31 of the Constitution of Kenya, which guarantees the right to privacy. It reads:

> Every person has the right to privacy, which includes the right not to have –
> (a) their person, home or property searched;
> (b) their possessions seized;
> (c) information relating to their family or private affairs unnecessarily required or revealed; or
> (d) the privacy of their communications infringed.

The right of privacy is an interesting right because it protects journalists themselves, particularly through the protection of personal communications, but also requires caution on their part when reporting the news or investigating the conduct of individuals. While the right to privacy can give way to the public interest, there is a zone of privacy around a person's private and family life which is relevant to the public only in fairly exceptional circumstances.

2.5.3 Internal limitations to the right to freedom of expression and the right to freedom of the media

It is important to note that the rights to freedom of expression and to the media contain internal limitations. Articles 33(1) and 34(1) set out the contents of the right to freedom of expression and of the media respectively, and both are subject to article 33(2), which reads:

> 33(2) The right to freedom of expression does not extend to –
> (a) propaganda for war;
> (b) incitement to violence;
> (c) hate speech; or
> (d) advocacy of hatred that –
> (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or

(ii) is based on any ground of discrimination specified or contemplated in Article 27(4).

The provisions of article 33(2) of the Constitution, the internal limitation to the rights to freedom of expression and the media, require some explanation.

- While the provisions of article 33(2) are not in themselves controversial, it is noteworthy that the internal limitation provides that the right to freedom of the media does not extend to both hate speech – article 33(2)(c) and to the advocacy of hatred – article 33(2)(d). However, no indication is given as to what the difference is between hate speech and the advocacy of hatred as provided for in article 33(2)(c) and (d).

- The effect of the internal limitation is that hate speech and the advocacy of hatred are not protected expression and any legislation designed to regulate hate speech or the advocacy of hatred in terms of article 33(2)(c) and (d) would not have to meet the requirements of the general limitations clause provided for in section 24 of the Constitution.

The provisions regarding advocacy of hatred in article 33(2)(d) are extremely broadly framed. In this regard:

- They include wording such as 'vilification of others', the effect of which is that 'vilification' accordingly constitutes advocacy of hatred, irrespective of the basis for such vilification or level of vilification, which term is undefined

- They include incitement to cause 'harm' on whatever basis without giving an indication as to what is meant by 'harm'. One can assume that 'harm' is less than 'violence', as incitement to violence is already provided for in article 33(2)(b)

- They include advocacy of hatred based on any ground of discrimination specified or contemplated in article 27(4), namely, race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth

- The provisions of article 33(2)(d)(i) and (ii) are not cumulative. They are framed in the alternative. This is unusual as hate speech provisions usually require that advocacy of hatred be based on certain specified grounds AND constitute incitement to cause harm.

The effect of this is that a wide range of expression could conceivably fall within the

definition of 'advocacy of hatred' and/or 'hate speech' therefore be unprotected in terms of the constitutional rights to freedom of expression and the media.

2.5.4 Limitations on the right to open justice

Article 50(8) permits the exclusion of the press or other members of the public from any court proceedings if the exclusion is deemed necessary to protect witnesses or vulnerable persons, morality, public order or national security.

2.5.5 Exclusion from parliamentary and county assembly sittings

Article 118(2) permits the exclusion of the press or other members of the public from any parliamentary sitting if the relevant speaker has determined that the circumstances are exceptional and that there are justifiable reasons for the exclusion.

Article 196(2) makes the same provision for county proceedings.

2.5.6 State of emergency provisions

The constitutional provisions dealing with a state of emergency have already been dealt with in this chapter under the discussion on constitutional limitations. Suffice it to note here that many rights critical to protecting a free press can be derogated from during a state of emergency.

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

A number of institutions that are relevant to the media have been established under the Kenyan Constitution. These include:

- A body to set media standards which is, in practice, the Media Council of Kenya
- The Kenya National Human Rights and Equality Commission – which has been restructured to establish additional commissions, namely:
  - The Commission on Administrative Justice; and
  - The National Gender and Equality Commission,

  both of which are also dealt with below
- The Ethics and Anti-Corruption Commission,
- The judiciary.

2.6.1 The media standards body: The Media Council of Kenya

Article 34(5) of the Constitution of Kenya specifically instructs Parliament to make provision for the establishment of a body to set media standards and to regulate and monitor compliance with those standards. It specifies that the body should be independent of control by government, political or commercial interests, and that it should reflect the interests of all sections of society. The Media Council Act, Act 46 of 2013, establishes the Media Council of Kenya as this constitutional body, and we deal with this in detail below in this chapter.

2.6.2 The Kenya National Human Rights and Equality Commission

Bodies such as a human rights commission are important for the media because if they are truly independent of government, ordinary people as well as institutions like the media can turn to them for protection of their human rights, such as the right to freedom of expression. Such bodies are important in preserving human rights and can act as a bulwark against heavy handed or illegal government restrictions on fundamental rights. It goes without saying that the effectiveness of such institutions is usually linked to the level of genuine independence they enjoy.

The Kenya National Human Rights and Equality Commission (KNHREC) is established in article 59(1) of the Constitution. According to article 59(2), among the functions of the Commission are that it performs a watchdog role over state affairs, public administration and government, as well as investigating complaints. Every person has the right to complain to the KNHREC.

Further, article 59(2)(g) states that a function of the KNHREC is to act as the principal organ of the state in ensuring compliance with obligations under treaties and conventions relating to human rights.

In articles 59(4) and 59(5), Parliament is given authority to enact legislation that may restructure the KNHREC into two or more separate commissions with equivalent powers. Each successor commission has to be a commission within the meaning of Chapter 15 of the Constitution, and have the status and powers of a commission under that chapter. Two bodies have been created and are dealt with below.

A member of a commission (other than an *ex officio* member) or the holder of an independent office may be removed from office only for: serious violation of the Constitution or any other law; gross misconduct, whether in the performance of his or her functions or otherwise; physical or mental incapacity to perform the functions of office; incompetence; or bankruptcy. A person wishing to remove a member of a

commission must present a petition to the National Assembly setting out the alleged facts constituting that ground, according to article 251.

Article 254(3) specifies that every report required from a commission under this article must be published and publicised.

2.6.3 The Commission on Administrative Justice

The Commission on Administrative Justice (CAJ) is established in terms of the Commission on Administrative Justice Act, Act No. 23 of 2011. It came out of the constitutionally permissable restructuring of the KNHREC – article 59(4).

Under section 3(2) of the CAJ Act, the CAJ is the successor to the Public Complaints Standing Committee of the KNHREC and has taken over the ombudsman function of the KNHREC. The CAJ's functions under section 8 include:

- Investigating any conduct in state affairs, an act or omission, that is alleged or suspected to be prejudicial or improper, or that might lead to such
- Investigating complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector
- Reporting to the National Assembly bi-annually on the complaints investigated and remedial action taken
- Recommending compensation or other appropriate remedies against persons or bodies to which this act applies
- Providing advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures
- Publishing periodic reports on the status of administrative justice in Kenya
- Promoting public awareness of policies and administrative procedures on matters relating to administrative justice
- Taking appropriate steps in conjunction with other state organs and commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration

- Working with the Kenya National Commission on Human Rights to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration.

The chairperson and members of the CAJ are appointed for a single term of six years – section 14(1), and its secretary, who is the chief executive officer and appointed through a competitive process, is appointed for a five-year term, renewable once – section 21.

In the performance of its functions, the CAJ has the powers of the court to issue summonses, question any person with respect to the matter under investigation, and require any person to disclose any information within the person's knowledge relevant to the investigation – section 27.

The CAJ is required to investigate any complaint but may, on its own initiative, investigate any other matter arising from the carrying out of an administrative action of a public office, a state corporation or any other body or agency of the state – section 29. However, among the things it may not investigate are:

- Proceedings or a decision of the Cabinet or a committee of the Cabinet
- A criminal offence
- A matter pending before a court or judicial tribunal
- The grant of honours or awards by the president – section 30.

Complaints to the CAJ may be made by the person aggrieved by the matter, or on that person's behalf by a family member or other suitable representative if the aggrieved person is dead or not able to act for themselves, or by a member of the National Assembly with the consent of the aggrieved person or their suitable representative – section 32.

The CAJ is funded by Parliament, monies or assets that accrue to it in the course of the performance of its functions and all monies from any other source provided, donated or lent to it – section 45.

A person who obstructs the CAJ or its staff, submits false or misleading information, fails to honour a summons, or misrepresents or knowingly misleads the CAJ commits an offence punishable by a fine, imprisonment or both – section 52.

The annual report of the CAJ under article 254 of the Constitution has to be published in the Gazette and at least one national newspaper – section 53.

The CAJ is empowered by section 56 to make regulations for the better carrying into effect of the provisions of the CAJ Act.

The CAJ is important for the media because it is a body with a particular focus on the operations of the public sector. Operating effectively, it could only have a beneficial impact, improving transparency, accountability and responsiveness of the public sector – issues that are important when reporting on the activities of the public sector.

2.6.4 The National Gender and Equality Commission

The National Gender and Equality Commission (NGEC) is also a successor commission of the KNHREC, in accordance with article 59 of the Constitution, and has the status and powers of a commission under Chapter Fifteen of the Constitution. It was established in terms of the National Gender and Equality Commission Act of 2011.

The NGEC's role is, essentially, to promote equality and freedom from discrimination. While the NGEC's objectives appear far removed from the work of the media, it is important for the media to be aware that such a body exists and that discriminatory publications are likely to be acted upon by this body.

2.6.5 The Ethics and Anti-Corruption Commission

The Ethics and Anti-Corruption Commission (EAC) is provided for in section 79 of the Constitution and it has the status and powers of other commissions established under Chapter Fifteen of the Constitution.

The EAC's role is to ensure compliance with, and enforcement of, the provisions of Chapter 6 of the Constitution, which is headed 'Leadership and Integrity' and which contains standards for the conduct of public officials, including in respect of ethical standards, financial probity and other employment.

This body is important for the media because it enforces compliance by public officials with constitutional standards of ethics and tries to root out corruption. These kinds of activities lead to more transparent and accountable government, which ultimately assists the media in its work.

Parliament has passed the Ethics and Anti-Corruption Commission Act, No. 22 of 2011 to regulate the establishment and functioning of the EAC. We do not set out its provisions in detail here.

2.6.6 The judiciary

The judiciary (or judicature) 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.

Part 1 of Chapter Ten of the Constitution of Kenya is headed 'Judicial Authority and Legal System'. In terms of article 159 of the Constitution of Kenya, judicial authority vests in and is exercised by the courts and tribunals established under the Constitution.

Article 160(1) states: 'In the exercise of judicial authority, the Judiciary … shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority'. Article 159 requires that justice shall be done to all irrespective of status, and shall not be delayed.

A guiding principle for courts and tribunals in article 159(2)(d) states that 'justice shall be administered without undue regard to procedural technicalities'.

In terms of article 162, the system of courts in Kenya consists of three superior courts, namely:

- *The Supreme Court*
  - The Supreme Court is the apex court in Kenya. In terms of article 163(7) of the Constitution of Kenya, all courts other than the Supreme Court, are bound by the decisions of the Supreme Court. Article 163(8) gives it the power to make rules for the exercise of its jurisdiction, and article 163(9) specifies that an act of Parliament may make further provision for its operation.
  - The Supreme Court has exclusive original jurisdiction to hear and determine disputes relating to the elections to Office of the President – article 163(3)(a).
  - In terms of article 163(1) of the Kenyan Constitution, the Supreme Court consists of: the chief justice, who shall be the president of the court; the deputy chief justice, who shall deputise for the chief justice and be the vice president of the court; and five other judges. However, article 163(2) states that it 'shall be properly constituted

for the purposes of its proceedings if it is composed of five judges'. All of the above are appointed by the president, upon the recommendation of the Judicial Service Commission (JSC), and subject to the approval of the National Assembly, in terms of article 166(1).

- *The Court of Appeal*
  - In terms of article 164(3) of the Constitution of Kenya, the Court of Appeal has jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by an act of Parliament.
  - It consists of no fewer than 12 judges and is organised and administered as prescribed by an act of Parliament (article 164(1)(a)). The president of the Court of Appeal is elected by the judges of the court from among themselves (article 164(2)).

- *The High Court*
  - The High Court, and courts with the status of High Court established by Parliament, are the third kind of superior court in Kenya. The courts established by Parliament deal with employment and labour relations, the environment and the use and occupation of land and title thereto.
  - In terms of article 165 of the Kenyan Constitution, the High Court has unlimited original jurisdiction to determine any civil or criminal proceedings under law, except issues reserved for the courts established by Parliament with the status of the High Court. It also has jurisdiction under article 165(3)(d) to hear any question respecting the interpretation of the Constitution. Effectively, this ambit allows the High Court to enquire into any matter of law in Kenya.
  - In terms of article 165(1) of the Kenyan Constitution, the High Court is made up of the principal judge (who is elected by the judges of the High Court from among themselves) and such number of *puisne* judges (judges other than the chief justice) as may be prescribed by Parliament. In terms of article 166(1) of the Kenyan Constitution, the *puisne* judges shall be appointed by the president in accordance with the recommendation of the JSC.

A superior court judge may be removed from office only for inability to perform the functions of his or her office arising from mental or physical incapacity, a breach of a code of conduct prescribed for judges of the superior courts by an act of Parliament, bankruptcy, incompetence, or gross misconduct or misbehaviour. The process for

removal is set out in article 168(2)–(7). Essentially, the removal of a judge may be initiated only by the JSC. It sends a petition to the president and he is required to suspend the judge from office within 14 days of receipt thereof.

Appeals lie from the Court of Appeals to the Supreme Court as of right in any case involving the interpretation and application of the Constitution, and in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved – article 163(4)(a). However, the High Court has jurisdiction to hear any question in respect of the interpretation of the Constitution including the determination of:

- Whether any law is in contravention of the Constitution – article 165(3)(d)(i)

- Matters relating to Constitutional powers of state organs in respect of county governments and the constitutional relationship between levels of government –article 165(3)(d)(iii).

It should be noted that this authority is subject to article 165(5), which specifies that the High Court does not have jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court, or matters falling within the jurisdiction of the Parliament-established courts, which determine employment and labour relations issues, and environment and land issues.

In terms of article 169, the system of courts in Kenya also comprises subordinate courts, namely:

- *The magistrates' courts*
  - The Constitution does not provide information regarding the jurisdiction of the magistrates' courts, but does state in article 169(2) that Parliament shall enact legislation conferring jurisdiction, functions and powers on the subordinate courts established under article 169(1). The Magistrates' Courts Act, No. 26 of 2015, gives effect to articles 23(2) and 169(1)(a) and (2) of the Constitution by conferring jurisdiction, functions and powers on the magistrates' courts, and providing the procedure of the magistrates' courts.

- *The kadhis' courts*
  - These courts have jurisdiction only over questions of Muslim law relating to personal status, marriage, divorce or inheritance, according to article 170(5). They are established under the Kadhis' Courts Act, Chapter 11 R(2012).

- *Courts martial*
  - The Constitution does not provide information regarding the jurisdiction of the courts martial, but does state in article 169(2) that Parliament shall enact legislation conferring jurisdiction, functions and powers on the subordinate courts established under article 169(1). Section 160 of the Kenya Defence Force Act, No. 25 of 2012, provides for the constitution of the courts martial. Guiding principles of these courts are set out in section 161 of that act. Acts of Parliament confer jurisdiction, functions and powers on these subordinate courts, and may establish any other court or local tribunal – section 169(2).

2.6.7 The Judicial Service Commission

The JSC is a constitutional body that is established in terms of article 171(1) of the Kenyan Constitution to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice.

Its functions are to:

- Recommend persons for appointment as judges to the president
- Review and make recommendations on conditions of service of judges and judicial officers (excluding remuneration), and the staff of the judiciary
- Appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the judiciary, in the manner prescribed by an act of Parliament
- Prepare and implement programmes for the continuing education and training of judges and judicial officers
- Advise the national government on improving the efficiency of the administration of justice.

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 whom are essential for democracy.

Article 171(2) of the Kenyan Constitution specifies that the JSC is made up of 11 members, namely:

- The chief justice (the chairperson)
- A Supreme Court judge elected by his fellows
- One Court of Appeal judge elected by his fellows
- One High Court judge and one magistrate (one of whom must be a woman and the other a man, elected by the members of the association of judges and magistrates)
- The attorney general
- Two advocates (one of whom must be a woman and the other a man, each of whom has at least 15 years' experience, elected by the members of the statutory body responsible for the professional regulation of advocates)
- One person nominated by the Public Service Commission
- One woman and one man to represent the public, not being lawyers, appointed by the president with the approval of the National Assembly.

The chief registrar of the judiciary is the secretary to the JSC, and members of the JCS, apart from the chief justice and the attorney general, hold office, provided that they remain qualified, for a term of five years and shall be eligible to be nominated for one further term of five years.

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.

Section 20(1) of the Constitution specifies that the Bill of Rights applies to all law and binds all state organs and all persons, though it does not clarify whether this includes juristic persons (such as a company). It is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights – section 21(1).

While rights are generally enforceable through the courts, the Constitution itself also envisages the right of people, including the media, to approach a constitutional body such as the EAC, NGEC and the KNHREC, to assist in the enforcement of rights.

Article 23, 'Authority of the courts to uphold and enforce the Bill of Rights', gives the High Court jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

According to article 23(2), Parliament must enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Article 23(3) lists the reliefs available, including:

- Declaration of rights
- An injunction
- A conservatory order
- A declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24, the general limitations clause
- An order for compensation
- An order of judicial review.

Perhaps one of the most effective ways in which rights are protected under the Constitution is through the provisions of the Constitution – that is, articles 255–257 – that require a constitutional amendment of the Bill of Rights to be put to a referendum, as well as requiring the support of at least two-thirds of the National Assembly and the Senate, respectively, at its second and third readings.

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 129(1) of the Constitution of Kenya states that executive authority derives from the people of Kenya, and article 130 of the Constitution of Kenya provides for a national executive consisting of:

- The president
- The deputy president
- The rest of the Cabinet, which must reflect the regional and ethnic diversity of the people of Kenya.

Additional authority of the president is covered in the remaining parts of article 131(1) of the Constitution of Kenya, and provide that the president of the Republic of Kenya shall be the head of state and government as well as the commander-in-chief of the defence force and chairperson of the National Security Council.

The president is elected in a national election conducted on the same day as a general election – article 136(2)(a), or assumes office whenever the Office of the President becomes vacant, in terms of article 139 read with articles 144, 145 and 146 of the Constitution. The presidential election procedure is set out in article 136, and the election is by registered voters (who must be citizens over the age of 18) and by secret ballot.

Article 152 of the Constitution of Kenya provides for a cabinet consisting of the president, the deputy president, the attorney general and not fewer than 14 and not more than 22 Cabinet secretaries. The main role of Cabinet is to advise the president with respect to the policy of the government. In terms of article 153(2), Cabinet secretaries are accountable individually and collectively to the president for the exercise of their powers and the performance of their functions. They are required, under article 153(4)(b), to provide Parliament with full and regular reports concerning matters under their control.

Each candidate in a presidential election nominates another person, who is qualified for nomination for election as president – article 137, as a candidate for deputy president – article 148. There is no separate nomination process for deputy president. The Independent Electoral and Boundaries Commission (IEBC) declares the candidate nominated by the person elected as president to be elected as deputy president. The general role of the deputy president is to be the principal assistant to the president and to deputise for the president in the execution of the president's

functions – article 147. The deputy president is to perform functions specified in the Constitution, and any other functions as assigned to him by the president. Subject to article 134, when the president is absent or is temporarily incapacitated, and during any other period that the president decides, the deputy president shall act as the president. The deputy president shall not hold any other state or public office – article 147(4).

In terms of article 152 of the Constitution of Kenya, the president nominates and, with the approval of the National Assembly, appoints cabinet secretaries. A Cabinet secretary may not be an MP. The president may reassign or dismiss a Cabinet secretary, but *has* to dismiss a Cabinet secretary if required to do so by a resolution adopted by a majority of the members of the National Assembly after conducting the processes provided for in article 152(6)–(10).

THE LEGISLATURE

Legislative or law-making power in Kenya vests in Parliament, which, in terms of article 93 of the Kenyan Constitution, consists of the National Assembly and the Senate. Article 109(1) provides that the legislative power of Parliament is exercised through bills passed by Parliament and assented to by the president.

In terms of article 97(1), the National Assembly consists of:

- 290 elected members, each elected by the registered voters of single member constituencies, as specified in article 89(1)
- 47 women, each elected by the registered voters of the counties, each county constituting a single member constituency
- 12 members nominated by parliamentary political parties according to their proportion of members of the National Assembly, in accordance with article 90, to represent special interests, including the youth, persons with disabilities and workers
- The speaker, who is an *ex officio* member. Article 106(1)(a) provides for a speaker for each house of Parliament who is elected in accordance with the Standing Orders, from among persons who are qualified to be elected as MPs but are not such members. Article 106(1)(b) provides for a deputy speaker for each house of Parliament, but election is from among the members of the relevant house.

In terms of article 98(1), the Senate consists of:

- 47 elected members, each elected by the registered voters of the counties, each county constituting a single member constituency, as per article 98(1)(a)

- 16 women who are nominated by political parties according to their proportion of members of the Senate elected under article 98(1)(a) in accordance with article 90, which details the allocation of party list seats

- Two members – one man and one woman – representing the youth

- Two members – one man and one woman – representing persons with disabilities

- The speaker, who is an *ex officio* member. Article 106(1)(a) provides for a speaker for each house of Parliament who is elected in accordance with the Standing Orders, from among persons who are qualified to be elected as MPs but are not such members. Article 106(1)(b) provides for a deputy speaker for each house of Parliament, but election is from among the members of the relevant house.

The quorum of Parliament is 50 members in the case of the National Assembly and 15 members in the case of the Senate – article 121.

Election is by universal adult suffrage (citizens over the age of 18, as defined in article 260) and by secret ballot – article 38. The elections for the seats in Parliament and for the members of county assemblies is on the basis of proportional representation by use of party lists – article 90(1). The IEBC is responsible for the conduct and supervision of the elections, as well as ensuring that the party lists are correctly formulated – lists must alternate between male and female candidates in the priority in which they are listed, and except in the case of county assembly seats, each party list must reflect the regional and ethnic diversity of the people of Kenya – article 90(2)–(3).

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.

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 Kenya has done, is to separate the functions

of the three branches of government – the executive, the legislature and the judiciary – so that no single branch is able to operate alone, assume complete state control and amass centralised power. While each branch performs a number of different functions, each also plays a 'watchdog' role in respect of the others. 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

The Constitution of Kenya contains many protections and freedoms for the media, however, there are weaknesses that ought to be strengthened to better protect the media.

2.9.1 Remove internal constitutional qualifiers to certain rights

The Constitution of Kenya, as has been set out above, makes provision for certain rights to be subject to 'internal' limitations – that is, the provision dealing with a right contains its own limitations clause, setting out ways in which a government can legitimately limit the ambit of the right.

These internal limitations occur within a number of articles on rights in the Constitution of Kenya. They deal specifically and only with the limitation or qualification of the particular right that is dealt with in that article. As has been more fully discussed above, the rights to freedom of expression and of the media contain such internal limitations. In other words, the article that contains the right also sets out the parameters or limitations allowable in respect of that right.

The rights contained in the provisions dealing with fundamental human rights and freedoms would be strengthened if the rights were subject only to a single generally applicable limitations clause rather than each having their own limitations clause. Indeed, such a general limitations clause already exists in article 24 of the Kenyan Constitution and so it is not clear why the internal limitations clauses are even necessary.

2.9.2 Independent public broadcaster and broadcasting regulator

There is no doubt that the broadcasting sector would be greatly strengthened if the Kenyan Constitution gave constitutional protection for a truly independent public broadcaster and broadcasting regulator. Given the importance of the public broadcaster and broadcasting regulator 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 Kenya.

3 THE MEDIA AND LEGISLATION

In this section you will learn:

- ❑ What legislation is and how it comes into being
- ❑ Legislation governing journalists
- ❑ Legislation governing the print media
- ❑ Legislation governing the making, exhibition and broadcasting of films
- ❑ Legislation governing the internet
- ❑ Legislation governing the broadcast media generally
- ❑ Legislation that regulates the state broadcaster
- ❑ Legislation governing broadcasting signal distribution
- ❑ Legislation that threatens a journalist's duty to protect sources
- ❑ Legislation that prohibits the publication of certain kinds of information
- ❑ Legislation relating to the interception of communication
- ❑ Legislation that specifically assists the media in performing its functions

3.1 Legislation: An introduction

Note: The practice in Kenya is to refer to legislation by chapter (e.g. CAP 63 of the Laws of Kenya), as opposed to year of enactment, and in citing the chapter, all amendments thereto should be considered to have been taken into consideration. However, this reference work is intended for a wider audience than just Kenyans, and so the year of commencement has been included in the CAP references.

Note that a reference to the Cabinet secretary in any law is a reference to the Cabinet secretary responsible for the administration of that law.

3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed by Parliament, the legislative authority. As we know, legislative authority in Kenya vests in Parliament, which is made up of the National Assembly and the Senate. The president is involved in enacting legislation.

There are detailed rules in the Constitution of Kenya which set out the different law-making processes that apply to different types of legislation. It is important for journalists and others in the media to be aware that the Constitution of Kenya requires different types of legislation to be passed in accordance with particular

procedures, as contained in Part 4, 'Procedures for Enacting Legislation'. The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the Constitution of Kenya, there are four kinds of legislation, each of which has particular procedures and/or rules applicable to it. These are:

- Legislation that amends the Constitution – articles 255–257 of the Constitution
- Legislation not concerning county government – articles 109 and 122 of the Constitution
- Legislation concerning county government – articles 109–113 and 122–123 of the Constitution
- Legislation that deals with financial measures – articles 109 and 114 of the Constitution

3.1.2 The difference between a bill and an act

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

In Kenya, if a bill is passed by Parliament in accordance with the various applicable procedures required for different types of bills, as set out above, it becomes an act once it is assented to by the president, in terms of articles 115(1)(a), 115(5)(b) or 115(6) of the Constitution of Kenya. Article 115 contains mechanisms for the president to refer a bill back to Parliament should he or she have any reservations, and for a deadlock between Parliament and the president to be broken by a two-thirds vote in both the National Assembly and the Senate (if Senate's approval is required).

An act must be published in the Gazette and becomes law only when it has been so published – article 116(1)–(2). Note, however, that it is possible for Parliament to make retrospective laws, in terms of article 116(2).

It is also important to be aware that some laws governing certain media-related aspects came into force prior to the coming into effect of the 2010 Constitution of Kenya. As they were passed by the governing authority of the time and have yet to be repealed, they are still good law.

3.2 Legislation governing journalists

Section 5(1) of the Media Council Act, Act 46 of 2013 establishes the Media Council of Kenya, a body which is independent of control by government, political and commercial interests – section 11. The appointments process for members of the

Media Council is dealt with elsewhere in this chapter. Section 6 describes its functions, and the ones that are of particular importance to journalists include:

- Promoting and protecting the freedom and independence of the media
- Prescribing standards for journalists, media practitioners and media enterprises, and promoting ethical and professional standards, as well as regulating and monitoring compliance therewith
- Ensuring the protection of the rights and privileges of journalists in the performance of their duties
- Advising the government and setting standards for the training of journalists
- Accrediting Kenyan and foreign journalists by certifying their competence, authority or credibility against official standards based on the quality and training of Kenyan journalists. Accreditation is valid for a renewable period of 12 months, according to section 46(2)
- Compiling and maintaining a register of accredited journalists, media enterprises and such other related registers as it may deem fit, and issuing accreditation documents
- Facilitating resolutions of disputes between the media and government, the media and the public, and intra-media disputes.

Section 27 of the Media Council Act establishes the Complaints Commission, a separate body whose members are appointed in the same manner as applies to the members of the Media Council. It is independent in its operations, functions and powers, according to section 30, and must be guided by article 159 of the Constitution. Section 30 states that its functions are to:

- Mediate or adjudicate in disputes between the government and the media, between the public and the media, and in intra-media ethical issues
- Ensure adherence to the Code of Conduct for the Practice of Journalism (Journalism Code) in the Second Schedule of the Media Council Act
- Achieve impartial, speedy and cost-effective settlement of complaints against journalists and media enterprises.

Any person aggrieved by a publication or the conduct of a journalist may complain

to the Complaints Commission, according to section 34(1)(a), as may any person aggrieved by anything done against a journalist that limits or interferes with the constitutional freedom of expression of the journalist – section 34(1)(b). Part of its mandate is almost identical to that of the Communications and Multimedia Appeals Tribunal under section 102A of the Kenya Information and Communications (KIC) Act, and these two bodies cross-refer complaints. The factors that would determine which body hears which complaint are unclear from the legislation. However, the Communications and Multimedia Appeals Tribunal hears appeals from decisions of the Media Council and the Communications Authority of Kenya (CA), while the Complaints Commission does not.

According to section 45(1), journalists shall at all times comply with the code of conduct set out in the Second Schedule of the Media Council Act (Journalism Code). Clause 1 of the Journalism Code clarifies that it applies to journalists, media practitioners and foreign journalists.

The Journalism Code contains 26 clauses detailing the required conduct of the media. In brief, these are the following:

- *Undue pressure or influence*
  - News must be gathered and reported without fear or favour.
  - A journalist may not solicit or accept gifts, favours or payment from those who may seek to influence coverage, nor engage in activities that may compromise their integrity and independence.
  - A journalist is to resist undue influence – financial or intimidatory – from any outside forces, including advertisers, sources, story subjects, powerful individuals and special interest groups, and news content is to be determined solely through editorial judgment.
  - Self-interest or peer pressure that might undermine journalistic duty and service to the public is to be resisted.
  - Journalists may not use financial information they receive in advance for their own benefit or pass the information to others, nor may they write or broadcast about any market instruments in which they or their close family have a significant financial interest in without disclosing the interest to the editor. Also, journalists may not buy or sell, directly or through an agent, market instruments about which they intend to write in the near future.

- *Public interest*
  - Stories of public interest are to be fair, accurate and unbiased, with all sides of the story reported wherever possible.

- *Payment for information*
  - Story sources who have a vested interest in the story may not be paid.
  - Sponsorship of the news may not determine, restrict or manipulate content.

- *Reporting of investigations*
  - Surreptitious news gathering techniques, including hidden cameras or microphones, may be used only if there is no other way of obtaining stories of significant public importance, and the technique must be explained to the audience.

- *Privacy*
  - The public's right to know must be weighed against the privacy rights of people in the news.

- *Intrusions into grief or shock*
  - Pictures of grief and disaster are discouraged.
  - Coverage must show respect, dignity and compassion to victims of tragedy.

- *Interviewing or photographing children*
  - Except in matters of public interest, such as child abuse or abandonment, a journalist may not interview or photograph a child in the absence of and without the consent of the adult responsible for the child's welfare.
  - Children may not be approached or photographed while at school.

- *Children in criminal cases*
  - Children may not be identified in cases concerning sexual offences.

- *Victims of crime*
  - Coverage must show respect, dignity and compassion to victims of crime.
  - Victims of sexual assault are not to be identified, nor is material to be published that will facilitate their identification.

- *Innocent relatives or friends*
  - Relatives or friends of persons convicted or accused of crimes are not to be identified unless it is necessary for full, fair and accurate reporting.

- *Gathering of information*
  - Comment is to be sought from anyone mentioned in an unfavourable context and records of attempts to seek the comment are to be kept.
  - Journalists must generally identify themselves, and not obtain information or photographs through misrepresentation or subterfuge. The latter is justifiable only when the information is in the public interest and cannot be obtained by any other means.

- *Presenting information*
  - News is to be presented fairly and impartially, with primary value being placed on significance and relevance. Professional, analytical reporting is required, not personal bias.
  - Corrections are to be done promptly without restating the error, except when clarity demands it. A correction must be given the same prominence as the information being corrected.

- *Discrimination and hate speech*
  - The public is to be informed without bias or stereotype, and a diversity of expressions, opinions and ideas must be presented in context.
  - Information on ethnic, religious or sectarian disputes may be published only after proper verification of the facts, and in a manner which will not inflame relations between groups.
  - Pictures that embarrass and promote sexism are discouraged.
  - Newspapers may not permit the columns to be used for writings which encourage or glorify social evils, warlike activities, or ethnic, racial or religious hostilities.
  - Quoting persons making derogatory remarks based on ethnicity, race, creed, colour or sex is not allowed.

- *Comment*
  - There must be clear differentiation between fact and comment or conjecture.

- *Headlines, posters, pictures and captions*
  - Headings must reflect and justify the matter printed under them.
  - Headings containing allegations made in statements must identify the source, or at least be in quotation marks.
  - Techniques, including photo manipulations, that skew facts, distort reality or sensationalise events are to be avoided.

- *Confidential sources*
  - All persons subject to the Media Council Act and the Journalism Code have a professional obligation to protect confidential sources.
  - The identity of a confidential informant must be known to the editor and reporter.
  - Source are to be identified whenever possible. Confidential sources shall be used only when it is clearly in the public interest to gather or convey important information, or when the person providing the information may be harmed.

- *Violence and obscenity*
  - Obscene material is not to be published, unless such material contains news.
  - Publication of violent, bloody or abhorrent scenes must be avoided, unless the publication or broadcast will serve the public interest. Where possible, a warning must be issued to viewers or readers in advance.

- *General conduct*
  - All subjects of news coverage are to be treated with respect and dignity.
  - Taping or recording anyone may not be done without the person's knowledge. An exception may be made only if the recording is necessary to protect the journalist in a legal action or for some other compelling reason.
  - Articles or broadcasts with the potential to exacerbate communal trouble shall be avoided.
  - Women and men must be treated equally as news subjects and news sources.
  - Advertisements are required to adhere to the terms of the Journalism Code as well, and it is the editor's responsibility to ensure that they do so.

Section 45(2) of the Media Council Act provides that the Journalism Code may be amended by the Cabinet secretary on the recommendation of the Media Council.

Section 7 of the Penal Code, CAP 63 of 1930, restates the principle that ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence, so journalists would do well to keep up to date with all law affecting their profession.

Another key law for journalists is the Kenya Information and Communications Act, CAP 411A of 1998 (KIC Act). The KIC Act was significantly amended by the Kenya Information and Communications (Amendment) Act, 2013.

In terms of the KIC Act, the Communications and Multimedia Appeals Tribunal is established. The Tribunal is empowered to receive complaints from any person aggrieved by any publication or conduct of a journalist, by anything done against a journalist that limits or interferes with the constitutional freedom of expression of such a journalist or media enterprise, or any action taken, omission made or decision made by any person under the KIC Act – section 102A. Part of its mandate is almost identical to that of the Complaints Commission under section 34 of the Media Council Act, and these two bodies cross-refer complaints. It is unclear from the legislation what factors would determine which body hears which complaint. However, the Communications and Multimedia Appeals Tribunal hears appeals from decisions of the Media Council and the CA, while the Complaints Commission does not.

After hearing the parties to a complaint, section 102E(1) of the KIC Act gives the Communications and Multimedia Appeals Tribunal authority to, among other things:

- Order the offending party to publish an apology or correction in such a manner as the Tribunal may specify
- Make any directive and declaration on freedom of expression
- Issue a public reprimand to the journalist involved
- Order the offending editor of the broadcast, print or online material to publish the Tribunal's decision in such a manner as the Tribunal may specify
- Impose a fine on the journalist adjudged to have violated the KIC Act
- Recommend the suspension or removal from the register of the journalist involved.

3.3 Legislation governing the print media

Unfortunately, in terms of:

- The Books and Newspapers Act – CAP 111 of 1960
- The Media Council Act – Act 46 of 2013, and

- The Kenya Information and Communications Act – CAP 411A of 1998,

there are a number of constraints on the ability to operate a print media publication in Kenya. In particular, Kenya effectively requires the registration of newspapers, which is out of step with international best practice. These kinds of restrictions impinge upon the public's right to know by setting barriers to the establishment of print media operations.

❖ **The Books and Newspapers Act, CAP 111 of 2013**

The definition of a newspaper is extremely broad in the Books and Newspapers Act, and includes 'any … printed matter containing news, or intelligence, or reports of occurrences, of interest to the public or any section thereof, or any views, comments or observations thereon, printed for sale or distribution and published periodically or in parts or numbers at intervals not exceeding three months'. The definition of a book includes 'any magazine, review, Gazette, pamphlet, leaflet, sheet of letterpress, sheet of music, map, plan and chart, which is separately published, and any part or division thereof, but does not include a newspaper' – section 2.

Section 22 gives the minister responsible for the administration of the Books and Newspapers Act wide powers relating to the implementation of the act, including prescribing:

- The forms of registers, returns, applications, notices, bonds to be used
- The particulars, matters and information to be entered in the registers
- Fees payable
- The penalties for contravention, which may include a fine, imprisonment or both.

Section 11(1) of the Books and Newspapers Act makes the starting or printing of a newspaper a costly exercise. It provides that no person may print a newspaper, or publish one printed in Kenya, unless a bond of one million Kenyan shillings has been lodged with the Registrar of Books and Newspapers, as specified in section 11(3). The bond must have one or more sureties, as may be required by the registrar. This bond is intended as security for the payment of any monetary penalty or damages that may be imposed upon or adjudged against the publisher. It is also for the payment of any damages or costs awarded against the publisher in respect of any libel (that is, defamation) – section 11(1). Anyone who prints or publishes a newspaper without complying with the bond requirements is guilty of an offence and is liable to a fine, imprisonment or both. Subsequent offences result in a longer term of imprisonment and being barred from publishing or printing any newspaper in Kenya – section 14.

The large bond puts newspaper printing and publishing outside the reach of anyone

without significant financial muscle. This financial barrier interferes with the public's right to know.

Section 17 requires every book and newspaper printed in Kenya to have, printed in English on its first or last printed page, the name and address of its printer and of its publisher as well as the names of the places in which it is printed and published. Non-compliance is an offence punishable by imprisonment, a fine or both, as well as possible forfeiture or destruction of the printed materials.

According to section 18, a printer is required to keep a copy of every printed book or newspaper for six months after its publication date, and write on it the name, business and residential or postal address of the person who engaged for it to be printed. The printer is required to produce it for the Registrar, a court, judge or magistrate if requested in writing to do so. Non-compliance is an offence punishable by imprisonment, a fine or both.

Section 19 contains provisions that cause concern. Any police officer may seize any book or newspaper which he reasonably suspects of having been printed or published in contravention of the Books and Newspapers Act – section 19(1). Section 19(3) is particularly alarming as it gives any police officer of assistant inspector rank or above the right to enter and search any place where it is suspected that publications are being produced in contravention of the act, and to do so without a warrant if he or she has reasonable cause to believe that the delay while obtaining such a warrant would defeat the purposes of this act.

Section 20 of the Books and Newspapers Act spreads the responsibility for non-compliance with the act to every person involved with managing the company and makes them guilty of an offence. The onus is then on the individuals to prove their non-involvement or innocence of the charges.

Part II of the Books and Newspapers Act is entitled 'Deposit and Registration of Books and Newspapers'. The requirements specified in this section do not apply to any book or newspaper printed or published by or on behalf of the government – section 5(1). All book (and thus, magazine) publishers are required, by section 6(2), to deliver at their own cost up to three copies of the publication to the registrar appointed by the minister, and two copies to the director of the Kenya National Library Service, within the timeframes specified in section 6(1). Both the registrar and the director are required to issue a written receipt therefore to the publisher.

Section 7 requires the publisher of every newspaper printed in Kenya to provide two copies of the newspaper and two copies of every supplement carried with it to the

registrar on every day that the newspaper is published. A form detailing all such deliveries must be submitted to the registrar each year (section 8). Any publisher who fails to comply with sections 6, 7 and 8 is guilty of an offence and may be fined, imprisoned or both – section 9. Importantly, section 9(4) makes any person who sells or distributes any book or newspaper where the publisher has not complied with sections 6, 7 or 8 also guilty of an offence and liable to a fine, imprisonment or both.

The Books and Newspapers Act contains so-called subsidiary legislation after section 22 which details:

- Classes of books and newspapers excluded under section 5(2), which permits the minister to exclude any book, newspaper or class thereof from the deposit and registration requirements in Part II of the act

- Classes of persons excluded under section 10(2), which permits the minister to exclude any person or class of person from the bond requirements in Part III of the act

- The Books and Newspapers Rules, which summarise the requirements and procedures in terms of registration, deposits, returns, bonds and the forms required therefore

- Fees payable to the registrar for inspecting entries to the register, individual books or newspapers, and the charges for filing of returns of newspapers, books, changes of particulars and filing of a bond.

❖ **The Media Council Act, Act 46 of 2013**

The Media Council Act applies to media enterprises, journalists, foreign journalists accredited under this act, media practitioners, and consumers of media services – section 4.

Section 5(1) establishes the Media Council of Kenya, a body which is stated to be independent of control by government, political and commercial interests – section 11. The appointments process for members of the Media Council is dealt with elsewhere in this chapter. Section 6 describes its functions, including:

- Promoting and protecting the freedom and independence of the media

- Prescribing standards of journalists, media practitioners and media enterprises, and promoting ethical and professional standards, as well as regulating and monitoring compliance therewith

- Ensuring the protection of the rights and privileges of journalists in the performance of their duties

- Advising the government and setting standards for the training of journalists

- Accrediting Kenyan and foreign journalists by certifying their competence, authority or credibility against official standards based on the quality and training of Kenyan journalists. Accreditation is valid for a renewable period of 12 months, according to section 46(2)

- Subject to any other written law, considering and approving applications for accreditation by educational institutions that seek to offer courses in journalism. Only accredited institutions may offer or teach journalism courses. An unaccredited institution that teaches journalism courses commits an offence and its proprietor, director or manager is liable to a fine, imprisonment or both (section 47)

- Compiling and maintaining a register of accredited journalists, media enterprises and such other related registers as it may deem fit, and issuing accreditation documents

- Facilitating resolutions of disputes between the media and government, the media and the public, and intra-media disputes.

Section 6(2) requires the Media Council to ensure that the freedom and independence of the media is exercised in a manner that respects the rights and reputations of others, and does not compromise national security, public order, public health and public morals. The Cabinet secretary, in consultation with the Media Council, is authorised by section 6(3) to make regulations to give further effect to section 6(2).

According to section 22, an action may not lie against the Media Council or any of its officers or appointed persons in respect of anything done or omitted by them in good faith in the performance of their duties.

Section 27 of the Media Council Act establishes a Complaints Commission, a separate body whose members are appointed in the same manner as applies to the members of the Media Council. It is independent in its operations, functions and powers, according to section 30, and must be guided by article 159 of the Constitution. Any person aggrieved by a publication or the conduct of a journalist may complain to the Complaints Commission, according to section 34(1)(a), as may any person aggrieved

by anything done against a journalist that limits or interferes with the constitutional freedom of expression of the journalist – section 34(1)(b). Part of its mandate is almost identical to that of the Communications and Multimedia Appeals Tribunal, under section 102A of the KIC Act, and these two bodies cross-refer complaints. It is unclear from the legislation what factors would determine which body hears which complaint. However, the Tribunal hears appeals from decisions of the Media Council and the CA, while the Complaints Commission does not.

The functions of the Complaints Commission are to:

- Mediate or adjudicate in disputes between the media and the government, the media and the public, and intra-media disputes on ethical issues
- Ensure adherence to the standards of journalism provided for in the Code of Conduct for the Practice of Journalism in Kenya
- Achieve impartial, speedy and cost-effective settlement of complaints against journalists and media enterprises – section 31.

The Complaints Commission has the power to:

- Establish and maintain an internal mechanism for the resolution of disputes
- Prescribe procedures for determination of media-related disputes
- Receive, investigate and deal with complaints made against journalists and media enterprises
- Summon and receive information and evidence.

Any person aggrieved by a publication or the conduct of a journalist or media enterprise may complain to the Complaints Commission, as may any person aggrieved by anything done against a journalist or media enterprise that limits or interferes with the constitutional freedom of expression of such a journalist or media enterprise – section 34(1)(a) and (b). The complaint under section 34(1) must be in writing and must include the grounds for the complaint, the nature of the injury or damage suffered, and the remedy sought. Although section 32(4) states that a complainant's name, address and identity must be revealed to the Complaints Commission, the Commission may, under section 34(5), keep that information confidential or accept an anonymous complaint concerning an issue of public interest, or where no clearly identifiable person or group is affected.

Under section 34(8), the Complaints Commission may also take up a complaint on its own initiative, or refer a complaint to the Communications and Multimedia Appeals Tribunal, where the matter falls under the mandate of the Tribunal. Sections 35–38 of the Media Council Act detail the complaints, hearings and resolution procedures. A person aggrieved by a decision of the Complaints Commission may apply to the High Court, according to section 42(1), but the timeframe for this application is unclear. Section 42(2) specifies that the aggrieved person may, 'after 30 days after the Commission has made its decision', apply to the High Court, but section 43 specifies that the challenge has to take place within 30 days of the Commission's decision.

Except as expressly provided in the Media Council Act or any other regulations made thereunder, the Complains Commission has the power to regulate its own procedure – sections 33(3) and 44.

According to section 45(1), journalists and media enterprises shall at all times comply with the code of conduct set out in the Second Schedule of the Media Council Act (Journalism Code). The Journalism Code, which applies to Kenyan journalists, foreign journalists, media practitioners, and media enterprises, according to section 1 thereof, contains 26 sections detailing the required conduct of the media. They are dealt with above in this chapter in the section headed 'Legislation governing journalists', and are not repeated here.

Section 45(2) provides that the Journalism Code may be amended by the Cabinet secretary on the recommendation of the Media Council.

Section 7 of the Penal Code, CAP 63 of 1930, restates the principle that ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence, so print media houses would do well to keep up to date with all law affecting their businesses.

❖ **The Kenya Information and Communications Act, CAP 411A of 1998**

A key law for the print media is the Kenya Information and Communications Act, CAP 411A of 1998 (KIC Act). The act was significantly amended by the Kenya Information and Communications (Amendment) Act, 2013.

Under section 102 of the KIC Act, the Communications and Multimedia Appeals Tribunal was established. The Tribunal is empowered to receive complaints from any person aggrieved by any publication or conduct of a journalist or media enterprise, anything done against a journalist or media enterprise that limits or interferes with the constitutional freedom of expression of such a journalist or media enterprise, or any action taken, omission made or decision made by any person under the KIC Act

– section 102A. Part of its mandate is almost identical to that of the Complaints Commission under section 34 of the Media Council Act, and these two bodies cross-refer complaints. It is unclear from the legislation what factors would determine which body hears which complaint. However, the Communications and Multimedia Appeals Tribunal hears appeals from decisions of the Media Council and the CA, while the Complaints Commission does not.

It should be noted that the definition of 'media' in the KIC Act specifically excludes print and book publishing, but the Tribunal's authority extends to cover the print media. This is extremely confusing, and we include relevant provisions in this section given the Tribunal's jurisdiction over the print media.

According to section 8 of the Second Schedule of the KIC Act, the Communications and Multimedia Appeals Tribunal has the powers of the High Court with regard to:

- Administering oaths to the parties and witnesses to the proceedings
- Summoning witnesses and requiring the production of documents
- Ordering the payment of costs
- The provisions of the law relating to commissions of enquiry with respect to:
  - The protection of the members of the Tribunal from suit
  - The form of summonses to witnesses
  - The giving or fabricating of false evidence
  - The duty and indemnity of witnesses, and the penalty for contumacy, insult or interruption of proceedings
  - The appearance of advocates.

After hearing the parties to a complaint, section 102E(1) gives the Tribunal the authority to, among other things:

- Order the offending party to publish an apology or correction in such a manner as the Tribunal may specify
- Make any directive and declaration on freedom of expression
- Issue a public reprimand of the journalist or media enterprise involved
- Order the offending editor of the print material to publish the Tribunal's decision in such a manner as the Tribunal may specify

- Impose a fine on the media enterprise and journalist adjudged to have violated the KIC Act

- Recommend the suspension or removal from the register of the journalist involved.

Any person aggrieved by a decision or order of the Tribunal may, within 30 days of such a decision or order, appeal to the High Court. No decision or order of the Tribunal may be enforced until the time for lodging the appeal has expired, or until any appeal lodged has been determined – section 102G of the KIC Act.

Section 58 of the KIC Act forbids the sending by post of indecent or obscene printing, photographs, lithographs, engravings, books, cards or other obscene articles. This should be noted by publishers which distribute by mail.

3.4 Legislation governing the making, exhibition and broadcasting of films

The making and exhibition of films is governed by the Films and Stage Plays Act, CAP 222 of 1962 (Films Act). There are a number of constraints on the making and exhibition of films in Kenya.

The Films Act includes a number of regulations for makers and exhibitors of films which are covered in the relevant section of this chapter. These include the Forms and Fees Regulations and the Film Censorship Regulations.

Any person aggrieved by a decision of a licensing officer, licensing authority or the Kenya Film Classification Board may appeal to the minister responsible for the administration of the Films Act. The minister may confirm or modify the decision, and any decision the minister makes is final – section 29.

Further, the minister may revoke any licence or certificate of approval in writing served on the person to whom it was originally issued – section 30.

The Second Schedule to the Films Act lists the licence fees payable for:

- A film, recorded video, poster or trailers of a film
- Lodging of an appeal
- Annual licence for cinemas
- Annual licence for video show theatres and video vendors
- Annual licence for video libraries
- Commercials.

Nothing contained in the Films Act applies to the exhibition or making of any film by the government – section 36.

3.4.1 Licensing requirements to make a film in Kenya

In terms of section 4(1) of the Films Act, all films made in Kenya, whether for exhibition or sale within the country or outside it, have to be made in accordance with the terms and conditions of a filming licence issued by the licensing officer, who is appointed by the minister in terms of section 3. However, section 10 gives the licensing officer complete discretion to exempt from the provisions in Part II of the Films Act, any film or class of films, generally or by reference to the person or class of persons making the film or films. This can be done in writing or by notice in the Gazette.

Where any film is made in contravention of the conditions in section 4(1), every person involved in the making of the film is guilty of an offence punishable by a fine, imprisonment or both – section 4(2). In addition, or in lieu of any other penalty, the court may order the confiscation and destruction of the film – section 32. If any offence under this act, or transgression of the regulations made thereunder, is committed by a company or other body corporate, every person involved in the management of the company is guilty of an offence, and the onus is on the individual to prove innocence and/or non-involvement – section 33.

An application for a filming licence must be made to the licensing officer in writing, and must be accompanied by a full description of the scenes in, and the full spoken text of, the entire film, including those parts made outside Kenya – section 5(1). However, the licensing officer may, at his discretion, accept the application without the complete description and text. The licensing officer may require any non-English text to be translated into English, with the translation certified to his satisfaction – section 5(2). Where a licence has been granted, the film must be made in accordance with the furnished particulars and the conditions of the licence – section 8. Non-compliance makes all involved in the film guilty of an offence.

Prior to issuing the licence, the licensing officer may require the applicant to enter into a bond, with or without sureties, to ensure the film is made in accordance with the conditions of the licence, and that the description, text and other information supplied accords with the information provided to the licensing officer – section 6(2). Alterations and additions may be made to the film, but the licence will then need to be endorsed to include the amendments, in accordance with the same process as for the original licence – section 7. No films may be made that do not comply with the requirements of sections 6 and 7, and all involved in making a non-compliant film are

guilty of an offence. Further, section 18 prohibits the adding of any matter to a film after it has been approved for exhibition. Doing so voids the certificate of approval issued in terms of section 16 of the Films Act.

The issuing of licences is at the discretion of the licensing officer, and he or she may issue it subject to conditions, such as a person appointed by the licensing officer being present at the making of the film – section 6(1). The appointed person may intervene, if need be by force, to stop the making of any scene which in his opinion is in contravention of the licence or the specifications of section 9(1) of the Films Act. The licensing officer then determines whether to permit the resumption of the making of the film – section 9(2). Any person who hinders or obstructs the police officer or appointed person in the exercising of his duties is guilty of an offence – section 9(3), as are all involved in the making of the film should filming be resumed without the permission of the licensing officer or in contravention of the conditions he or she stipulates – section 9(4).

3.4.2 Requirements to exhibit a film in Kenya

There are a number of restrictions on the exhibition of films in Kenya, detailed in Part III of the Films Act. Section 11 of the Films Act establishes the Kenya Film Classification Board (Film Board).

Section 15 details the Film Board's functions, among which are:

- Regulating the creation, broadcasting, possession, distribution and exhibition of films by:
  - Examining every film and every poster submitted under the act for purposes of classification
  - Imposing an age restriction on viewership
  - Giving consumer advice, with due regard for the protection of women and children against sexual exploitation or degradation in cinematograph films and on the internet.
- Licensing and issuing certificates to distributors and exhibitors of films.

The Film Board is also empowered to make excisions from films – section 15(3). Its authority extends similarly to approving and excising posters for public display which advertise films. Any person who exhibits a film without the required excisions is guilty of an offence – section 15(6).

No person may exhibit or distribute any film unless he is registered as an exhibitor

or distributor by the Film Board and issued with a certificate – section 12(1). No film may be distributed, exhibited or broadcast, either publicly or privately, unless the Film Board has examined it and issued a certificate of approval for it – section 12(2). However, this condition does not apply to educational documentaries approved by the Kenya Institute of Education or to films restricted for use in the medical profession – sections 12(2)(a) and (b). Any person who exhibits a film in contravention of these restrictions is guilty of an offence – section 16(6).

Exhibition of a film or poster in contravention of the act is punishable by a fine, imprisonment or both. In addition, or in lieu of any other penalty, the court may order the confiscation and destruction of the film as well as the revocation of the certificate of approval or permission previously granted – section 32. If any offence under this act, or transgression of the regulations made thereunder, is committed by a company or other body corporate, every person involved in the management of the company is guilty of an offence, and the onus is on the individual to prove innocence and/or non-involvement – section 33.

Every application for a certificate of approval for a film has to be made to the Film Board, and the application must be accompanied by the entire film to which the film relates as well as every poster connected with it which is intended for public display. The Film Board may require any non-English text to be translated into English, with the translation certified to the Film Board's satisfaction – section 14.

3.4.3 Requirements to broadcast a film in Kenya

The Kenya Information and Communications Act, CAP 411A of 1998 (KIC Act), details in section 46I(2) requirements relating to the broadcasting of films. It specifies that where any cinematograph film has been submitted under any law for classification or censorship and approved for exhibition, and where approval of the film for exhibition has been denied or has been given subject to excisions, no broadcaster shall:

- In the case of any film in respect of which approval has been denied, broadcast the film or any part thereof

- In the case of any film that has been approved for exhibition subject to excisions therefrom, broadcast that film or any part thereof that includes any part required to be excised,

except with the consent of and subject to any conditions given by the Kenya Film Censorship Board established under the Films Act.

3.5 Legislation governing the internet

The Media Council Act, No. 46 of 2013, includes 'materials disseminated through the internet' in its definition of 'publication', and 'collecting, writing, editing and presenting news or news articles … [via] the internet' in its definition of 'journalism'.

Although no further mention of 'the internet' is made in the act, content producers for the internet would do well to know the contents of the act, especially the Code of Conduct for the Practice of Journalism in the Second Schedule, and which is dealt with under the heading 'Legislation governing journalists' above in this chapter.

Article 15(1)(a)(iii) of the Films and Stage Plays Act, CAP 222 of 1962, provides that the Kenya Film Classification Board (Film Board) includes among its functions 'giving consumer advice, having due regard to the protection of women and children against sexual exploitation or degradation … on the internet'.

A key law for the internet is the Kenya Information and Communications Act, CAP 411A of 1998 (KIC Act). The KIC Act was significantly amended by the Kenya Information and Communications (Amendment) Act, 2013.

In section 84D it provides that any person who publishes or transmits or causes to be published in electronic form, any material which is lascivious or appeals to the prurient interest, and its effect is likely to deprave and corrupt persons who read, see or hear the matter, is liable to a fine, imprisonment or both.

The provisions of the KIC Act relating to the powers and functions of the Communications and Multimedia Appeals Tribunal are applicable to internet content. These are dealt with under the heading 'Legislation governing journalists' above in this chapter.

3.6 Legislation governing the broadcast media generally

3.6.1 Legislation that regulates broadcasting generally

Broadcasting in Kenya is regulated by:

- The Kenya Information and Communications Act – CAP 411A of 1998 (KIC Act)
- The Media Council Act – Act 46 of 2013 (Media Council Act)
- The Kenya Broadcasting Corporation Act, CAP 221 of 1988 (KBC Act).

3.6.2 Establishment of the CA, the Media Council, the Complaints Commission and the Tribunal

Kenya has more than one authority involved in the regulation of broadcasting, namely:

- The Communications Authority of Kenya (CA), which is established under section 2 of the KIC Act.
- The Media Council of Kenya, which is established in terms of section 5(1) of the Media Council Act.
- The Complaints Commission, which is established under section 27 of the Media Council Act.
- The Communications and Multimedia Appeals Tribunal, which is established under section 102 of the KIC Act.

3.6.3 Main functions of the CA, the Media Council, the Complaints Commission and the Tribunal

THE COMMUNICATIONS AUTHORITY OF KENYA

According to section 5(1) of the KIC Act, the CA was established 'to licence and regulate postal, information and communication services'.

Section 5B provides that, in undertaking its functions, the CA must comply with the provisions of article 34(1)–(2) of the Constitution, and subject to constitutional article 24, the rights to freedom of the media and freedom of expression may be limited for the purposes and in the manner and to the extent set out in the KIC Act and any other written law. Such a limitation may only be to the extent that a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom – section 5B(3).

According to section 5C, the Cabinet secretary may issue to the CA policy guidelines of a general nature relating to the provisions of the KIC Act. Those guidelines have to be published in the Gazette.

The CA is responsible for issuing licences for:

- Signal distribution – sections 46O and 46N

- Broadcast radio stations and broadcast equipment – section 36
- Public, private and community broadcasting – section 46B
- Radio, television and any other class of licence as may be determined in accordance with the regulations – section 46B(2)(f).

Among other things, section 46A specifically requires the CA to:

- Promote and facilitate the development, in keeping with the public interest, of a diverse range of broadcasting services in Kenya
- Facilitate and encourage the development of Kenyan programmes
- Promote the observance of public interest obligations in all broadcasting categories
- Promote diversity and plurality of views
- Ensure the provision by broadcasters of appropriate internal mechanisms for dealing with complaints
- Protect the right to privacy of all persons
- Administer the broadcasting content aspect of the act
- Develop media standards
- Regulate and monitor compliance with those standards.

It may also revoke licences in accordance with the provisions of sections 46J and 46P. Any person who provides a broadcasting service without a broadcasting licence commits an offence, and is liable for imprisonment, a fine or both – section 46Q.

The CA may set standards for the time and manner of programmes to be broadcast by licensees under the KIC Act – section 46H(1).

Importantly, section 46H(2) empowers the CA to prescribe and review a programming code and a watershed period. The programming code has been prescribed by the CA and is dealt with in the section on regulations below in this chapter. However, broadcasters who are members of a body which has its own programming code enforced by that body, and accepted by the CA, may comply with the applicable self-regulatory programming code and not the programming code prescribed by the CA.

As part of its function, the CA is required, under section 84R(2), to promote, develop and enforce fair competition and equality of treatment among licensees. It may, on its own initiative or on request, investigate any licensee suspected of having committed any act, any omission, or engaged in a practice in breach of fair competition or equal access – sections 84S(1) and 84T.

Where a licensee is found to be competing unfairly, the CA may, among other things: require the licensee to pay a fine not exceeding the equivalent of 10% of the annual gross turnover of the preceding year for each financial year that the breach persists; and declare any anti-competitive agreement or contracts null and void immediately.

Section 104 to the KIC Act gives the CA the power to undertake the prosecution of any offence under the act, and an officer duly authorised in writing by the CA may conduct such a prosecution.

THE MEDIA COUNCIL OF KENYA

The Media Council was established in terms of the Media Council Act to have authority over a number of broadcasting-related issues including – section 6:

- Promoting and protecting the freedom and independence of the media, along with setting ethical and professional standards for media practitioners, media enterprises and media training, plus regulating and monitoring compliance therewith
- Advising the government or relevant regulatory authority on those issues
- Facilitating resolutions of disputes between the media and government, the media and the public, and intra-media disputes
- Conducting annual reviews of the performance and public opinion of the media, and publishing the results in at least two national circulation daily newspapers
- Tabling reports on its functions before Parliament, through the Cabinet secretary.

The work of the Media Council has a significant impact on journalists working for broadcasters. We have set out the legislative provisions dealing with the Media Council under the heading 'Legislation governing journalists' above in this chapter.

THE COMPLAINTS COMMISSION

The work of the Complaints Commission, established in terms of the Media Council

Act, applies to media enterprises generally, and as such affects the broadcasting sector. It is dealt with under the heading 'Legislation governing the print media' above in this chapter. Part of its mandate is almost identical to that of the Communications and Multimedia Appeals Tribunal under section 102A of the KIC Act, and these two bodies cross-refer complaints. It is unclear from the legislation what factors would determine which body hears which complaint. However, the Tribunal hears appeals from decisions of the Media Council and the CA, while the Complaints Commission does not.

THE COMMUNICATIONS AND MULTIMEDIA APPEALS TRIBUNAL

The Tribunal, established in terms of the KIC Act, is empowered to receive complaints from any person aggrieved by any publication or conduct of a journalist or media enterprise, by anything done against a journalist or media enterprise that limits or interferes with the constitutional freedom of expression of such a journalist or media enterprise, or any action taken, omission made or decision made by any person under the KIC Act – section 102A. Part of its mandate is almost identical to that of the Complaints Commission under section 34 of the Media Council Act, and these two bodies cross-refer complaints. It is unclear from the legislation what factors would determine which body hears which complaint. However, the Tribunal hears appeals from decisions of the Media Council and the CA, while the Complaints Commission does not.

Many of the functions of the Tribunal are dealt with under the heading 'Legislation governing the print media' above in this chapter, but there are some functions that relate specifically to broadcasting. The CA is the body that issues licences to broadcasting and signal distribution organisations. Part of the Tribunal's role is to hear the appeal of any person who is aggrieved by a decision of the Complaints Commission relating to:

- A broadcast complaint – section 46L(5)
- A refusal by the CA to grant a licence – section 79
- A refusal by the CA to renew a licence – section 81
- A modification the CA has made to a licence – section 82(5)
- A revocation of a licence by CA – section 83A(2)
- A decision by the CA regarding unfair competition – section 84T(8)

- Any dispute arising between a radio operator and the owner or occupier of any land – section 85(5).

3.6.4 Appointment of members

THE COMMUNICATIONS AUTHORITY OF KENYA

According to section 6 of the KIC Act, the CA is managed by a board. The board comprises:

- A chairman, who is appointed by the president in accordance with the process laid out in section 6B
- The principal secretary for the time being responsible for matters relating to broadcast, electronic, print and all other types of media
- The principal secretary for the time being responsible for matters relating to finance
- The principal secretary for the time being responsible for matters relating to internal security
- Seven other persons appointed by the Cabinet secretary in accordance with the process laid out in section 6B.

In terms of section 6A(1) of the KIC Act, to be qualified for appointment to the board, a person has to:

- Be a citizen of Kenya
- Hold a degree from a university recognised in Kenya in any of the following fields: law; telecommunications, information and communications technology (ICT); broadcasting; postal regulation; humanities and social sciences; any other relevant field; or have a distinguished career spanning at least 20 years in the ICT sector
- Have experience in the relevant sector – 10 years for the chairman, five years for any other board member
- Satisfy the leadership and integrity requirements of Chapter Six of the Constitution.

Under section 6A(3), a person would be disqualified from board membership for reasons that include: having any direct or indirect commercial interest in the sector within the previous six months; being an office bearer or employee of a political party; being a public officer; being an undischarged bankrupt; having been convicted of a felony and sentenced to imprisonment; having been convicted of an offence under the KIC Act; having been removed from office for abuse thereof.

The board members are selected after a public nominations process detailed in section 6B. According to this section, vacancies on the CA Board have to be posted in the Gazette and on the official website of the ministry, and applications invited from qualified persons. The president or Cabinet secretary, as the case may be, has to convene a selection panel to evaluate and select appropriate candidates, which selection panel must comprise persons drawn from the:

- Media Council of Kenya
- Kenya Private Sector Alliance
- Law Society of Kenya
- Institute of Engineers of Kenya
- Public Relations Society of Kenya
- Kenya National Union of Teachers
- Consumers' Federation of Kenya
- Ministry responsible for matters relating to the media.

It is unclear whether or not these institutions are able to nominate representatives to the selection panel or whether the president or Cabinet secretary has the discretion to make the appointments from those organisations directly. The independence of the selection panel is largely determined by this critical issue and therefore it is unfortunate that the KIC Act is so vague in this regard.

Applications have to be forwarded to the selection committee within seven days of the publication of the notice, and the committee is required to prepare a shortlist and publish the names and qualifications of the shortlisted applicants in the Gazette and on the ministry's official website within the following seven days. Within the 14 days thereafter, the selection committee interviews the shortlisted applicants and then forwards to the president a list of three persons qualified to be chairperson, or to the Cabinet secretary two persons qualified to be board members in relation to each vacancy. The president or Cabinet secretary, as the case may be, has to make the appointment/s within 14 days of receipt of those names. All appointments are published in the Gazette. In selecting the CA board members, the president and Cabinet secretary must ensure that the board is representative of the interests of all sections of society, that equal opportunity was given for persons with disabilities and

other marginalised groups, and that not more than two-thirds of the members are of the same gender.

The chairperson and members of the board hold office for three years, renewable once – section 6C. A board member may be removed from office if he/she is found to be guilty of gross misconduct or is absent from three consecutive meetings without permission of the board, except for good cause shown – section 6D. The procedure for removal of a member of the CA Board under section D has to be carried out in accordance with administrative justice requirements in article 47 of the Constitution.

Section 7(f) gives the CA the authority to establish a broadcasting standards committee and such other committees as may be necessary to carry out its functions, and section 7(g) gives it the authority to co-opt persons whose skills and expertise may be necessary for the functioning of the CA. Any co-opted person may attend board meetings, but may not vote.

The director general (DG) is chief executive of the CA and is responsible for the day-to-day management thereof – section 11(1). The DG is an *ex officio* member of the board, but does not have a board vote – section 11(2). Sections 11(3), (4) and (6) specify that the DG is to be recruited and appointed by the board through a competitive process, that the terms and conditions of the DG's service are determined by the CA, in consultation with the Public Service Commission, and that the DG is appointed for a term of four years, renewable once.

THE MEDIA COUNCIL OF KENYA

Under section 7(1) of the Media Council Act, the Media Council consists of:

- A chairperson and seven other members appointed by the Cabinet secretary on the recommendation of a selection panel convened by him, and
- One person nominated by the Cabinet secretary.

The 13-member selection panel comprises individuals nominated by the following organisations – section 7(3):

- Kenya Union of Journalists
- Media Owners Association
- Kenya Editors' Guild
- Law Society of Kenya
- Kenya Correspondents Association
- Public Relations Society of Kenya

- National Gender and Equality Commission
- Association of Professional Societies in East Africa
- Consumers Federation of Kenya
- The ministry responsible for matters relating to the media
- Kenya News Agency
- Two persons nominated by the journalism schools of recognised universities, one public and one private.

The Cabinet secretary is required by section 7(2)(a) to place a notice in the Gazette and at least two national circulation newspapers declaring any vacancies in the Media Council. Applications from qualified individuals received within the following seven days are forwarded to the selection panel – section 7(5). Only citizens of Kenya qualify to be members of the Media Council, according to section 8. The selection panel draws up a shortlist, and publishes the names and qualifications of all shortlisted applicants in the Gazette and two national circulation newspapers – section 7(7). After interviewing the shortlisted applicants – section 7(8) – the selection panel chooses one person as chairman and seven members, and forwards the names to the Cabinet secretary – section 7(9). Under section 7(11), the Cabinet secretary may reject any nominations solely on the grounds specified in section 8(2), which deals with circumstances which would disqualify a person from Media Council membership, after which the selection panel puts forward another person from the shortlist – section 7(12).

The selection panel and the Cabinet secretary are required by section 7(14) to ensure that:

- The nominees to the Media Council reflect the interests of all sections of society
- Equal opportunities are provided for persons with disabilities or other marginalised groups
- Not more than two-thirds of the Media Council members are of the same gender.

After the appointment of the Media Council chairperson and members, the selection panel is dissolved – section 7(15).

Under section 12(1), the chairperson and members of the Media Council serve a three-year term, renewable once, and serve on a part-time basis – section 12(2). The chairperson or a member of the Media Council may be removed from office for, among other things, violation of the Constitution, gross misconduct, physical or mental incapacity, incompetence or neglect of duty, or acceptance of any position or shares that would result in a conflict of interest with his/her official duties to the Media Council – section 14(1). Anyone wishing to remove a Media Council member

has to present a written petition to the National Assembly, according to section 14(2), and the National Assembly forwards any satisfactory complaint along with its recommendation to the Cabinet secretary – section 14(3). The Cabinet secretary is required to appoint a three-person tribunal to consider the petition, according to section 14(4), and if the tribunal determines the grounds are sufficient for removal, shall recommend the Cabinet secretary remove the member from office – section 14(5). The Cabinet secretary is bound by the recommendation of the tribunal – section 14(7).

Section 17 provides for the appointment by the Media Council, after a competitive recruitment process, of a secretary to the Council who is the chief executive officer of the Media Council and is responsible for overall management of the Council. The secretary is an *ex-officio* member of the Media Council Board. The Council has the power to remove the secretary from office, according to section 18, without reference to the Cabinet secretary.

The Media Council may establish such committees as may be necessary for the better carrying out of its functions under section 9(1), and may co-opt persons with special knowledge and expertise as required – section 9(2).

According to section 22, an action may not lie against the Media Council or any of its officers or appointed persons in respect of anything done or omitted by them in good faith in the performance of their duties.

THE COMPLAINTS COMMISSION

Section 28 of the Media Council Act specifies that the chairperson of the Complaints Commission is required to be a person who holds or has held a judicial office in Kenya, or who is an advocate of the High Court of Kenya with at least 10 years' experience. The six other members of the Complaints Commission must have knowledge or experience in one of the following areas: journalism; media policy and law; media regulation; business practice and finance; the performing arts or entertainment; advertising practice; or related social sciences.

Section 27(2) specifies that the provisions related to the process of selecting members of the Media Council noted in sections 7(2)–(8) apply to the selection of members of the Complaints Commission as well. These are dealt with immediately above.

The chairperson and vice chairperson of the Complaints Commission are elected by the members themselves at their first meeting – section 28(2). The chairperson or a member of the Complaints Commission may be removed from office for, among

other things, violation of the Constitution, gross misconduct, physical or mental incapacity, incompetence or neglect of duty, or acceptance of any position or shares that would result in a conflict of interest with his/her official duties to the Complaints Commission – section 13(1) read with section 14(1).

In performing its functions, the Complaints Commission is required to be independent in operations and guided by the provisions of article 159 in the Constitution, which relate to judicial authority and principles – section 30.

THE COMMUNICATIONS AND MULTIMEDIA APPEALS TRIBUNAL

Under section 102(1) of the KIC Act, the Communications and Multimedia Appeals Tribunal comprises:

- A chairman, nominated by the JSC, who must be qualified to hold office as a judge in the High Court of Kenya, and possess experience in communication policy and law

- At least four persons with knowledge and experience in media, telecommunication, postal, courier systems, radio communications, information technology or business practice and finance, and who are not in the employ of the government, the Media Council or the CA.

Vacancies on the Tribunal have to be posted in the Gazette and in at least two national circulation newspapers within 14 days of its occurrence, and applications must be invited from qualified persons – section 102(2)(a). Within that time period, the Cabinet secretary has to convene a selection panel to evaluate and select appropriate candidates, which section 102(3) specifies must comprise persons drawn from the following organisations:

- Media Council of Kenya
- Kenya Private Sector Alliance
- Law Society of Kenya
- Institute of Engineers of Kenya
- Public Relations Society of Kenya
- Kenya National Union of Teachers
- Consumers Federation of Kenya
- The ministry responsible for matters relating to the media.

It is extremely unclear whether or not these institutions are able to nominate representatives to the selection panel or whether the Cabinet secretary has the discretion

to make the appointments from those organisations directly. The independence of the selection panel is largely determined by this critical issue and it is therefore unfortunate that the KIC Act is so vague in this regard.

Applications have to be forwarded to the selection committee within seven days of the publication of the notice, according to section 102(5), and the committee is required to prepare a shortlist and publish the names and qualifications of the shortlisted applicants in the Gazette and in at least two national circulation newspapers within the following seven days – section 102(7). Within the 14 days thereafter, section 102(8) requires the selection committee to interview the shortlisted applicants and then forward to the Cabinet secretary a list of three persons per vacant position – section 102(9). The Cabinet secretary has the discretion to reject nominations, in which instance the selection committee must submit fresh nominees – section 102(11). The Cabinet secretary must make the appointment/s within seven days of receipt of the list of nominees by notice in the Gazette, according to section 102(10), but may extend the period specified in respect of any matter under this section by up to 14 days – section 102(12). In selecting the Communications and Multimedia Appeals Tribunal members, the Cabinet secretary must ensure that the Tribunal is representative of the interests of all sections of society, that equal opportunity was given for persons with disabilities and other marginalised groups, and that not more than two-thirds of the members are of the same gender – section 102(13).

Once the Tribunal members are appointed, the selection committee is dissolved – section 102(14). All members of the Tribunal are appointed for a three-year term, renewable once, according to section 102(15).

A position will become vacant if a Tribunal member accepts any office which would have made him/her ineligible for appointment to the Tribunal – section 102(16)(b). The Cabinet secretary may remove a member from office on the recommendation of a tribunal set up for the purpose under section 102(17). This tribunal's recommendation must be acted upon by the Cabinet secretary within 30 days – section 102(20).

3.6.5 Funding for the CA, the Media Council, the Complaints Commission and the Tribunal

THE COMMUNICATIONS AUTHORITY OF KENYA

Under section 17 of the KIC Act, the funds of the CA consist of:

- Such moneys or assets as may accrue to or vest in the CA in the course of the exercise of its powers or performance of its functions under the KIC Act

- Sums payable to it pursuant to the KIC Act, any other written law, any gift or trust
- Moneys provided by Parliament
- Moneys from other sources provided for, donated or lent to the CA.

THE MEDIA COUNCIL OF KENYA

Section 23 of the Media Council Act specifies that the funds of the Media Council consist of:

- Monies allocated by the National Assembly
- Fees charged to journalists by the Media Council for documents of accreditation or registration
- Monies or assets as may accrue to the Media Council in the performance of its functions
- Monies from any other source provided, donated or lent to the Media Council.

THE COMPLAINTS COMMISSION

The Media Council Act does not deal with the sources of funding for the Complaints Commission.

THE COMMUNICATIONS AND MULTIMEDIA APPEALS TRIBUNAL

The KIC Act does not deal with the sources of funding for the Tribunal.

3.6.6 Making broadcasting regulations

❖ **The Kenya Information and Communications Act, CAP 411A of 1998**

The KIC Act authorises the Cabinet secretary, in consultation with the CA, to make regulations affecting many aspects of broadcasting in Kenya, including:

- Radio communications – section 38(1)

- All broadcasting services – section 46K – including:
  - The facilitation, promotion and maintenance of diversity and plurality of views
  - Financing and broadcast of local content
  - Mandating the carriage of content in keeping with interest obligations
  - Prescribing anything that may be prescribed under this part of the KIC Act

- Fair competition in the sector – section 84R(3) and 84W(1).

The words 'in consultation with' mean that the CA essentially has a veto over regulations made by the Cabinet secretary.

Section 5B(5) of the KIC Act gives the CA authority to make regulations for the better carrying out of the provisions of section 5B, which requires the CA to comply with various constitutional provisions in undertaking its functions under the KIC Act.

❖ **The Media Council Act, No. 46 of 2013**

The Media Council Act authorises the Cabinet secretary, in consultation with the Media Council, to make regulations for the better carrying out of the provisions of the Media Council Act – section 50(1) – though the Media Council may make rules to govern its own procedures, according to section 50(2). The words 'in consultation with' mean that the Media Council essentially has a veto over regulations made by the Cabinet secretary.

3.6.7 Licensing regime for broadcasters in Kenya

BROADCASTING LICENCE REQUIREMENT

Any person who provides a broadcasting service without a broadcasting licence commits an offence and is liable for imprisonment, a fine or both – section 46Q of the KIC Act. The CA is the body empowered by the KIC Act to issue broadcasting licences – section 46. It may also revoke licences in accordance with the provisions of sections 46J and 46P.

CATEGORIES OF BROADCASTING LICENCES

Broadcasting services in Kenya are classified as public, private and community broadcasting – section 46B(1) of the KIC Act.

The KIC Act categorises licences into the following classes – section 46B(2):

- Free-to-air radio
- Free-to-air television
- Subscription radio
- Subscription television
- Subscription management
- Any other class of licence as may be determined in accordance with the regulations, which are included as subsidiary legislation in the KIC Act.

That said, application forms and guidelines for the various licence categories may be downloaded from the CA website,[19] and the CA's categories of broadcasting services therein are different to those provided for in the act, according to its Broadcasting Market Structure[20] document, namely:

- Terrestrial subscription (pay) broadcasting (licence duration: television – 5 years)
- Free-to-air community broadcasting (licence duration: television – 4 years; radio – 3 years)
- Commercial free-to-air broadcasting (licence duration: television – 7 years; radio – 5 years)
- Digital mobile broadcasting (licence duration: television – 7 years)
- Terrestrial subscription broadcasting (licence duration: television – 7 years; radio – 5 years)
- Subscription management (licence duration: 5 years)
- Community free-to-air broadcasting (licence duration: television – 7 years; radio – 5 years)
- Satellite broadcasting (licence duration: television – 7 years)
- Cable broadcasting (licence duration: television – 7 years; radio – 5 years)
- IPTV broadcasting (licence duration: 5 years).

BROADCASTING LICENSING PROCESS

The procedures for applying for a licence and its renewal are covered in Part VI, 'Licensing and Enforcement of the KIC Act'. Every application for a licence under the KIC Act must be in the prescribed form and must be accompanied by the prescribed fees. Additional information may be required by the CA in considering the application – section 77.

Those ineligible for a broadcasting licence include: a political party; a person adjudged bankrupt or who has entered into an arrangement with his creditors; someone of unsound mind; a public or state officer – section 46D(1).

The CA must publish the name and other particulars of the licence applicant as well as its reasons for the proposed granting of the broadcasting licences in the Gazette at least 30 days before granting a licence. Public comment is invited, and written objections with respect to the proposed licence may be made by the public for at least 30 days after the gazetting – section 78. In making its decision, the CA must take the written representations into account.

The CA may licence the applicant on the expiry of the period of written representation, subject to such conditions as may be prescribed, including the payment of licence fees – section 79. Should the CA not grant the licence, it is required to notify the applicant in writing of the reasons for refusal within 30 days, and the applicant may, if aggrieved, appeal to the Communications and Multimedia Appeals Tribunal. The Tribunal must publish in the Gazette its decision and the reasons therefore within 15 days of every decision on an appeal – section 82(6).

According to the KIC Act, a successful applicant must commence using the assigned frequencies within such period as the CA stipulates in the licence. Failure to do so may result in revocation of the licence – section 46J(c). Regulations have been promulgated that also deal with this issue and these are dealt with below in this chapter.

A licence granted under the KIC Act continues in force for such a period as may be specified in the licence, unless earlier revoked – section 80. On application, a licence may be renewed for such a further period as the CA may specify subject to the payment of the prescribed fee. Where the CA does not renew the licence, it is required to notify the licensee in writing of the reasons for refusal within 30 days, and the licensee may, if aggrieved, appeal to the Communications and Multimedia Appeals Tribunal – section 81. The Tribunal must publish in the Gazette its decision and the reasons therefore within 15 days of every decision of an appeal – section 82(6).

The CA may make modifications to the conditions attached to any licence issued under the KIC Act, but is required to publish in the Gazette the intended changes, the reason for the modification, and specifying a period of no less than 30 days during which written objections may be made – section 82. A licensee aggrieved by the decision of the CA may appeal to the Communications and Multimedia Appeals Tribunal within 15 days of receipt of notification of modification, and the Tribunal may stay the modification pending its decision on the appeal. The Tribunal must publish in the Gazette its decision and the reasons therefore within 15 days of every decision of an appeal – section 82(6).

The CA is required to maintain separate registers of the various licences it issues

under the KIC Act, containing such particulars for every licence as may be prescribed – section 83. Any person may inspect the register of licences for a prescribed fee, though the fee is waived for a member of the police force, a public officer acting in the course of duty, or a person authorised by the board of the CA.

The forms for applying for broadcasting licences are included in the First Schedule of the KIC Act, and the forms and guidelines are also available for download on the CA website.[21]

FREQUENCY SPECTRUM LICENSING

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

The CA is the body that licenses spectrum, according to section 36(1) of the KIC Act. Section 35 specifies that no person may establish or use any radio communication station or apparatus except in accordance with the terms of a licence granted under section 36.

Any licence granted under section 36 may be subject to terms and conditions as the CA may specify, including limitations as to position, apparatus and such like – section 36(2). The CA may renew or revoke the licence, or vary or modify any conditions attached thereto – section 36(4). The licence is valid for as long as specified in the individual licence – section 36(3).

Regulations for managing and allocating the spectrum are included in the KIC Act in subsidiary legislation, and are dealt with in the regulations section of this chapter.

RESPONSIBILITIES OF BROADCASTERS

❖ **The Kenya Information and Communications Act, CAP 411A of 1998**

Section 46F–I of the KIC Act details the particular conditions that the CA may require broadcasters of different categories to meet. In brief, these are:

- 46F – Community broadcasting licence conditions regarding community involvement and participation in programming and management of community broadcasting licensees.

- 46G – Private broadcasting licence conditions regarding coverage areas and local television content requirements.

- 46H – Programming standards applicable to all broadcasters including the applicable programming code, and the watershed period when large numbers of children are likely to be watching.

- 46I – Requirements applicable to all licensed broadcasters include:
  - Providing responsible and responsive programming that caters to the varied needs and susceptibilities of different sections of the Kenya community
  - Ensuring Kenyan identity is developed and maintained in programmes
  - Broadcasting such a percentage of Kenyan programmes as is prescribed by the CA
  - Observing standards of good taste and decency
  - Gathering and presenting news and information accurately and impartially
  - When controversial or contentious issues of public interest are discussed, making reasonable efforts to present alternative points of view, either in the same programme or in other programmes within the period of current interest
  - Respecting the right to privacy of individuals
  - Respecting copyright and neighbouring rights in respect of any work or material
  - Keeping a programme log or machine readable record of its programming for a period of one year after the date of broadcasting
  - Ensuring that advertisements, either in terms of content, tone or treatment, are not deceptive or are not repugnant to good taste
  - Ensuring that derogatory remarks based on ethnicity, race, creed, colour and sex are not broadcast
  - Not broadcasting any film that has been denied approval for exhibition, nor broadcasting an approved film that has not had any required excisions removed
  - Broadcasting on radio or television such percentage of Kenyan programmes as is prescribed by the CA.

According to section 46Q, an offence is committed by any person who:

- Provides a broadcasting service in an area for which he/she/it is not licensed to broadcast
- Broadcasts in contravention of the act or the licence conditions.

Contravention of section 46Q makes the licensee liable to a fine, imprisonment or both.

Where the CA has determined that a licensee is contravening the KIC Act, or any other written law or any of the conditions of that licence, and has taken action on the issue, any licensee aggrieved by the decision may appeal it with the Communications and Multimedia Appeals Tribunal within 15 days of the notice thereof – section 83A.

❖ **The Media Council Act, No 46 of 1998**

Within the Media Council Act, the Second Schedule contains the Code of Conduct for the Practice of Journalism (Journalism Code), and section 1 specifies that journalists, media practitioners, foreign journalists and media enterprises (all of which are relevant to broadcasters) are all subject to the Media Council Act and thus also to the Journalism Code. The Journalism Code, which comprises 26 sections, is dealt with previously in this chapter in the section headed 'Legislation governing journalists', and is not repeated here.

3.6.8 Are the CA, the Media Council, the Complaints Commission and the Tribunal independent regulators?

THE COMMUNICATIONS AUTHORITY OF KENYA

Section 5A of the KIC Act specifies that the CA is independent and free of control by government, political or commercial interests in the exercise of its powers and performance of its functions and, further, should be guided by the national values in article 10 and those for public servants in article 232(1) of the Constitution.

While this statement is a strong indication of independence, it is unfortunate that the provisions of the KIC Act are unclear as to how the members of the selection panel which recommends board appointments are appointed. In this regard, it is extremely unclear whether or not the organisations whose representatives make up the selection panel are able to nominate their representatives to the selection panel or whether the president or Cabinet secretary has the discretion to make the appointments from those organisations directly. The independence of the selection panel is largely determined by this critical issue and it is therefore unfortunate that the KIC Act is so vague in this regard.

The KIC Act authorises the Cabinet secretary, in consultation with the CA, to make regulations affecting many aspects of broadcasting in Kenya. The words 'in consultation with' mean that the CA essentially has a veto over regulations made by the Cabinet secretary.

Section 5B(5) of the KIC Act gives the CA authority to make regulations for the better carrying out of the provisions of section 5B, which requires the CA to comply with

various constitutional provisions in undertaking its functions under the KIC Act. Consequently, it appears that the CA may make regulations on its own and also has veto powers in respect of regulations made by the Cabinet secretary.

THE MEDIA COUNCIL OF KENYA

Section 11 of the Media Council Act specifies that the Media Council is independent of control by government, political or commercial interests. This statement is a strong indication of independence, and section 7(3) of the Media Council Act supports this view as the members of the selection panel, which recommends board appointments, are nominated by their individual organisations without government intervention.

The Media Council Act authorises the Cabinet secretary, in consultation with the Media Council, to make regulations for the better carrying out of the provisions of the act. The words 'in consultation with' mean that the Media Council essentially has a veto over regulations made by the Cabinet secretary.

THE COMPLAINTS COMMISSION

Section 30 of the Media Council Act specifies that the Complaints Commission is independent in its operations and shall be guided by the provisions of article 159 of the Constitution. This statement is a strong indication of independence, and section 7(3) of the Media Council Act supports this view as the members of the selection panel, which recommends appointments to the Complaints Commission, are nominated by their individual organisations without government intervention.

THE COMMUNICATIONS AND MULTIMEDIA APPEALS TRIBUNAL

It is unfortunate that the provisions of the KIC Act are unclear as to how the members of the selection panel, which recommends Tribunal appointments, are appointed. In this regard, it is extremely unclear whether or not the organisations whose representatives make up the selection panel are able to nominate their representatives to the selection panel or whether the Cabinet secretary has the discretion to make the appointments from those organisations directly. The independence of the selection panel is largely determined by this critical issue and it is therefore unfortunate that the KIC Act is so vague in this regard.

3.6.9 Amending the legislation to strengthen the broadcast media generally

The legislation in place in Kenya is remarkably restrictive, particularly considering the media freedoms and protections within the Kenyan Constitution.

- The Media Council and the CA ought to be empowered to make their own regulations without executive intervention.

- The Media Council Act ought to be amended to allow for self-regulation in respect of content published in the print media. Given that the importance of self-regulation of content matters has been recognised in the KIC Act, it is surprising that similar recognition has not been afforded to the print media.

3.7 Legislation that regulates the state broadcaster

State broadcasting in Kenya is regulated in terms of:

- The Kenya Broadcasting Corporation Act, CAP 221 of 1988 (KBC Act)
- The Kenya Information and Communications Act, CAP 411A of 1998 (KIC Act).

3.7.1 Establishment of the Kenya Broadcasting Corporation

The Kenya Broadcasting Corporation (KBC) is established in terms of section 3 of the Kenya Broadcasting Corporation Act, CAP 221 of 1988 (KBC Act) as a corporation which is a body corporate with perpetual succession and which has the power to sue and be sued in its corporate name, and to hold property.

A reference to the minister in the KBC Act should be construed as a reference to the relevant Cabinet secretary.

3.7.2 The KBC's mandate

The KBC is designated as the 'public broadcaster' and is required to provide 'public broadcasting services', in terms of section 46E of the KIC Act. According to section 8(1) of the KBC Act, the KBC's duties include:

- Providing independent and impartial broadcasting services of information, education and entertainment in English, Kiswahili and any other languages the KBC may decide upon

- Providing an external broadcasting service for reception in countries outside Kenya, should the minister responsible for the administration of the KBC Act (the minister) require it

- Advising the government on all matters relating to the broadcasting services and the KBC generally

- Appointing and entering into agreements with such contractors and artistes as may be necessary for the purposes of the KBC Act

- Conducting broadcasting services with impartial attention to the interests and susceptibilities of the different communities in Kenya

- Providing facilities for commercial advertising and for the production of commercial programmes at a fee and time the KBC may determine

- Including in its sound and television programmes a daily service of news broadcast in English, Kiswahili and any other languages the KBC may decide upon

- Keeping a fair balance in all respects in the allocation of broadcasting hours between different political viewpoints

- In consultation with the Electoral Commission, during the campaign period preceding any presidential, parliamentary or local government election, allocating free air time to registered political parties participating in the election to expound their policies.

Section 8(2) empowers the KBC, among other things, to:

- Produce, manufacture, purchase or otherwise acquire and sell or otherwise dispose of all materials and apparatus for use in connection with broadcasting services

- Collect news and information in or from any part of the world and in any manner that may be thought fit and to establish and subscribe to news agencies

- Complete, publish, print and distribute matter conducive to the performance of its duties, or to enter into a contract with any person for that purpose

- Accept for broadcasting, with or without charge, advertisements and announcements which do not conflict with the general policy of the KBC

- Make available to broadcasting organisations the use of its sound and television studios, upon terms it may determine, for the purpose of preparing programmes for broadcasting

- Carry on or operate such services, including wired distribution services, as are conducive to the exercise of its duties

- With the approval of the minister, establish companies whose objects include any of the KBC's powers, functions or duties whose business is capable of being carried on in such a way as to facilitate or advance those powers, functions or duties, and to purchase or otherwise acquire stocks, shares or securities of, and subsidise and assist, the companies.

In terms of section 9(1) of the act, the KBC is the successor in title to the government operating under the now-repealed Kenya Broadcasting Corporation (Nationalization) Act, 1967 (CAP 221).

The managing director of the KBC has the authority to plan, regulate and control the content and balance of all broadcasts by the KBC – section 11(2)(b).

In terms of section 14, the minister may, by written instruction, supply announcements or programmes of national importance by sound or television that the KBC is required to broadcast. Section 14(2) permits the KBC to choose whether or not to announce that the broadcast is at the request of the minister.

3.7.3 Appointment of the KBC's Board

In terms of section 4 of the KBC Act, the board of directors consists of:

- A chairman, appointed by the president
- The managing director, who is appointed by the minister after consultation with the board – section 5(1). Control and executive management of the KBC is vested in him or her – section 11(1)
- The permanent secretary in the ministry responsible for information and broadcasting
- The permanent secretary in the Office of the President
- The permanent secretary in the ministry responsible for finance
- Up to seven members appointed by the minister:
  - They may not be employees of the KBC
  - No more than three may be public officers
  - At least one must have knowledge or experience with radio communication and apparatus
  - At least one must have knowledge or experience of radio or television programme production

- At least one must have knowledge or experience in the print media
- At least one must have knowledge or experience of financial management and administration.

Each board member holds office for three years and is eligible for reappointment – First Schedule, section 1. A board member may be removed from office by the minister for non-attendance of meetings, or if he/she is incapacitated physically or mentally, or is otherwise unable or unfit to discharge the functions of a director – First Schedule, section 2.

The board may establish one or more advisory councils of at least seven members to advise the board on any matter concerning the broadcasting service of the KBC – section 12(1)–(2). According to the provisions relating to advisory councils in the Second Schedule of the KBC Act, members of advisory councils hold office for up to three years (section 1), and may be removed from office for incapacity or if he/she is, in the opinion of the board, unfit or unqualified to continue in office.

3.7.4 Funding for the KBC

Section 37 of the KBC Act states that the government may make grants to the KBC, though section 38(1) requires that the KBC conduct its business according to commercial principles. The KBC may invest moneys in securities – section 38(3) – and section 39 gives the KBC permission to borrow money by the issue of loan stock on such terms as may be approved by the minister responsible for finance. All the funds, assets and other movable and immovable property of the 'Voice of Kenya' became vested in the KBC, according to section 54(1).

According to section 43(3), the accounts of the KBC have to be audited and reported upon annually by the auditor general (corporations). It is noteworthy that in April 2016 the auditor general declared the KBC insolvent.[22]

3.7.5 The KBC: Public or state broadcaster?

Despite requirements for 'impartiality' and 'independence' in section 8(1)(a) and (f), and 10(1) of the KBC Act, the KBC cannot be said to be a public broadcaster. The board is appointed by the president and the minister, and no public nominations process or shortlisting by a multi-party body such as the National Assembly takes place in respect of board appointments.

According to section 16(1), the corporation is required to employ such public officers as may be seconded to it by the government. Under section 16(2), the government

may at any time determine the secondment of any public officer to the KBC. The KBC may also request the secondment of such an officer.

Section 51 of the KBC Act specifies that the Protected Areas Act, CAP 204 of 1949, applies to the grounds, buildings and installations of the KBC, as though an order for their protection had been made under section 3 of that act. The Protected Areas Act permits persons entering such protected areas to be searched, detained, arrested or removed by the police. These kinds of protections are typical of strategically important government sites, and thus lend weight to viewing the KBC as a state broadcaster.

In terms of section 14, the minister may, by written instruction, supply announcements or programmes of national importance by sound or television that the KBC is required to broadcast. Section 14(2) permits the KBC to choose whether or not to announce that the broadcast is at the request of the minister.

Further, the minister, after consultation with the board, makes regulations for the KBC – section 53. The effect of the words 'after consultation' is that the board does not have a veto in respect of such regulations.

3.8 Legislation governing broadcasting signal distribution

Signal distribution is the physical process of delivering the signal from a broadcasting studio to the audience. According to section 46N of the KIC Act, no person may provide signal distribution services within Kenya or from Kenya to other countries except in accordance with a licence issued by the CA. Any person who contravenes this requirement is guilty of an offence and is liable to a fine, imprisonment or both.

The CA's Broadcasting Market Structure[23] document recognises the following categories in this sector, and application forms and guidelines may be downloaded from the CA website:[24]

- National broadcast signal distribution (licence duration: 15 years)
- Self-provisioning broadcast signal distribution (licence duration: 15 years)

Section 46O authorises the CA to set conditions on the granting of a signal distribution licence, and these conditions may include:

- Providing signal distribution services as a common carrier to broadcasting licensees

- Providing services promptly and in an equitable and non-discriminatory manner

- Providing capability for a diversity of broadcast services
- Providing an open network that is interoperable with other signal distribution networks
- Complying with the specific nature and location of transmitters and their transmission characteristics
- Any other conditions the CA may determine.

Non-compliance with any specified condition is an offence, punishable with a fine, imprisonment or both.

3.9 Legislation that undermines a journalist's duty to protect sources

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

Kenya has yet to enact specific whistleblower protection legislation, though significant protection is offered to whistleblowers in the recently passed Access to Information Act, which is discussed elsewhere in this chapter.

❖ **The Penal Code, CAP 63 of 1930**

The Penal Code was enacted prior to Kenya's independence but has been amended numerous times since then. The 2012 revision, which followed the 2010 revision of the Constitution, provides that any person who, having been called upon to give evidence in a judicial proceeding, and fails to do so, is guilty of an offence and liable to imprisonment under section 121(1)(b), though section 121(2) also provides for the option of a fine or both penalties in the case of this offence.

❖ **The Media Council Act, Act 46 of 2013**

Any person aggrieved by a publication or the conduct of a journalist may complain to the Complaints Commission, according to section 34(1)(a). The Complaints

Commission has the power to summon and receive information and evidence, to require any person to give it assistance in the investigation of a complaint made under the Media Council Act, or summon anyone to appear before it for examination on matters relevant to an investigation of a complaint, according to section 33. Section 49(1) provides that the penalty for a contravention of the Media Council Act is a fine, imprisonment or both, where no specific penalty is otherwise specified.

❖ **The National Cohesion and Integration Act, Act 12 of 2008**

In terms of section 27, the National Cohesion and Integration Commission (NCIC) (established under section 15 of the NCI Act) has the power to summon witnesses, to call for the production of books, plans and other documents, and to examine witnesses and parties on oath. Section 29 specifies that any person summoned to attend and give evidence at a sitting of this commission is bound to obey the summons as if it were served by the High Court. In terms of section 58, the NCIC may apply to a magistrates' court for an order requiring a person to furnish any information required by a compliance notice if the person fails to furnish the information, or if the NCIC has reasonable cause to believe that the person does not intend to furnish the information.

❖ **Commission on Administrative Justice Act, No. 23 of 2011**

Under section 27(c), the Commission on Administrative Justice (CAJ) has the powers of a court to require any person to disclose any information within the person's knowledge that may be relevant to any investigation by the CAJ. Section 27(a) gives the CAJ the power to issue summonses or other orders requiring attendance of any person before the CAJ and the production of any document or record relevant to any investigation by the body.

❖ **The National Intelligence Service Act, No. 28 of 2012**

The 2014 Amendments to the National Intelligence Service Act provides for a new section 42(2) which empowers the director general of the Intelligence Service, subject to guidelines approved by the National Intelligence Service Council and accompanied by a warrant from the High Court, to issue a written authorisation valid for 180 days, to an intelligence officer empowering him or her to, among other things, obtain any information, material, record or document and for that purpose to enter into any place or obtain access to anything, search for, remove, examine or take extracts from or make copies of all records, information, document or thing, or to monitor communications.

❖ **The Prevention of Terrorism Act, No. 30 of 2012**

The 2014 Amendments to the Prevention of Terrorism Act provides for a new section 36A(1) which empowers the National Security Organs (the Kenya Defence Forces, the National Intelligence Service and the National Police Service) to intercept

communication for the purposes of detecting, deterring and disrupting terrorism. This has obvious implications for a journalist's need to protect his or her sources.

In a very serious legislative amendment, section 36A(3) of the Prevention of Terrorism Act purports to limit article 31 of the Constitution (providing for the right to privacy) for the purposes of intercepting communication directly relevant in the detecting, deterring and disrupting of terrorism. The effect of this provision is to undermine the supremacy clause in Kenya's Constitution (article 2(1)). It is for a court to determine that a legislative provision is a justifiable limitation of a right provided for in the Constitution and not the legislature by way of a statutory provision.

It is, however, 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 or the right to freedom of the media will depend on the particular circumstances in each case, particularly on whether or not the information is available from any other source. It is therefore extremely difficult to state that these provisions are, by themselves, a violation of the rights to freedom of expression and to the media under the Constitution.

3.10 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, including:

- Prohibition of publications relating to judicial proceedings
- Prohibition of publications that discredit the judiciary and judicial organs
- Prohibition of publications that undermine the authority of a public officer
- Prohibition of publications that constitute treason
- Prohibition of publications that are contrary to the interests of public order
- Prohibition of publications that contain certain election-related information
- Prohibition of publications that constitute hate speech
- Prohibition of publications that are contrary to the interests of public health

- Prohibition of publications relating to sexual offences
- Prohibition of publications that are contrary to the interests of the defence or security of Kenya
- Prohibition of publications that constitute encouragement of terrorism
- Prohibition of publications that contain alarming information
- Prohibition of publications that constitute incitement to violence and disobedience of the law
- Prohibition of publications that are contrary to the interests of public morals
- Prohibition of publications that constitute obscenity and pornography
- Prohibition of publications that constitute incitement to boycott
- Prohibition of publications that contain subversive information
- Prohibition of publications affecting relations with foreign states and external tranquillity
- Prohibition of publications that do not correctly identify the publisher and printer
- Prohibition of publications that constitute criminal defamation.

3.10.1 Prohibition of publications relating to judicial proceedings

❖ **Penal Code, CAP 63 of 1930**

Information directed to be held in private

Any person who publishes a report of the evidence taken in any judicial proceeding, which has been directed to be held in private, is guilty of an offence punishable by imprisonment – section 121(1)(e). This is deemed, according to section 121(3), to be in addition to and not in derogation from the power of the High Court to punish for contempt of court.

❖ **Sexual Offences Act, No. 3 of 2006**

Information identifying the victim of a sexual offence or the victim's family

Under section 31(4)(d), a court in criminal proceedings involving the alleged commission of a sexual offence may, on declaring a witness vulnerable according to

the specifications of section 31, prohibit the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to their identification.

Any person, including a juristic person, who publishes any information in contravention of section 31, contrary to any direction of the court, or in any manner reveals the identity of a witness contrary to any direction of the court, commits an offence punishable by imprisonment, a fine or both. The fine imposed is greater if the person identified or published about is under 18 years of age – section 31(11). Any juristic person convicted of such an offence is liable to a fine – section 31(12).

3.10.2 Prohibition of publications that discredit the judiciary and judicial organs

❖ **Penal Code, CAP 63 of 1930**

Insulting a judicial officer is an offence in terms of article 586 of the Penal Code, and the punishment is a period of imprisonment, a fine or both. Further, publicly discrediting a judicial decision using words, writings, images or any acts (article 588) is an offence. The punishment is a period of imprisonment, a fine or both.

3.10.3 Prohibition of publications that undermine the authority of a public officer

❖ **Penal Code, CAP 63 of 1930**

Uttering, printing or publishing any words or doing anything calculated to bring into contempt or to excite defiance of the lawful authority of a public officer is an offence punishable by imprisonment – section 132.

3.10.4 Prohibition of publications that contain certain election-related information

❖ **Elections Act, Act 41 of 2011**

Section 41 of the Elections Act specifically prohibits exit polls from being published or distributed during the prescribed hours for an election – that is, while voting is actually taking place.

3.10.5 Prohibition of publications that constitute treason

❖ **Penal Code, CAP 63 of 1930**

Section 40(1)(b) of the Penal Code states that any person who expresses, utters or declares any compassings, imaginations, inventions, devices or intentions by publishing any printing or writing which intends harm or imprisonment to the president, deposing of the president or overthrow of the government is guilty of the offence of treason. The offence of treason is punishable by death, according to section 40(3).

3.10.6 Prohibition of publications that are contrary to the interests of public order

❖ **Penal Code, CAP 63 of 1930**

Section 52(1) of the Penal Code prohibits the importation of any publication that is judged by the minister to be against the interests of public order. Section 52(2) authorises the minister, on reasonable grounds justifiable in a democratic society and in the interest of public order, to declare any publication to be a prohibited publication. Both sections require an order to be published in the Gazette. Being in possession of a prohibited publication is an offence punishable with imprisonment – section 53(1).

New section 66A(1) of the Penal Code makes it an offence to publish, broadcast or distribute through print, digital or electronic means, insulting, threatening or inciting material or images of dead or injured persons which are 'likely to … disturb public peace'. The offence is punishable upon conviction by a fine, a period of imprisonment or both.

In a very serious legislative amendment, section 66A(3) of the Penal Code purports to limit articles 33 and 34 of the Constitution (providing for freedom of expression and the media) for material likely to disturb public peace. The effect of this provision is to undermine the supremacy clause in Kenya's Constitution (article 2(1)). It is for a court to determine that a legislative provision is a justifiable limitation of a right provided for in the Constitution and not the legislature by way of a statutory provision.

3.10.7 Prohibition of publications that constitute hate speech

❖ **The Kenya Information and Communications Act, CAP 411A of 1998**

Under section 5B(4), the right to freedom of expression does not extend to the spread of hate speech or the advocacy of hatred that constitutes ethnic incitement, vilification of other persons or communities, or any ground of discrimination specified or contemplated in article 27(4) of the Constitution.

❖ **The National Cohesion and Integration Act, Act 12 of 2008**

A person who:

- Publishes or distributes written material
- Distributes, shows or plays a recording of visual images
- Provides, produces or directs a programme which is threatening, abusive or insulting,

commits an offence if the intention is to stir up ethnic hatred or, having regard to all

the circumstances, ethnic hatred is likely to be stirred up – section 13. In this section, 'ethnic hatred' includes hatred against persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins. The offence is punishable by a fine, imprisonment or both.

In terms of section 62, a newspaper, radio station or media enterprise that publishes utterances intended to incite feelings of contempt, hatred, hostility, violence or discrimination against any person, group or community on the basis of ethnicity or race, commits an offence and is liable to a fine.

3.10.8 Prohibition of publications that are contrary to the interests of public health

❖ **Penal Code, CAP 63 of 1930**

Section 52(1) of the Penal Code prohibits the importation of any publication that is judged by the minister to be against the interests of public health. Section 52(2) authorises the minister, on reasonable grounds justifiable in a democratic society and in the interest of public health, to declare any publication to be a prohibited publication. Both sections require an order to be published in the Gazette. Being in possession of a prohibited publication is an offence punishable with imprisonment – section 53(1).

3.10.9 Prohibition of publications relating to sexual offences

❖ **Sexual Offences Act, No. 3 of 2006**

Section 14(b) states that any person, including a juristic person, who prints or publishes, in any manner, any information that is intended to promote or facilitate conduct that would constitute a sexual offence against a child is guilty of an offence which is punishable by imprisonment, and where the accused is a juristic person, to a fine. The same penalty is specified under section 19(3)(b) for such conduct relating to a person with disabilities, though the accused individual does have the option of a fine.

3.10.10 Prohibition of publications that are contrary to the interests of the defence or security of Kenya

❖ **Penal Code, CAP 63 of 1930**

Section 52(1) of the Penal Code prohibits the importation of any publication that is judged by the minister to be against the interests of the security of Kenya. Section 52(2) authorises the minister, on reasonable grounds justifiable in a democratic society and in the interest of the defence of Kenya, to declare any publication to be a prohibited publication. Both sections require an order to be published in the Gazette.

Being in possession of a prohibited publication is an offence punishable with imprisonment – section 53(1).

New section 66A(2) of the Penal Code makes it an offence to publish or broadcast any information which undermines investigations or security operations by the National Police Service or the Kenya Defence Forces. The offence is punishable upon conviction by a fine, a period of imprisonment or both.

❖ **Preservation of Public Security Act, CAP 57 of 1960**

Section 4(2)(d) of the Public Security Act specifies that regulations for the preservation of public security may make provision for the censorship, control or prohibition of the communication of any information, or of any means of communicating or of recording ideas or information, including any publication or document, and the prevention of the dissemination of false reports.

It should be noted that under section 7(2), regulations made under this act may make provision for the apprehension and punishment of anyone offending against the regulations. The section further states that these penalties may exceed those otherwise permitted by law to be imposed by regulations, and may include the death penalty and the forfeiture of any property connected in any way with the offence.

❖ **The Prevention of Terrorism Act, No. 30 of 2012**

The 2014 amendments to the Prevention of Terrorism Act provides for a new section 30F(1), which makes it an offence to broadcast any information which undermines investigations or security operations relating to terrorism, without authorisation from the National Police Service. The offence is punishable upon conviction by a fine, a period of imprisonment or both.

In terms of section 30F(2), any person who publishes or broadcasts photographs of victims of a terrorist attack without the consent of the National Police Service and of the victim commits an offence. The offence is punishable upon conviction by a fine, a period of imprisonment or both.

❖ **Official Secrets Act, CAP 187 of 1968**

Section 3(1)(c) states that any person who, for any purpose prejudicial to the safety or interests of Kenya 'obtains, collects, records, publishes or communicates in whatever manner to any other person any code word, plan, article, document or information which is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power or disaffected person, is guilty of an offence'.

Section 3(2) makes it an offence to take a photograph of or in a prohibited place

without having obtained the authority of the officer in charge of that place. These offences are both punishable by imprisonment. A warrant is not required for the arrest of any person suspected of having, or being about to commit, an offence under the Official Secrets Act – section 17(1).

3.10.11 Prohibition of publications that constitute encouragement of terrorism

❖ **The Prevention of Terrorism Act, No. 30 of 2012**

The 2014 Amendments to the Prevention of Terrorism Act provide for a new section 30A which makes it an offence to publish a statement that is likely to be understood as directly or indirectly encouraging, or inducing another person to commit or prepare to commit, an act of terrorism. The offence is punishable upon conviction by a period of imprisonment.

3.10.12 Prohibition of publications that contain alarming information

❖ **Penal Code, CAP 63 of 1930**

Any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace is guilty of a misdemeanour. However, proving that measures were taken prior to publication to verify the accuracy of the published item which led to the belief that the information was true is regarded as a defence – section 66.

New section 66A(1) of the Penal Code makes it an offence to publish, broadcast or distribute through print, digital or electronic means, insulting, threatening or inciting material or images of dead or injured persons which are likely to cause fear and alarm to the general public. The offence is punishable upon conviction by a fine, a period of imprisonment or both.

In a very serious legislative amendment, section 66A(3) of the Penal Code purports to limit articles 33 and 34 of the Constitution (providing for freedom of expression and the media) for material likely to cause public alarm. The effect of this provision is to undermine the supremacy clause in Kenya's Constitution (article 2(1)). It is for a court to determine that a legislative provision is a justifiable limitation of a right provided for in the Constitution and not the legislature by way of a statutory provision.

3.10.13 Prohibition of publications that constitute incitement to violence and disobedience of the law

❖ **Penal Code, CAP 63 of 1930**

An offence is committed by any person who prints, publishes, utters any words or

does any act indicating or implying that it might be desirable to do, or omit to do (the omission of which would bring harm) anything that is calculated to:

- Bring death or physical injury to any person or group of persons
- Lead to damage or destruction of property
- Prevent the enforcement or execution of any written law, or lead to defiance or disobedience of lawful authority.

The offence is punishable by imprisonment – section 96.

3.10.14 Prohibition of publications that are contrary to the interests of public morals

❖ **Penal Code, CAP 63 of 1930**

Section 52(1) of the Penal Code prohibits the importation of any publication that is judged by the minister to be against the interests of public morals. Section 52(2) authorises the minister, on reasonable grounds justifiable in a democratic society and in the interest of public morals, to declare any publication to be a prohibited publication. Both sections require an order to be published in the Gazette. Being in possession of a prohibited publication is an offence punishable with imprisonment – section 53(1).

3.10.15 Prohibition of publications that constitute obscenity and pornography

❖ **Penal Code, CAP 63 of 1930**

Under section 181, any person who makes, produces or has in his possession obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene object or objects tending to corrupt morals, or publicly exhibits any indecent show or performance, is guilty of a misdemeanour and is liable to imprisonment or a fine.

❖ **Sexual Offences Act, Act 3 of 2006**

Section 16(1) states that any person, including a juristic person, who '… publicly exhibits or puts into circulation … makes, produces or has in his or her possession any obscene book, pamphlet, paper, drawing, painting, art, representation or figure or any other obscene object whatsoever which depicts the image of any child' is guilty of an offence which is punishable by imprisonment, a fine or both. A subsequent conviction is punishable by longer imprisonment without the option of a fine. Under section 16(3), the item shall be deemed obscene if it appeals to the 'prurient interest', or if it 'tends to deprave and corrupt persons'.

Section 4(1) of the Sexual Offences Regulations, 2008, which are published as

subsidiary legislation to the Sexual Offences Act, specifies that the articles referred to in section 16 of the Sexual Offences Act include those articles prohibited under section 52(1)–(2) of the Penal Code. Further, according to section 4(3) of the Regulations, the minister of matters relating to legal affairs and prosecutions may, in consultation with the Prohibited Publications Review Board, and by an order in the Gazette, prohibit other publications for purposes of section 16 of the Sexual Offences Act.

❖ **The Kenya Information and Communications Act, CAP 411A of 1998**

In terms of section 84D of the KIC Act, any person who publishes or transmits or causes to be published in electronic form, any material which is lascivious or appeals to the prurient interest, and its effect is likely to deprave and corrupt persons who read, see or hear the matter, is liable to a fine, imprisonment or both.

3.10.16 Prohibition of publications that constitute incitement to boycott

❖ **Penal Code, CAP 63 of 1930**

An offence is committed by any person who, by word of mouth, publicly, or by making a publication – as defined in section 98(7) – advises, induces or persuades people to take an action furthering a boycott, or attempts to do so. Unless the contrary is proved, any publication is deemed to be made with the intention of furthering the designated boycott – section 98(3). The offence is punishable by imprisonment, according to section 98(2).

3.10.17 Prohibition of publications that contain subversive information

❖ **Penal Code, CAP 63 of 1930**

Under section 77(1), any person who utters any words with a subversive intention is guilty of an offence and liable to imprisonment. Subversive activities under section 77(3) include:

- Supporting, propagating or advocating any act or thing prejudicial to the public order, the security of Kenya or administrative justice
- Inciting violence or counselling defiance of or disobedience to the law or lawful authority
- Indicating, expressly or by implication, any connection, association or affiliation with, or support of, any unlawful society
- Anything intended to promote feelings of hatred or enmity between the different races and communities in Kenya. This provision does not extend to comments or

criticisms made in good faith with a view to removal of any causes of hatred or enmity between races or communities

- Anything intended to bring into hatred or contempt or to excite disaffection against any public officer or class of public officers in the execution of his duty. This provision does not extend to comments or criticisms made in good faith with a view to the remedying or correction of errors, defects or misconduct on the part of the public officer or officers.

3.10.18 Prohibition of publications affecting relations with foreign states and external tranquillity

❖ **Penal Code, CAP 63 of 1930**

Publication of anything intended to be read, or any sign or visible representation tending to degrade, revile or expose to hatred or contempt any foreign prince, potentate, ambassador or other foreign dignitary with the intent to disturb peace and friendship between Kenya and the country of the prince or dignitary, is a misdemeanour, according to section 67.

3.10.19 Prohibition of publications that do not correctly identify the publisher and printer

❖ **Books and Newspapers Act, CAP 111 of 1960**

Every book and every newspaper printed within Kenya has to have printed legibly in English on its first or last printed page the:

- Name address of its printer
- Name and address of its publisher
- Name of the place in which it is printed
- Name of the place in which it is published – section 17(1).

Any person who prints, publishes, sells, distributes or assists in selling or distributing any book or newspaper which does not comply with this requirement is guilty of an offence punishable by a fine, imprisonment or both – section 17(2).

Further, the court may order all copies of the book or newspaper in the custody of the court or in the possession of the offender to be forfeited or destroyed.

3.10.20 Prohibition of publications that constitute criminal defamation

Chapter XVIII of the Penal Code, CAP 63 of 1930 deals with defamation and libel in detail.

WHAT IS CRIMINAL DEFAMATION?

Section 194 of the Penal Code provides for the misdemeanour offence of libel, which is, in the part that is relevant for the media, the unlawful publication by print, writing or effigy, or by any means otherwise than solely by gestures, spoken words or other sounds, of any defamatory matter concerning another person with the intent to defame that other person.

Defamatory matter itself is defined in section 195 as matter likely to injure the reputation of any person in his profession or trade by an injury to his reputation. It is immaterial whether the defamed person is living or dead at the time of the publication.

Publication of libel is regarded as 'causing the print, writing, painting, effigy or other means by which the defamatory matter is conveyed … either by exhibition, reading, recitation, description, delivery or otherwise, that the defamatory meaning becomes known, or is likely to become known' to the defamed person or any other person. It is not necessary that the defamatory meaning be directly or completely expressed. It suffices if the meaning and person alleged to be defamed can be collected either from the alleged libel itself or from any intrinsic circumstances, or a combination of the two – section 196.

WHEN WILL THE PUBLICATION OF DEFAMATORY MATTER BE LAWFUL?

Under section 197, the publication of defamatory matter is unlawful unless:

- The matter is true and it is in the public interest that it be published
- It is privileged.

ABSOLUTE PRIVILEGE

The publication of defamatory matter is absolutely privileged, according to section 198, therefore, no person is liable to punishment if the matter is published:

- By the president, the Cabinet of ministers, in Parliament or in an official document of proceedings therefrom

- In the Cabinet of ministers, in Parliament, in any case by the president, a minister or an MP

- By order of the president or the Cabinet of ministers

- Concerning a person subject to military or naval discipline and relates to his conduct as a person subject to such discipline and is published by someone in authority over him

- In the course of any judicial proceedings, by a person taking part therein as a judge, magistrate, commissioner, advocate, assessor, witness or party thereto

- Is in fact a fair report of anything said, done or published in the Cabinet of ministers or in Parliament

- By a person legally bound to publish it.

Where a publication is absolutely privileged, it is immaterial whether the matter be true, false, known or not known or believed to be false, and whether or not it is published in good faith.

CONDITIONAL PRIVILEGE

According to section 199, publication of defamatory matter is privileged provided:

- It was published in good faith

- The party who published it is under legal, moral or social duty to publish it to the person to whom the publication is made

- The publisher has a legitimate personal interest in so publishing, on condition that the publication does not exceed either in extent or matter what is reasonably sufficient for the occasion

- One of the following cases applies:
    - It is a fair report of any court proceedings not held in camera. It should be noted that this specifically excludes anything on which the court prohibits publication on the grounds that it is seditious, immoral or blasphemous
    - The matter published is a copy, reproduction or fair abstracts of any matter which has been previously published which was absolutely privileged, as per section 198
    - It is an expression of opinion in good faith as to the conduct of a person in a judicial, official or other public capacity, or as to his or her personal character so far as it appears in such conduct

- It is an expression of opinion in good faith as to the conduct of a person in relation to any public question or matter, or as to his personal character as it appears in such conduct
- It is an expression of opinion in good faith as to the conduct of any person as disclosed by evidence given in a public legal proceeding, or as to the character of any person so far as it appears in any such conduct
- It is an expression of opinion in good faith as to the merits of any book, writing, painting, speech or other work, performance or act published or publicly done or made or submitted by a person to the judgment of the public, or as to the character of the person so far as it appears therein
- It is a censure passed by a person in good faith on the conduct of another person in any matter in respect of which he or she has authority over the other person, or on the character of the other person so far as it appears in such conduct
- It is a complaint or accusation made by a person in good faith against another person in respect of his or her conduct in any matter, or in respect of his or her character so far as it appears in such conduct, to any person having authority over that other person in respect of such conduct or matter, or having authority by law to inquire into or receive complaints respecting such conduct or matter
- It is published in good faith for the protection of the rights or interests of: the person who publishes it; the person to whom it is published; or of some person in whom the person to whom it is published is interested.

DEFINITION OF GOOD FAITH

In terms of section 200 of the Penal Code, a publication of defamatory matter shall be deemed not to have been made in good faith if:

- The matter is untrue, and the person publishing it did not believe it to be true

- The matter is untrue, and it was published without reasonable care being taken to ascertain whether it was true or false

- In publishing the matter, the person who published it intended to injure the person defamed in a substantially greater degree or substantially more than was reasonably necessary for the public interest or for the protection of the private right or interest in respect of which he claims to be privileged.

3.11 Legislation relating to the interception of communication

The growth of wireless and cellular communications, along with advances in ITCs raises the possibility of the monitoring, recording and intercepting of communications by the media and others, including government.

❖ **The Kenya Information and Communications Act, CAP 411A of 1998**

The Kenya Information and Communications Act, CAP 411A of 1998, provides in section 83W(1)(b) that any person who by any means knowingly intercepts or causes to be intercepted, directly or indirectly, any function of, or data within a computer system, commits an offence, and is liable to a fine, imprisonment or both – section 83W(2). However, according to section 83W(5)(b), a person is not liable to punishment if he or she is acting in reliance of any statutory power to do so.

Any person who discloses access codes or any other means of gaining access to any information in a computer, knowing that the disclosure is likely to cause prejudice to any person, commits an offence and is liable to a fine, imprisonment or both – section 83Z.

❖ **The Prevention of Terrorism Act, No. 30 of 2012**

The 2014 Amendments to the Prevention of Terrorism Act provide for a new section 36A(1) which empowers the National Security Organs (the Kenya Defence Forces, the National Intelligence Service and the National Police Service) to intercept communication for the purposes of detecting, deterring and disrupting terrorism.

In a very serious legislative amendment, section 36A(3) of the Prevention of Terrorism Act purports to limit article 31 of the Constitution (providing for the right to privacy) for the purposes of intercepting communication directly relevant in the detecting, deterring and disrupting of terrorism. The effect of this provision is to undermine the supremacy clause in Kenya's Constitution (article 2(1)). It is for a court to determine that a legislative provision is a justifiable limitation of a right provided for in the Constitution and not the legislature by way of a statutory provision.

3.12 Legislation that specifically assists the media in performing its functions

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

Kenya has yet to enact specific whistleblower protection legislation, though significant protection is offered in the recently passed Access to Information Act, 2016.

❖ **Access to Information Act, 2016 (AI Act)**

On 31 August 2016, the president of Kenya signed into law the Access to Information Act, 2016.[25]

Objectives of the legislation

Access to information is guaranteed in the Kenyan Constitution, and the object of the AI Act, in terms of section 3(a), is to give effect to the right of access to information by citizens as provided under article 35 of the Constitution.

In line with constitutional requirements, it is further intended to – section 3(b)-(f):

- Provide a framework for public and private entities to proactively disclose information
- Provide a framework to facilitate access to information
- Promote routine and systematic disclosure of information, transparency and accountability
- Provide for the protection of persons who disclose information of public interest in good faith
- Provide a framework to facilitate public education on the right to access information under the AI Act.

The AI Act gives every citizen of Kenya the right to access of information. A 2012 High Court decision held that the word 'citizen' in article 35 of the Constitution applied to natural persons only, and thus juristic persons such as companies were excluded from the right. However, the AI Act of 2016 specifically includes 'any private entity that is controlled by one or more Kenyan citizens' in its definition of 'citizen', so companies, NGOs, etc. also have the right of access to information.

Section 4(1) gives every citizen the right to information held by:

- The state
- Another person and where that information is required for the exercise or protection of any right or fundamental freedom.

In terms of section 2, a 'private body' is defined as any private entity or non-state actor that:

- Receives public resources and benefits, utilises public funds, engages in public functions, provides public services, has exclusive contracts to exploit natural resources (with regard to said funds, functions, services or resources)

- Is in possession of information which is of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to exposure of corruption or illegal actions or where the release of the information may assist in exercising or protecting any right.

In terms of section 2, a 'public entity' is defined as:

- Any public office, as defined in article 260 of the Constitution

- Any entity performing a function within a commission, office, agency or other body established under the Constitution.

Importantly, in terms of section 4(2), this right of access to information is not affected by:

- Any reason the person gives for seeking access

- The public entity's belief as to what the person's reasons are for seeking access.

The legislative provisions applicable to public entities also apply to private bodies, with any 'necessary modification' – sections 10(4) and 11(4).

Mandatory grounds for refusing access to information
Under section 6(1), information must be withheld by a public entity or private body, where it is satisfied that disclosure of the information is likely to:

- Undermine the national security of Kenya – section 6(2)(a)–(l) specifies what falls into this category, including:
  - Military strategy, covert operations, doctrine, capability, capacity or deployment
  - Foreign government information with implications on national security
  - Intelligence activities, sources, capabilities, methods or cryptology
  - Foreign relations

- Scientific, technology or economic matters relating to national security
- Vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security
- Information obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime, enforcement of any law and activities suspected of constituting threats to national security
- Information between the national and county governments deemed to be injurious to the conduct of affairs of the two levels of government
- Cabinet deliberations and records
- Information that should be provided to a state organ, independent office or a constitutional commission when conducting investigations, examinations, audits or reviews in the performance of its functions
- Information that is referred to as classified information in the Kenya Defence Forces Act
- Any other information whose unauthorised disclosure would prejudice national security.

- Impede the due process of law or endanger the safety of life of any person

- Involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made

- Prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained. In terms of section 6(3), if the information relates to the results of any product or environmental testing, and the information concerned reveals a serious public safety or environmental risk, this ground for refusing access does not apply.

- Cause substantial harm to the ability of the government to manage the economy of Kenya. In terms of section 6(3), if the information relates to the results of any product or environmental testing, and the information concerned reveals a serious public safety or environmental risk, this ground for refusing access does not apply

- Significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration

- Damage a public entity's position in any actual or contemplated legal proceedings
- Infringe professional confidentiality as recognised in law or by the rules of a registered association of a profession.

Public interest override to mandatory non-disclosure
Despite the restrictions dealt with in section 6(1)–(2), a public entity or private body may be required to disclose information where the public interest outweighs the harm to the protected interests as determined by a court – section 6(4). In terms of section 6(6), when considering this public interest, particular regard must be had to the constitutional provisions to:

- Promote accountability
- Ensure effective oversight of expenditure of public funds
- Inform the public on issues of public health, safety or the environment
- Ensure any statutory authority with regulatory responsibilities adequately discharges its functions.

Age-related override to mandatory non-disclosure
Unless the contrary is proved by the public entity or private body, information is presumed not to be exempt if it has been held for more than 30 years – section 6(7).

Public acessibility is a ground for refusing access to information that is otherwise disclosable
A public entity is not obliged to supply information to a requester if that information is reasonably accessible by other means – section 6(5).

Information provision that is mandatory
Twelve months after commencement of the AI Act, section 5(1)(a) comes into effect – section 5(4). Section 5(1)(a) requires a public entity to facilitate access to information and details the information that the entity must make accessible, which includes:

- The particulars of its organisation, functions and duties
- The powers and duties of its officers and employees
- The procedure followed in the decision-making process, including channels of supervision and accountability
- Salary scales of its officers by grade

- The norms set by it for the discharge of its functions

- Any guidance used by it in its dealing with the public or with corporate bodies, including the rules, regulations, instructions, manuals and records held by it or under its control or used by its employees for discharging its functions

- A guide sufficient to enable any person wishing to apply for information under this act to identify the classes of information held by the body, the subjects to which they relate, and the location of any indexes to be consulted by any person.

Every year after section 5(1)(a) comes into effect, statements updating the information contained in the previous year's statements must be published – section 5(1)(b). Section 5(1) also contains critical requirements for information of relevance to the public in relation to policy development and decision-making by public entities. These include that:

- All relevant information must communicated to the public or affected persons prior to the initiation of a project or formulation of a policy – section 5(1)(c)

- Reasons for any decision taken in relation to a person, must be provided to that person – section 5(1)(d).

Further, every public entity is required, in terms of section 17(2), to keep and maintain records that are accurate and are stored in a manner which facilitates the right of access to information. Section 17(3)(c) specifies that every public entity shall, not later than three years from the date on which the AI Act begins to apply, computerise its records and information management systems in order to facilitate more efficient access to information.

Upon signing any contract, a public entity has to publish on its website, or make available through other suitable means, the following particulars of the contract – section 5(1)(e):

- The public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and terms of reference

- The contract sum

- The name of the provider, contractor or individual to whom the contract has been granted

- The periods within which the contract shall be completed.

Process for requesting information

An information access officer must be appointed, according to the AI Act. This is the chief executive officer of a public entity, or these duties may be delegated by the chief executive officer to another officer of the public entity – section 7.

An application to access information must be made in writing in English or Kiswahili, and must contain sufficient particulars to make it clear what information is being requested – section 8(1). An applicant who is illiterate or who has a disability may make such a request orally, but then the information access officer is required to reduce the oral request to writing and provide the applicant with a copy of the request – section 8(2)–(3). A public entity may prescribe a form for making an application to access information, but no application may be rejected solely on the ground that the applicant has not used the prescribed form – section 8(4).

The timeframes specified in sections 9 and 10 regarding the decision as to whether the information will be provided are unclear and in some cases contradictory.

Section 9(1) states that, subject to section 10, a public officer must make a decision on an application within 21 days of receipt of the application. An information access officer may, within five days of receipt of the request, transfer the application or any relevant part of it, to another public entity if the information requested is held by that entity – section 10(1). Where an application is transferred, the information access officer must inform the applicant of the transfer within seven days of receipt of the application (presumably of the original) – section 10(2). The public entity to which the application has been transferred is then required to make a decision on the application within 21 days from the date that the application was first made – section 10(3).

As soon as the information officer has decided whether or not to provide access to the requested information, he or she is required to immediately communicate the decision to the requester – section 4. The information officer must indicate:

- Whether the public or private entity holds the requested information
- Whether the request has been approved
- If it has been declined, the reasons for the decision, including the reasons for considering the information exempt.

If the request is declined, the information officer must also issue a statement of how the requester may appeal to the Commission of Administrative Justice (CAJ).

In terms of section 14(1), an applicant may apply in writing to the CAJ requesting a review of the decision of a public or private entity to:

- Refuse to grant access to the information applied for
- Grant access to information in an edited form
- Purport to grant access, but not actually granting the access in accordance with an application
- Defer providing the access to information
- Grant access to only a specified person
- Refuse to correct, update or annotate a record of personal information in accordance with an application made under section 13, which relates to personal information held by a public or private entity.

Where the applicant does not receive a response to an application under section 9(1) within the specified period, the application shall be deemed to have been rejected – section 9(6).

Section 9(2) addresses not the decision-making timeframe, but the information provision timeframe, where the information sought concerns the life or liberty of a person. It specifies that the information must be provided within 48 hours of receipt of the application.

In term of section 9(3), the information officer to whom a request has been made under section 9(2) may extend this to a maximum of 14 days if:

- The application is complex
- The application is for a large volume of information
- The application requires a search through a large amount of information and meeting the stipulated time would unreasonably interfere with the activities of the information holder

- Consultations are necessary in order to comply with the request and they cannot be completed within the stipulated timeframe.

Process for provision of information

The AI Act requires information to be disseminated by the most effective method of communication in that local area, in the local language, easily accessible and available at no charge or at cost – section 5(2). According to section 5(3), at a minimum the material must be made available:

- For inspection by any person without charge
- By supplying a copy on request for which a reasonable charge to cover reproduction costs may be made
- On the internet, provided that the materials are held by the authority in electronic form.

Where a decision is taken to provide the requested information, the information officer must send the applicant a written response within 15 working days of the receipt of the request, and advise – section 11(1):

- That the application has been granted
- That the information will be contained in an edited copy, where applicable
- The details of any fees, or further fees, to be paid for access, together with the calculations made to arrive at the amount of the fee
- The method of payment of such fees
- The proposed process of accessing the information once the payment is made
- That an appeal may be made to the CAJ in respect of the amount of fees required or the form of access proposed – section 14(1). According to section 14(2), such an application must be made within 30 days from the day on which the decision is notified to the applicant, or within such a further period as the CAJ will allow.

Upon receipt of the required fee, the information must be produced forthwith at the place where it is kept in the form in which it is held. If the applicant requests that it be made available in another form and, if it is practicable to do so, this shall be done at the expense of the applicant – section 11(3). Section 11(2) states that the inform-

ation must be made available for inspection immediately, but in any event, not later that two working days from the date of receipt of the payment.

No fee may be levied for the submission of an application – section 12(1) – but the entity providing the information may charge a prescribed fee (not more than the cost of reproduction and delivery) for the provision of the information – section 12(2). Within those limitations, the Cabinet secretary responsible for matters relating to information makes regulations prescribing the fees payable – section 12(3).

Offences in terms of the AI Act

Where an application to access information has been made to a public entity under section 8 and the applicant would have been entitled, subject to payment of any fee, to provision of any information in accordance with that section, any employee, officer or individual subject to the direction of the public entity who alters, defaces, blocks, erases, destroys or conceals any record held by the public entity with the intention of preventing the disclosure of that information, commits an offence – section 18(1)–(2). Upon conviction, the person is liable to a fine, imprisonment or both – section 18(3).

In terms of section 16(8), in any proceedings for an offence relating to the disclosure of information, it is a defence to show that:

- The disclosure was in the public interest
- Before making the disclosure, the defendant had reasonable belief in the veracity of the information – section 16(3).

Where any information provided by a public entity or private body to an applicant under section 11 was supplied to the public entity or private body by a third person, the publication to the applicant of any defamatory matter contained in the information shall be privileged unless the publication is shown to have been made with malice – section 19.

Any person who provides false information maliciously, intending to injure another person, commits an offence and is liable, on conviction, to a fine, imprisonment or both – section 16(4).

Enforcement of the AI Act

Section 20 gives the CAJ powers of oversight and enforcement for the AI Act, and requires it to designate an access to information commissioner with specific responsibility of performing the functions assigned to the CAJ under the AI Act. Section 21(3) makes its decisions binding on the national and county governments.

Public entities and relevant private bodies are required to provide to the CAJ such reports as the Access to Information Act requires – section 23(7). The CAJ, in consultation with the public, must develop guidelines detailing reporting requirements – section 23(8) – and may request any further information from affected bodies to facilitate and enhance monitoring – section 23(9).

If an applicant for information is dissatisfied with the decision of an information access officer, he or she may within 30 days of the decision being communicated to him or her – section 14(2), or such time as the CAJ may allow, appeal to the CAJ in respect of the following decisions – section 14(1):

- Refusal to grant access to requested information
- Granting access in redacted form
- Purporting to grant access, but not actually granting access in accordance with an application
- Deferring providing the access to information
- Imposition of a fee or the amount of the fee
- Remission of application prescribed fee
- Granting of access to information only to a specified person
- Refusal to correct, update or annotate a record of personal information.

The CAJ may, on its own initiative or upon request by any person, review a decision by a public entity refusing to publish information that it is required to publish under the AI Act – section 14(3). The procedure for submitting a request for review by the CAJ is the same as the procedure for lodging complaints with the body, as detailed in section 22 – section 14(4). These may be lodged orally or in writing to the secretary or such other person as may be authorised by the CAJ for the purpose, and must be in a form and contain particulars as prescribed by the CAJ from time to time – section 22.

In terms of section 23(1), the CAJ has the power to:

- Issue summonses or other orders requiring attendance of any person before the CAJ, and the production of any document or record relevant to any investigation by the CAJ

- Question any person on any subject matter under investigation before the CAJ

- Require any person to disclose any information within such person's knowledge relevant to any investigation by the CAJ.

A person who fails to appear before the CAJ in accordance with any summons or order, knowingly gives false or misleading information or causes an obstruction in the course of the CAJ proceedings, commits an offence which is punishable with a fine, imprisonment for up to six months or both – section 28(8).

If the CAJ is satisfied that there has been an infringement of the provisions of the AI Act, it may order – section 23(2):

- The release of the information unlawfully withheld
- A recommendation for the payment of compensation
- Any other lawful remedy or redress.

Any person who is unsatisfied with a CAJ order may, within 21 days from the date the order was made, appeal to the High Court – section 23(3).

Functions of the CAJ in respect of the AI Act
In terms of section 21(1), the functions of the CAJ in this context include:

- Investigating violations or provisions of the AI Act, on its own initiative or upon receipt of a complaint

- Requesting and receiving reports from public entities with respect to the implementation of the AI Act and as the act relates to data protection, especially as it relates to the protection of personal data

- Developing and facilitating public awareness programmes on the rights of access to information and the right to protection of personal data

- Working with public entities to promote the right to access of information

- Working with regulatory bodies on promotion and compliance with data protection measures in terms of legislation

- Monitoring state compliance with international treaty obligations relating to freedom of and right of access to information and protection of personal data

- Hearing and determining complaints and reviewing decisions arising from violations of the right of access to information

- Promoting protection of data as provided for under the AI Act or the Constitution

- Performing other functions the CAJ may consider necessary for the promotion of access to information and of data protection.

An order of the CAJ may be filed in the High Court by any party thereto, according to regulations to be prescribed by the CAJ in consultation with the chief justice. Such party must give written notice of the filing of the order to all other parties within 30 days of the filing of the order – section 23(4). If no appeal is filed, the party in favour of whom the order is made by the CAJ may apply *ex-parte* by summons for leave to enforce such order as a decree, and the order may be executed in the same manner as an order of the High Court – section 23(5).

In terms of section 26 of the AI Act, the CAJ must submit an annual report to Parliament, by way of the Cabinet secretary in charge of information, and it must include an overall assessment of the performance of government with regard to access to information during the period under review. The Cabinet secretary must lay the report before Parliament within two months of receipt thereof, along with any necessary comments. The Cabinet secretary is also required to report each year to Parliament the steps which the government has taken in implementing recommendations made in the CAJ report.

On or before 30 June of each year, section 27 requires every public entity to submit a report to the CAJ which includes:

- The number of requests for information received by the entity, and the number of requests processed

- The number of determinations not to comply with requests under section 8, and the main grounds for such determinations

- The average number of days taken to process different types of requests

- The total amount of fees collected by the public entity while processing requests

- The number of full-time staff devoted to processing requests for information, and the total amount expended for processing such requests.

The Cabinet secretary in charge of information is empowered by section 25 to make regulations after consultation with the CAJ for the better carrying into effect of the provisions of the AI Act.

Whistleblower protection

The Access to Information Act provides a number of protections that would normally form part of whistleblower protection legislation. Section 3(e) provides for the protection of persons who release information for public interest in good faith. Section 16(1) expands on this by specifying:

> A person shall not be penalized in relation to any employment, profession, voluntary work, contract, membership of an organization, the holding of an office or in any other way, as a result of having made or proposed to make a disclosure of information which the person obtained in confidence in the course of that activity, if the disclosure is of public interest.

Section 16(2) states that:

> For purposes of subsection (1), a disclosure which is made to a law enforcement agency or to an appropriate public entity shall be deemed to be made in the public interest.

The disclosures protected under section 16(1) and (2) include information on – section 16(5):

- Violations of the law, including human rights violations
- Mismanagement of funds
- Conflict of interest
- Corruption
- Abuse of public office
- Dangers to public health, safety and the environment.

Section 16(6) states that a person is 'penalised' if he or she is:

- Dismissed
- Discriminated against
- Made the subject of reprisal or other form of adverse treatment
- Denied any appointment, promotion or advantage that otherwise would have been provided or any other personnel action provided under the law relating to whistleblowers.

The imposition of any such penalty in contravention of section 16(6) is actionable as a tort.

No settlement arising from a claim under section 16 may impose an obligation of confidentiality on any party to that settlement in respect of information which is accurate and which was, or which was proposed to be, disclosed – section 16(7).

In terms of section 16(8), in any proceedings for an offence relating to the disclosure of information, it is a defence to show that:

- The disclosure was in the public interest
- Before making the disclosure, the defendant had reasonable belief in the veracity of the information – section 16(3).

Any person who provides false information, maliciously intending to injure another person, commits an offence and is liable, on conviction, to a fine, imprisonment or both – section 16(4).

❖ **Judicial Service Act, Act 1 of 2011**

Under section 5 of the First Schedule of this act, the JSC is required to maintain the confidentiality of sensitive and highly personal information in the applications for judicial positions, as described in sub-paragraph (1). However, any information that is not described under that sub-paragraph shall be set out in a separate part of the application and may be available to the public, according to section 5(2).

These requirements are useful to the media and to the public interest as it means the process of appointing and dismissing judges is transparent and may be commented upon. This is important in keeping the judiciary accountable to the populace and in maintaining the public's confidence in the integrity of the judiciary.

❖ **Independent Electoral and Boundaries Commission Act, Act 9 of 2011**

The IEBC supervises elections and referenda in Kenya at county and national government level. Among other things, it also has responsibility for regular revision of the voters' roll, and the delimitation of constituencies and wards in accordance with the Constitution – section 4. These are important issues in a democracy, and the transparency and accountability of the IEBC is essential to maintain public confidence in the process.

Within three months of the end of each financial year, the IEBC is required to present its annual report to the president and to Parliament. The IEBC is also required to

publish the annual report in the Gazette and in at least one national circulation newspaper – section 24.

Under section 27, a request in the public interest by a citizen, and thus the media, shall be addressed by the person the IEBC designates to do so. The request may be subject to the payment of a reasonable fee, where the IEBC incurs an expense in providing the information, and may be subject to confidentiality requirements. Subject to article 35 of the Constitution, the IEBC may decline to give information to an applicant if the request is unreasonable in the circumstances, the information requested is at a deliberative stage by the IEBC, failure of payment of a prescribed fee, or the applicant fails to satisfy the IEBC's confidentiality requirements. The right of access to information under article 35 is limited to the nature and extent specified under section 27.

❖ **Ethics and Anti-Corruption Act, Act 22 of 2011**

Under section 29, the Ethics and Anti-Corruption Commission is required to publish and publicise important information within its mandate affecting the nation. A request for information by a citizen, and thus the media, shall be addressed by a person designated by the Commission to do so. It may be subject to a reasonable fee, and be subject to confidentiality requirements. Subject to article 35 of the Constitution, the Ethics and Anti-Corruption Commission may decline to give information to an applicant if the request is unreasonable in the circumstances, the information requested is at a deliberative stage by the Commission, failure of payment of a prescribed fee, or the applicant fails to satisfy the Commission's confidentiality requirements. The right of access to information under article 35 is limited to the nature and extent specified under section 29 – that is, when the:

- Request is unreasonable
- Information requested is at a deliberative stage by the Commission
- Prescribed fee has not been paid
- Applicant has failed to satisfy the confidentiality requirements of the Commission.

❖ **County Government Act, Act 17 of 2012**

Under section 41, the deliberations of all meetings of the county executive committee are to be recorded in writing and its resolutions must be accessible to the public.

Under section 93, the county media is to have access to information in accordance with article 35 of the Constitution, and section 94 requires the county government to use the media to promote the freedom of the media.

A county government is required to establish mechanisms to facilitate public com-

munication and access to information in the form of the media with the widest public outreach in the county, which may include television stations, websites, community radio stations and other mass media – section 95.

According to section 96, every Kenyan citizen shall, on request, have access to information held by any county government or any unit or department thereof, or any other state organ. Subject to national legislation governing access to information, a county government shall enact legislation to ensure access to information, though it may impose reasonable fees for accessing information held by the county government, its departments or agencies.

4 REGULATIONS AFFECTING THE MEDIA

In this section you will learn:

- ❑ What regulations or rules are
- ❑ Key regulations that affect 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 legislation thereon.

4.2 Key regulations governing the media

4.2.1 Regulations contained in the Kenya Information and Communications Act, CAP 411A of 1998

There are a number of regulations contained in the subsidiary legislation of the KIC Act, and those that apply to the media are:

- Broadcasting – CAP 411A – 187/2009
- Dispute resolution – CAP 411A – 26/2010
- Tariffs – CAP 411A – 27/2010 and 149/2010
- Compliance monitoring, inspections and enforcement – CAP 411A – 28/2010
- Fair competition and equality of treatment – CAP 411A – 29/2010
- Consumer protection – CAP 411A – 54/2010
- Radio communications and frequency spectrum – CAP 411A – 58/2010
- Universal access and service – CAP 411A – 70/2010
- Licensing and quality of service – CAP 411A – 71/2010.

❖ **The Kenya Information and Communications (Broadcasting) Regulations, CAP 411A – 187/2009 (Broadcasting Regulations)**

Licensing process

Regulation 3(1), in Part II 'Licensing' of the Broadcasting Regulations, specifies that everyone wishing to provide broadcasting services in Kenya must apply to the CA for a licence through the prescribed procedure. A licence application has to be submitted for every broadcasting station an applicant wishes to operate – regulation 3(3). However, it should be noted that no persons other than the public broadcaster is directly or indirectly entitled to more than one broadcast frequency or channel for radio or television broadcasting in the same coverage area – regulation 10. The CA publishes applications received for broadcasting licences in the Gazette and is required by regulation 3(5) to invite public comment prior to issuing the licence, which it will consider when making the final decision whether or not to grant the licence.

The amended section 46J(c) of the KIC Act provides that the period within which a successful licence applicant must use the assigned broadcasting frequencies is 'such period as the Authority shall stipulate in the licence'. However, the Broadcasting Regulations have not been updated and they still state that a successful applicant must establish the necessary infrastructure and commence broadcasting within 12 months of receiving his/her licence – regulation 3(6). Failure to do so results in revocation of the licence – regulation 3(7). A broadcaster may not lease or transfer broadcast frequencies or channels assigned to it to any other person without the written authority of the CA – regulation (10(6).

Not less than 14 days before commencing broadcasting, regulation 8 requires licensees to publish in a wide circulation newspaper in the licensee's coverage area:

- A statement on the licensee's intention to transmit a broadcasting service in the coverage area
- The commencement date and time of transmissions
- The assigned frequency or channel
- The station programming format
- A statement inviting members of the public to contact the licensee in case the licensee's transmission interferes with services provided by other licensees
- The address and telephone number of the licensee.

Regulation 7 authorises the CA to prescribe fees payable for the broadcasting services licence application, and the fees applicable on granting of the licence, renewal, transfer, annual licence fees, as well as any other fees related to the services. It is authorised to exempt the public broadcasting services and any other licence category from payment of those fees.

All renewal applications may be submitted to the CA within six months before the expiry of the current licence. All required fees have to be paid before the issuance of the renewed licence – regulation 9.
Foreign commercial broadcasters may be licensed by the CA in consultation with the minister in charge of information, subject to availability of frequencies or channels – regulation 12(2).

Regulations relating to applicant's ownership
At the time of writing, the CA's website appeared well-maintained and current, and broadcast licence application forms for a number of licence categories were available for download.[26] There are several forms also included as subsidiary legislation in the KIC Act.

Form No. 1 in the KIC Act subsidiary legislation, entitled 'Application for Licences', specifies the required information relating to the company and individuals applying for a licence, including:

- Full name, address and contact information for the company or individual making the application, as well as the income tax personal identification number (PIN)
- Name, nationality, address and passport or identity numbers of individuals, shareholders and directors
- Shareholding information, including local versus foreign shareholding, stock exchange listing data
- The company's registration certificate number and a certified copy of the proof of registration or incorporation in Kenya
- The name and address of the bank or financial institution where its business account is held
- The services proposed and the market to be served
- Several mandatory items, specifically:

- A certified copy of proof of shareholding from the Registrar of Companies
- A certified copy of proof of registration or incorporation in Kenya
- A certified copy of the PIN card
- A non-refundable licence application fee
- A letter of application with company seal, where applicable

- Whether any of the partners, directors or shareholders:
  - Is an undischarged bankrupt
  - Has a beneficial interest in any other business licensed to provide or operate postal services
  - Has had a previous licence application rejected
  - Has had any previous licence cancelled, suspended or modified.

This information requirement relating to 'postal services' is the only instance in this form where a particular type of licence is mentioned. No other form requiring this level of information regarding the applicant is provided in the KIC Act, so it is presumed that this form applies to all licence applicants. Further, on the final page of Form 1, where the granting or rejection of the application is indicated with the official stamp, the type of licence to be granted has to be written in by the CA.

It should be noted that all copies of documents submitted with the application forms must be certified as true copies of the originals.

In addition, according to regulation 10(2), the shareholding in a licensee must comply with the government's communications sector policy, as may be published from time to time. The CA must be informed of any change in ownership, control or proportion of shares at least 90 days prior to the change being effected – regulation 10(3). A change in shareholding exceeding 15% of the issued share capital, or the acquisition by an existing shareholder of at least 5% of additional shares, requires the prior written consent of the CA. The information required and considerations influencing the CA's decision are detailed in regulation 10(4)–(5). For companies that are listed on the stock exchange, the Capital Markets Authority Act applies – regulation 10(8).

Licence application requirements

The application fee, initial licence fee and annual operating fee for each of the different categories of broadcasting-related licences is provided in the 'Fee schedule for broadcasting services licences'[27] document available on the CA's website. For most of them, the fee payable on 1 July each year is in the region of 0.5% of annual turnover. It should be noted that this document also specifies, under Note 3, that only the public broadcaster (the KBC) is eligible to apply for public radio or television licenses.

When applying for a licence, there are a number of requirements that must be met by anyone wishing to provide broadcasting services in Kenya. The relevant provisions of the Broadcasting Regulations are summarised as follows:

- A free-to-air commercial licence applicant must submit a business plan to the CA, which includes – regulation 4(1):
  - Evidence of technical capacity
  - Evidence of experience and expertise
  - Evidence of the capacity to offer broadcasting services for at least eight continuous hours a day
  - A programme line-up or schedule
  - Any other information the CA may prescribe.

- A subscription television or radio licence applicant must – regulation 4(2):
  - Meet all the requirements specified for the free-to-air applicant
  - Satisfy the CA that it has the capacity to offer a minimum of 10 channels to each subscriber.

- A community broadcasting licence applicant must provide – regulation 5(1):
  - Information on the service for which the licence is sought
  - Minutes of the meeting where it was resolved to establish a community broadcasting station
  - Proof of the sources of funding and sustainability mechanisms
  - Weekly programme schedules
  - Any other information the CA may prescribe.

Subscription broadcasting services licences may, upon application in the prescribed form, be granted for satellite broadcasting services, cable broadcasting services and subscription management services. There are various additional requirements applicable to satellite broadcasting services that are dealt with in the latter points of regulation 14 and in regulation 15.

Upon application in the prescribed form, the CA may grant a licence for terrestrial digital broadcasting and signal distribution services. There are various requirements that apply to terrestrial digital broadcasting services that are dealt with in regulation 16.

Administrative regulations

Regulation 6(2) requires all broadcasters to:

- Annually file documents with the CA showing their station identity and any changes thereto

- Ensure that their station identity is unique and does not cause confusion
- Keep records as prescribed by the CA
- Reveal their station's identity at intervals of 60 minutes during broadcast periods
- State, at least twice within every 24 hours, all the frequencies and channels on which they are licensed to operate.

All broadcasting licensees are required under regulation 40 to document their complaints-handling procedures, and those procedures need to be submitted to the CA for approval prior to the commencement of broadcasting services – regulation 41. Broadcast licensees must inform their listeners or viewers of the existence of these procedures at least once daily. Broadcast transcripts or recordings related to a complaint may not be disposed of until the issue is resolved.

On 1 July each year, licensees are required to submit to the CA a written report of all complaints received during the past period and how they were addressed. Persons who have exhausted a broadcaster's complaints handling procedure and are still unsatisfied may appeal to the CA under regulation 42, and the issue will then be dealt with under the Dispute Resolution Regulations (discussed below in this chapter) or as prescribed by the CA. Such a complaint must be lodged with the CA within 90 days of the date on which the material complained of was broadcast.

Funds generated by community broadcasters have to be reinvested in activities benefiting the community, according to regulation 13(3), and the CA is required to monitor this – regulation 13(4). Community broadcasters may carry on their stations advertisements that are relevant and specific to the community within the broadcast area – regulation 15(5).

The public broadcasting service may not source revenue from advertising or sponsorship, according to regulation 11(2), though the CA may, on application by the public broadcaster, grant the public broadcaster a licence to provide broadcasting services on a commercial basis – regulation 11(4).

This appears to contradict the provisions of section 38(1) of the KBC Act, which clearly envisages that the KBC is to conduct its business according to 'commercial principles', and it is clear that one of the most significant sources of revenue for the KBC is advertising.[28] The public broadcaster may enter into a public–private partnership when providing commercial services, though the partnership must comply with the law relating to public procurement – regulation 11(6).

Content regulations

Regulation 6(1) of the Broadcasting Regulations requires the CA to ensure that broadcasting services reflect the national identity, needs and aspirations of Kenyans. Accordingly, the CA requires a licensee to commit a certain amount of time to the broadcast of local content, as may be specified in the licence or by notice in the Gazette – regulation 35. The CA's Programming Code for Free-to-Air Radio and Television Broadcasters in Kenya contains definitions of what constitutes local programming and prescribed minimum local content quotas in regulation 18 thereof. In brief these are: 40% local content within one year of being awarded a licence, increasing to 60% within four years (note this excludes news and advertising). The CA may determine the financial penalty to be paid for failure to comply with the local content quota.[29] The CA is required to prescribe a minimum local content quota for foreign broadcasting stations that broadcast in Kenya as well.

All free-to-air broadcasters are required, in terms of regulation 6(3), to ensure that their services:

- Provide the amount of local content specified in the licence
- Include news and information in its programming, as well as discussions on matters of national importance
- Adhere strictly to the CA's or subscribed programme codes in the matter and time of programming schedules.

A commercial free-to-air broadcaster is required, in terms of regulation 12, among other things:

- To provide a diverse range of programming that reflects the identity, needs and aspirations of people in its broadcasting area
- Not to acquire exclusive rights for the non-commercial broadcast of national events identified by the CA to be of public interest.

A community broadcaster is required, in terms of regulation 13, to:

- Reflect the cultural, religious, language and demographic needs of the people in the community
- Deal with community issues which are not normally dealt with by other broadcasting services covering the same area

- Be informational, educational.

In terms of regulation 11(1), a public broadcaster is required to:

- Provide independent and impartial services
- Offer information, education and entertainment in English and Kiswahili, and other languages as it may decide
- Consider the interest and susceptibilities of the different communities in Kenya
- Provide and receive from others material to be broadcast while maintaining the distinctive character of the public broadcasting service and catering for audiences not generally catered for.

All broadcasting licensees are required to inform their listeners or viewers of the existence of their complaints handling procedures and how they can lodge a complaint at least once daily – regulation 40(1)(b).

All broadcasters are required by regulation 43 to make public notice of an emergency or public disaster announcements as requested by a person authorised by government, and in a manner specified in the Gazette.

The programme content code

The CA is required by regulation 37 to prescribe a programme code that sets the standards for the time and manner of programmes to be broadcast by licensees, which code is, in terms of regulation 18, required to conform to the requirements of regulations 19 to 34 which set out clear restrictions on the kind of content that can be broadcast. These restrictions are extremely numerous and are not summarised herein.

All licensees are subject to this programme code, or to a code prescribed by a recognised body of broadcasters that has been accepted by the CA – regulation 38.

In late June 2016, the Media Owners Association (MOA) submitted such a code to the CA. The director general stated that the submission had been reviewed by the CA, and had been returned to the MOA with advice on the areas to address before submitting a revised version for further consideration by the CA. As of the date of writing, no progress has been reported,[30] though regulation 38(5)(b) specifies that the body of broadcasters is required to resubmit the revised programme code within 30 days of the date of notification. Until such a code is approved by the CA, the CA's

programme code is the one in force. The Programming Code for Free-to-Air Radio and Television Services in Kenya (Programming Code) dated March 2016 is available for download from the CA's website.[31]

The Programming Code is 35 pages long and is too voluminous to summarise here in great detail. However, it is important to be aware of the type of content that is covered by the Programming Code, namely:

- *General principles*
  - The requirement to broadcast in a manner that serves the public interest at all times
  - The requirement to respect the dignity of individuals and basic rights of others
  - Adhering to generally accepted values, ethical and moral standards.

- *Family programming/Good taste and decency*
  - During the watershed period (05:00–22:00), programming must be suitable for family listening and viewing.

- *Protection of children*
  - Children may not be put at physical or moral risk.
  - Child victims of abuse may not be identified.
  - Children involved in criminal matters shall be interviewed only upon the consent of a parent or legal guardian.
  - A minimum of five hours of radio or television programming per week must be devoted to programmes suitable for children.

- *News and public affairs*
  - News must be fair, factual, accurate and objective.
  - Comment or station editorials must be clearly separated from news.
  - At least one-and-a-half hours of daily programming must be news.
  - Receiving any consideration to favour one side of the story is outlawed.
  - When broadcasting controversial issues of public interest, a wide range of opinions should be presented.
  - Sources of news must be clearly identified unless they are confidential.
  - Unconfirmed reports shall not be broadcast unless there is an immediate and urgent need for the public to know about them.
  - The use of hidden cameras or microphones may be resorted to only when the information being sought is vitally important in the public interest and after exhausting conventional methods.

- Morbid, violent, sensational or alarming detail is not essential to a factual news report and not permitted.

- *Analysis and commentaries*
  - Commentary must be based on facts.

- *Fundamental rights*
  - Broadcasters are obliged to respect the right to privacy of individuals and other fundamental rights particularly with regard to:
    - Grief
    - The presumption of innocence
    - The right to reputation.

- *Personal attacks*
  - Personal attacks on or unfair criticism of the character of an individual, institution or group on matters that have no bearing on the public interest are prohibited and the right of reply in such cases must be provided.

- *Election period and political parties*
  - Equitable opportunities to access unpaid airtime shall be given to candidates and political parties.
  - No programme is allowed manifestly to favour or oppose any candidate or political party.
  - The amount of airtime allotted to political propaganda and the rates to be charged shall be consistent to all parties and candidates.
  - Election propaganda shall be clearly identified as such.

- *Crime and crisis situations*
  - Coverage of crimes in progress or crisis situations shone shall not put lives in additional danger.
  - The identities of the victims shall not be broadcast until released by the authorities.
  - Coverage of crime shall not support the perpetrators.
  - Alleged perpetrators of sexual offences shall not be identified until formal charges have been filed.

- *Copyright*
  - Broadcasters are responsible for all obligations and liabilities to any third party associated with copyright or other rights that may arise from the broadcast of copyrighted programming.

- *Religious programmes*
  - Religious programmes shall not be used to attack, insult or ridicule other religions or to favour a particular faith over another.

- *Advertisements*
  - Advertising must be clearly distinguishable from other programming.
  - Advertisements must contain at least 40% local content footage.
  - Advertising may not be discriminatory.
  - Particular care must be exercised in relation to children.
  - Tobacco products advertising is outlawed.

- *Occultism and superstition*
  - Programmes featuring superstitious beliefs and practices shall be carefully presented so as not to mislead the audience.
  - Programmes that promote cult practices, witchcraft and similar activities may not be broadcast during the watershed period.

- *Discrimination*
  - No programme that is intended to stir up tribal, racial, religious or ethnic hatred is entitled to be broadcast.
  - Racist terms and stereotyped portrayals should be avoided.
  - Humour which offends against good taste and decency must be avoided.

- *Sex, obscenity and pornography*
  - Sex and related subjects must be treated with care and must conform to what is generally acceptable to Kenyan society.
  - Explicit depictions of sex are prohibited during the watershed period.
  - Unless there is a strong editorial justification, explicit or graphic descriptions of sex organs and acts are prohibited.
  - Offensive, obscene, blasphemous, profane and vulgar double meaning words and phrases are prohibited.

- *Liquor, cigarettes and dangerous drugs*
  - The use of liquor and dangerous drugs shall never be presented as socially acceptable.

- *Local content*
  - The requirements are dealt with immediately above this section.

- *User-generated content*
  - This is defined as including non-traditional sources of media such as Twitter, YouTube, Facebook, blogs, podcasts and mobile telephony.
  - Broadcasters are required to ensure that no harmful, libellous, threatening and hateful user-generated content is broadcast.
  - Broadcasters must ensure that their own user-generated content is accurate.

- *Persons with disabilities*
  - Broadcasters must include persons with disabilities in different programmes.
  - Programming relating to news, national events, emergencies and education shall provide a sign language insert or subtitles.
  - Humour based on physical, mental or sensory disability should be avoided.

- *Public complaints*
  - The Programming Code contains detailed guidelines on complaints by the public and how they are to be dealt with.

- *Offences and penalties*
  - Failure to comply with the Programming Code is an offence and the penalty is as set out in the KIC Act, namely a fine, imprisonment or both.

Offences

Any person who contravenes any provision of the Broadcasting Regulations commits an offence and is liable to a fine, imprisonment or both – regulation 44.

❖ **The Kenya Information and Communications (Dispute Resolution) Regulations, 2010, CAP 411A – 26/2010 (Dispute Resolution Regulations)**

The Dispute Resolution Regulations were made by the Minister for Information and Communications in consultation with the Communications Commission of Kenya, of which the Communications Authority of Kenya (CA) is the successor in title. The purpose of these regulations is to resolve disputes between licensees, or between a consumer and a licensee, or any other persons as may be prescribed under the act – section 3.

Under regulation 3(3), the CA is empowered to hold hearings, inquiries and investigations, but regulation 3(4) states that it may waive any rule or requirement where necessary.

A dispute has to be submitted to the CA, and the other party to the dispute, in writing within 60 days of the occurrence prompting the dispute – regulation 4(1). The prescribed fees must accompany the submission, according to regulation 4(4), and the CA is required to acknowledge receipt of the complaint in writing – regulation 4(6). The CA may decline to accept a memorandum of complaint that:

- Does not raise any issue, under the KIC Act
- Does not conform to the provisions of the act or directions given by the CA
- Is trivial, frivolous or vexatious
- Is defective or presented incorrectly
- Has been filed with any other body that has jurisdiction to hear and determine the dispute – regulation 4(7).

However, the CA is required to give the complainant an opportunity to be heard before declining to accept the memorandum of complaint, and must give the complainant an opportunity to rectify any defects in the pleadings – regulation 4(8)–(9). It is then required to notify both parties in writing, stating the reasons for declining – regulation 4(10).

The CA is required to notify the party against whom the complaint is made within seven days of receiving a complaint, and provide a copy of the memorandum of complaint. A response is required from that party within 21 days of receiving the notification – regulation 5. A complainant may withdraw a complaint at any time, and the CA will make orders relating to costs as it considers fit – regulation 6.

The parties to a dispute are required to set the date for the hearing of the dispute within 15 days of the date of the filing of the last response from either party. Except where otherwise agreed by the parties, each is entitled to not less than seven days' notice of the time, date and place. The CA may decide a matter based on documents laid before it or oral testimony given. The CA may call on experts as it deems necessary – regulation 7.

The CA has to produce its decision in writing within 30 days of the conclusion of the hearing, and include in the document its reasons for the decision. Any party dissatisfied with the decision may appeal to the Communications and Multimedia Appeals Tribunal within 15 days of the decision. However, the decision of the CA is binding until the Tribunal rules on the matter – regulation 8.

The parties may reach an agreement and withdraw the dispute by submitting the negotiated agreement to the CA for approval. The CA may make orders relating to costs as it deems appropriate. The CA may, on application, extend the time appointed for the performance of any act, should that appear just and expedient to the CA.

Records of proceedings, excluding anything confidential or privileged, are open for inspection by any person after the conclusion of the hearing, subject to conditions the CA may prescribe, and payment of inspection fees. The CA may publish in the Gazette and other media its decisions on disputes it has heard and determined – regulation 9.

The Complaints Handling Procedure may be downloaded from the CA website.[32]

❖ **The Kenya Information and Communications (Tariff) Regulations, 2010, CAP 411A – 27/2010 (Tariff Regulations)**

The purpose of the Tariff Regulations, under regulation 3, is to provide a framework for the determination of tariffs and tariff structures that subscription broadcasters may charge their customers, and to:

- Ensure licensees maintain financial integrity and attract capital
- Protect the interests of investors, consumers and stakeholders
- Provide market incentives for licensees to operate efficiently
- Promote fair competition.

A licensee is required to set just and reasonable tariffs which are clearly understandable to the end-user and are non-discriminatory – regulation 4(1). A licensee must provide accurate billing information on tariffs, and may not apply tariffs that prevent market entry or distort competition. A licensee who contravenes this regulation commits an offence – regulation 4(2)–(4).

A licensee has to file the schedules with their tariff rates with the CA quarterly, and may not charge its customers tariff rates that have not been filed with the CA. All tariff rates filed with the CA have to be available to the public for inspection. A licensee which contravenes this regulation commits an offence – regulation 5.

The CA may from time to time publish in the Gazette a schedule of regulated services. Regulated services have to be charged by licensees at the tariffs filed and approved by the CA. The CA may, on its own motion, set or review tariffs for a regulated service. A licensee which contravenes this regulation commits an offence – regulation 6. A licensee wishing to review the tariffs for a regulated service has to file an application with the CA at least 90 days before the change is due to come into effect – regulation 7.

The CA is required to Gazette applications for tariff changes, and is required to allow at least 30 days for written public comment, which the CA has to take into account when making its final decision – regulation 8.

The CA may approve or reject tariffs proposed by a licensee for a regulated service if the proposed tariff is viewed as unjustifiable, unfair or unreasonable. The CA is required to render any rejection in writing, state the reasons for the rejection, and make the rejection available to the provider. If new tariffs are approved, the licensee is required to inform the public by publishing the new tariffs in two daily national circulation newspapers, or by any method the CA approves. This has to be done no less than 14 days before the implementation of the new tariff. A licensee which contravenes this regulation commits an offence – regulation 9.

Any licensee wanting to offer a promotion or special offer is required to file all details thereof with the CA at least seven days before the intended date of implementation. Promotions may not run for more than 90 days, nor be repeated before three months have elapsed. It should be noted that approval has to be obtained from the Betting Control and Licensing Board, where the promotion involves games of chance. The CA may discontinue any promotion that does not comply with the Tariff Regulations, and must state the reasons for doing so – regulation 11.

The CA may initiate an investigation on its own motion, or pursuant to a complaint made to it – regulation 10. Any person who commits an offence under the Tariff Regulations for which no penalty is provided is liable to a fine, imprisonment or both – regulation 12.

❖ **The Kenya Information and Communications (Compliance Monitoring, Inspections and Enforcement) Regulations, 2010, CAP 411A – 28/2010 (Compliance Regulations)**

The CA is empowered to monitor and enforce compliance with the KIC Act, regulations and conditions of licences by all licensees – regulation 3. It is required to issue guidelines on installation and maintenance of communication infrastructure – regulation 4.

In carrying out its duties, the CA is guided by the KIC Act, the regulations and principles including:

- Transparency, fairness and non-discrimination
- The need to provide modern, qualitative, affordable and readily available communications systems and services
- The need to promote fair competition
- The need to promote and improve the quality of service provided

- Any other principle the CA considers necessary – regulation 5.

The CA may issue directions in writing to any person to secure compliance, and may enlist the assistance of law enforcement agencies and other departments as provided in the KIC Act. It may appoint a person to carry out the inquiry and provide a report. The CA may exercise its powers on its own initiative or in response to a complaint – regulation 6.

Every quarter and at the end of its financial year, a licensee is required to prepare and submit to the CA a report of its operations. Specifically, this report must address its operations and the extent to which it has adhered to the conditions of its licence. On the licensee's request, any information in these reports may be kept confidential – regulation 7.

Under regulation 8(3), a licensee is required to maintain proper records in a manner prescribed by the CA, and permit the CA access to the records as required. The CA inspectors, appointed under regulation 11, may at all reasonable times enter into any premises owned or controlled by a licensee for inspection purposes, and may examine, or remove for examination, any information, document, apparatus or equipment. Any person who obstructs a CA inspector in the performance of his duties commits an offence and is liable to a fine, imprisonment or both. However, under regulation 12(2), an inspector does not have the authority to compel any person to produce any document which he could not be compelled to produce in any civil proceedings.

An investigation into a licensee's compliance may be commenced where the CA has reason to believe the licensee has failed to comply with construction, installation or service provisions, or any condition of its licence or performance obligations – regulation 8(1). The CA may publish compliance or investigation reports in the Gazette, as it deems necessary – regulation 8(6).

Where an investigation has found contraventions taking place, the CA is required to notify the licensee in writing, and the licensee is required to remedy the contravention within three months as well as prove to the CA that it has sustainably remedied the contravention – regulation 9(1)–(3).

If a licensee fails, without reasonable cause, to remedy the contravention within the required period, the licensee is liable to a fine which is payable within 14 days of receipt of notification – regulation 9(4) and 10(1). The CA may also impose other sanctions on a licensee – regulation 10(2). Any licensee aggrieved by the decision of the CA may appeal to the Communications and Multimedia Appeals Tribunal within 15 days of receipt of the CA's notification – regulation 9(5).

The CA may institute civil proceedings against any person for remedies that may include injunctive relief, recovery of penalties, specific performance or pecuniary awards or damages – regulation 13.

❖ **The Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010, CAP 411A – 29/2010 (Competition Regulations)**

The Competition Regulations purpose, under regulation 3, is to:

- Provide a regulatory framework for the promotion of fair competition and equal treatment in the communications sector
- Protect against abuse of market power or other anti-competitive practices
- Provide the standards and procedures applied by the CA in determining whether conduct is anti-competitive
- Clarify agreements, conduct or practices that the CA considers anti-competitive or prohibited.

Under regulation 4, the CA has the power to determine, pronounce upon, administer and enforce compliance of all its licensees with competition laws and regulations relating to commercial activities in the communications sector. It may also cooperate with other statutory agencies where a matter falls concurrently under the jurisdiction of that body.

The CA may develop and publish in the Gazette guidelines to be followed when determining whether a licensee is in a dominant market position in a specific communications market – regulation 7. The criteria include the:

- Degree of market concentration
- Degree of price variation over time
- Ability to materially raise prices without suffering commensurate loss in service demand to other licensees
- Ability to maintain or erect barriers to entry to the market
- Ability to earn supernormal profits
- Power to make independent rate-setting decisions

- Degree of product or service differentiation and sales promotion in the market.

Where these criteria do not apply, the CA may presume dominance where the licensee's gross revenues exceed 25% of the total revenues of all licensees in the relevant market – regulation 8(4). The CA may direct a dominant service provider to cease a conduct that may have the effect of substantially reducing competition, or require that it implement appropriate remedies – regulation 8(5).

Licensees may not cross-subsidise prices for any service offered in the market with revenue from the sale of other services it may provide – regulation 10(1).

Under regulation 11, the obligations of licensees include:

- Providing a uniform, non-preferential service on a first-come-first-served basis

- Not violating the principle of equal access and non-preferential treatment if it considers the ability of the person to pay for a service when deciding whether to provide the service, or make other rational classifications among subscribers, such as business and residential, and to provide service on the basis of the classification.

Where a licensee intends to enter into an agreement or take any action that may affect another licensee in the same market segment, it may seek guidance from the CA at least 30 days prior to entering the agreement or taking the action – regulation 12. The CA is required to respond within 30 days of receiving the request, and to state whether the agreement or conduct is likely to contravene the Competition Regulations.

The CA may, on its own motion or upon a complaint, investigate a licensee whom it has reason to believe has breached the requirement for fair competition or equality of treatment – regulation 13. In conducting an investigation, the CA may:

- Require the production of any document or information which it considers relevant

- Take copies of, or extracts from, any document produced

- Require explanation of any such document

- Where a document is not produced, require a statement specifying where it can be found

- Enter any premises with a warrant and require the production of any relevant

document, including those stored in a computer, in a form in which it can be read and taken away

- Enter any premises with a warrant and search the premises and take copies of any relevant document, including those stored in a computer, in a form in which it can be read and taken away.

These regulations do not apply to conduct which is necessary for the operation of essential communications services insofar as the application of the Competition Regulations would obstruct the performance of the tasks assigned to the licensee, nor to conduct necessary to comply with a legal requirement, nor to conduct necessary to avoid conflict with international obligations.

❖ **The Kenya Information and Communications (Consumer Protection) Regulations, 2010, CAP 411A – 54/2010 (Consumer Regulations)**

According to the Consumer Regulations', the rights of customers, under regulation 3, include:

- Receiving clear and complete information about rates, terms and conditions
- Being charged only for the products and services they subscribe to
- Personal privacy and protection against unauthorised use of personal information
- Accurate and understandable billing, and prompt redress in the event of a dispute
- Protection from unfair trade practices, including false and misleading advertising and anti-competitive behaviour by licensees
- Equal opportunity for access to and quality of service as other customers in the same area at substantially the same tariffs.

A service provider is required to take appropriate measures to safeguard the security of its services and to inform subscribers if there is risk of a breach thereof – regulation 4.

A licensee is required to establish a customer care system through which customers can make enquiries and complaints concerning its services in a format and in such detail as required by the CA – regulation 5. The CA may publish guidelines relating to customer care systems.

A licensee must provide easily understood information about its complaint-handling processes in various media and formats – regulation 7. A customer must lodge any complaint in writing, and within six months of the date of the incident. The licensee must acknowledge receipt of a complaint and advise the customer, where possible at the time of making the complaint, the expected action, timing for investigation and resolution. If the service provider regards the customer complaint as frivolous or vexatious, the consumer must be informed accordingly. The complaints handling process must include ways in which the customer may remain informed of the progress of his or her complaint. Where a customer is not satisfied with a decision made on a complaint, he or she must be offered the option to escalate the complaint within the organisation in accordance with an identified process. If the customer is still not satisfied after that process has been followed, the customer may refer the complaint to the CA.

A licensee may not charge for complaint handling, but may impose a reasonable charge where the case warrants it, according to regulation 7(11), and the charge must be agreed to by the customer and referred to the CA before being imposed – regulation 7(12). A licensee is required to file quarterly with the CA information and statistics on all complaints reported, including those resolved and those outstanding – regulation 7(13).

Regulation 9 requires a licensee to establish mechanisms that enable parents or legal guardians to block harmful content from children. A licensee who promotes or glamorises alcohol and tobacco products to children commits an offence.

Licensees are required under regulation 11 to provide clear and comprehensive information on services, rates, terms, conditions and charges, as required by the CA. An outage credit system must be developed by a licensee and, on approval by the CA, this must become part of the licensee's standard subscriber service agreement – regulation 12.

A licensee must submit to the CA, within six months of being granted a licence, a commercial code of practice for approval – regulation 13. The CA may approve, recommend alterations, or reject the code, or extend the period for review thereof. The code must include the licensee's complaints handling procedure, advertising policy, system of outage credit, and emergency safety and assistance services, as well as any other information the CA may determine. Once approved, the code has to be delivered to all subscribers within three months of commencement of service.

A licensee must submit its standard subscriber service agreement to the CA for approval – regulation 14.

No private information of a customer may be offered by the licensee for sale or free to a third party without the prior consent of the customer concerned – regulation 15. The CA is required, under regulation 22, to monitor sector performance, conduct consumer satisfaction surveys and publish its finding at least once in every two years.

A licensee commits an offence under regulation 23 if the licensee:

- Fails to perform measurement, reporting and record-keeping tasks within required time frames
- Fails to reach a target for any of the parameters stipulated under the Consumer Regulations
- Fails to submit, within the time specified, any information requested by the CA pursuant to the Consumer Regulations
- Submits or publishes false or misleading information about the quality of its services
- Obstructs or prevents inspections or investigations by the CA
- Engages in any act or omission to defeat the purposes of the Consumer Regulations.

A person who commits an offence under these regulations is liable to a fine, imprisonment or both.

❖ **The Kenya Information and Communications (Radio communications and frequency spectrum) Regulations, 2010, CAP 411A – 58/2010 (Spectrum Regulations)**

Among the purposes of the Spectrum Regulations are meeting the country's socio-economic and cultural needs, and the equitable and fair allocation and assignment of spectrum to benefit the maximum number of users – regulation 3.

The CA is required to publish guidelines that specify eligibility criteria for the granting of spectrum licences – regulation 4. No person may possess, establish, install or use any radio communication equipment which requires licensing unless that person has a valid licence granted by the CA – regulation 5.

Regulation 8 details the obligations of licensees, including:

- Maintaining proper records

- Paying annual fees
- Putting the assigned frequencies into use within the period specified by the CA
- Not making any material changes to a licensed station without written authorisation from the CA.

The CA prescribes the methods for determining frequency spectrum pricing, according to regulation 10. The pricing formula set by the CA accords with the economic value of the frequency spectrum in order to encourage efficient use and stimulate growth – regulation 11.

Unlimited access to installations must be permitted to authorised CA officers for inspection purposes, according to regulation 13, and the CA may disable or confiscate any equipment that contravenes the conditions of the licence – regulation 16. A licensee who misuses frequencies is liable to a fine, imprisonment or both – regulation 17.

'Application form for frequency assignment and licence in radio communication service' is Form No. 5 in the First Schedule of the KIC Act. It requires administrative details on the applicant, including the name of the organisation or individual making the application as well as the nationality, identity or passport number, postal and physical addresses, contact numbers, name and contact information of its local suppliers, if any, the type of radio communication service to be licensed (HF, MF, FM), the broadcast area (with a certified copy of the broadcasting permit) and the name of the person or organisation responsible for the payment of bills.

Form 5 requires extensive technical detail including:

- Transmitter site details
- Transmitter equipment details including for the antenna and other equipment and their performance
- Hours of operation
- Proposed service commencement date

Form 6, 'Application for frequency assignment and licence in the fixed and mobile radio communication service', requires a similar level of detail relating to all relevant equipment.

The 'Second Schedule – Fees' lists the licence fees payable by various types of operators and service providers in Kenya. Section 14 deals with the fees payable by broadcasting stations and fixed satellite earth stations, which are calculated to be commensurate with the power and occupied bandwidth. The formula and explanatory notes are part of section 14 of the Second Schedule.

'Type approval/acceptance fees' are also part of the Second Schedule, and lists fees payable for MUXs, radio broadcast transmitters and television broadcast transmitters.

❖ **The Kenya Information and Communications (Universal access and service) Regulations, 2010, CAP 411A – 70/2010 (Universal Access Regulations)**

Among the purposes of the Universal Access Regulations is facilitating development and access to a wide range of local and relevant content – regulation 3(e). The requirements of the universal service levy imposed under regulation 84J(3) of the KIC Act are clarified under regulation 4 of the Universal Access Regulations. The levy is imposed on all licensees offering communications services on a commercial basis, and may not exceed one percent of gross revenue of a licensee.

❖ **The Kenya Information and Communications (Licensing and quality of service) Regulations, 2010, CAP 411A – 71/2010 (Service Regulations)**

Anyone wishing to operate any communication system or provide any communication service (note: these terms are not defined but we assume they include broadcasting services) requiring a licence under the KIC Act must apply to the CA for a licence – regulation 4. The application has to be done in the manner and form prescribed by the CA.

An applicant has to ensure that its shareholding conforms to the prevailing communications sector policy, and has to provide the CA with:

- Registration or identification documents prescribed by the CA
- The applicant's contact address
- Detailed business plans for the proposed services, where applicable
- Detailed information relating to the proposed system or services to be provided
- Information relating to any previous experience in management of the proposed system or services for which the licence is sought, where applicable
- Any other information the CA may require.

A licensee must notify the CA of any change of particulars, including to the name or contact address filed, and must notify the CA and the public of any change of trade or brand name, at least 30 days before the change takes place – regulation 8.

The shareholding must always comply with the government communications sector policy published from time to time, and the CA has to be notified of any proposed change in ownership, control or proportion of shares held in it at least 30 days before the change is effected. Any changes must comply with the regulation 9 requirements.

Written consent must be received from the CA prior to any transfer or assignment of

a licence. The CA must communicate its decision within 30 days of receiving the request – regulation 10.

Licence renewals (regulation 11) and licence revocation (regulation 12) are handled in accordance with the requirements of the KIC Act. Any person who is aggrieved by the CA's decision may appeal to the Communications and Multimedia Appeals Tribunal.

The obligations of a licensee in terms of providing quality of service are dealt with in regulation 13, and regulations 14 and 15 cover quality of service standards.

The CA is required to Gazette quality of service parameters from time to time, and licensees are required to take measurements, compile, summarise and submit them to the CA in the prescribed format within the specified period – regulation 16. The CA may investigate matters relating to these reports (regulation 17) and publish results submitted by licensees (regulation 18).

A licensee is responsible for obtaining any licenses and approvals it needs from other relevant authorities regarding infrastructural installations – regulation 20.

A person who provides any services under the KIC Act without a licence issued by the CA commits an offence and is liable to a fine, imprisonment or both.

4.2.2 Regulations contained in the Films and Stage Plays Act, CAP 222 of 1962 (Films Act)

There are two pieces of subsidiary legislation to the Films Act:

- Films and Stage Plays (Cinematographic Films) (Forms and Fees) Regulations, 1967 (Fees Regulations)

- Films and Stage Plays (Film Censorship) Regulations, 1968 (Censorship Regulations)

❖ **The Films and Stage Plays (Cinematographic Films) (Forms and Fees) Regulations, 1967 (Fees Regulations)**

Every application for a filming licence has to be made to the licensing officer in writing, and must be accompanied by a full description of the scenes in, and a full text of the spoken parts (if any) of the entire film which is to be made. This must be accompanied by a written statement by the applicant as to the duration of the film to be made and the part or parts thereof which are to be made in Kenya, or which have been made outside Kenya – regulation 2(1). Where a film has been granted a licence, but is made differently from the particulars provided to the licensing officer, without having obtained the necessary permissions, every person engaged in the making thereof

commits an offence – regulation 4. Languages other than English have to have their text translated into English to the satisfaction of the licensing officer – regulation 2(2).

Any person who makes any statement or representation which he knows or has reason to know to be false for the purpose of obtaining a filming licence is guilty of an offence – regulation 2(3).

The licensing officer may require the licence applicant to enter into a bond, with or without sureties, prior to granting the licence – regulation 3.

The filming licence with its charges and conditions is contained in the First Schedule of these regulations. The fees payable are assessed by the licensing officer in accordance with the written statement of the applicant as to the duration of the film – regulation 5(2) – and based on the fee table in the Second Schedule. The Second Schedule provides a list of fees based on length of film, type of film, number of days shooting, as well as fees for agents and agencies and so on. It should be noted that this licence does not authorise the licensee to take photographs within the meaning of the National Parks of Kenya (Photography) Regulations, for which separate authority is required – note on First Schedule.

Any person guilty of an offence under these regulations is liable to a fine, imprisonment or both. The court may, in addition to or in lieu of any other penalty, order the confiscation and destruction of the film and may revoke the filming licence, whether the person convicted is the holder of the licence or not – regulation 7.

❖ **The Films and State Plays (Film Censorship) Regulations, 1968 (Censorship Regulations)**

The chairman and vice chairman of the Film Censorship Board are, according to regulation 4(1), to hold office as such and as members of the board until their appointments are terminated by the minister. Other board members hold office for a three-year term, renewable once.

A certificate of approval issued under section 16(5) of the act, in Form 1 or Form 2 of the First Schedule to the Censorship Regulations, may be signed by the chairman, vice chairman or secretary of the board – section 11(1). A certificate of approval, or a decision of the board under section 16(1)(c) of the act to refuse approval for a film to be exhibited in public, remains valid for five years from the date of issuing or when the decision is made – regulation 11(2).

Where approval is declined, the board is required to notify the applicant and give him its reasons for doing so as soon as practicable – regulation 12. A person aggrieved by

a decision of the board may appeal under section 29 of the act to the minister in writing within 30 days of receiving notification – regulation 13.

The fees applicable to this process are contained in the Second Schedule of these regulations. Certificates of approval are required for films, recorded video, trailers of films, and commercials, among other things, and there is also a fee payable for lodging an appeal under section 29 of the act.

4.2.3 The Capital Markets Authority (Advertising) Regulations 2011 (Capital Markets Advertising Regulations)

Only regulated persons may issue or cause the issue of investment advertisements – regulation 3, except in instances where the advert relates to government or central bank securities, where the prospectus has been approved by the Capital Markets Authority (CMA) under section 50 of the act, or issued in accordance with the Securities Industry (Takeovers) Regulations 2011 – section 4. All the requirements in the schedule to these regulations have to be complied with – section 5.

According to section 2(2) of the Capital Markets Advertising Regulations, an investment advertisement issued outside Kenya shall be treated as issued in Kenya if it is directed at persons in Kenya, or it is made available to persons in Kenya via media principally published or broadcast in Kenya.

Specific dating is required by section 13 of the Advertising Regulations:

- An advert in a newspaper must have the date on which it was first issued in its bottom right-hand corner.

- A broadcast advertisement must have the date on which it was first issued shown prominently at the beginning or end of the advertising material.

5 MEDIA SELF-REGULATION

In this section you will learn:

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

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.

Section 46H of the KIC Act specifies that the programming code described under that section shall not apply to licensees that are members of a body, which has proved to the satisfaction of the CA that its members subscribe and adhere to a programming code enforced by that body by means of its own mechanisms, and further provided such programming code and mechanisms have been filed with and accepted by the CA.

Regulation 37(1) of the Broadcasting Regulations states that the CA is required to prescribe a Programme Code. Section 37(2) states that licensees shall be subject to the programme code prescribed by the CA 'or by a duly recognised body of broadcasters under regulation 38'. Regulation 38 specifies that pursuant to section 46H of the KIC Act, any registered body of broadcasters wishing to operate under its own programme code is required to submit such a code to the CA for approval. This is not unfettered self-regulation, but does put some initiative in the hands of the people and organisations in the industry.

The MOA has been vocal in the media on the subject of the programme code, and in late June 2016 submitted its own proposed independent programme code. According to the director general, the CA had reviewed the MOA's proposed code, and advised the MOA on the areas to address before submitting a revised version for further consideration by the authority.

As of the date of writing, no further progress has been reported,[33] despite the specification of regulation 38(5)(b) that the body of broadcasters is required to resubmit the revised programme code within 30 days of the date of notification. Until such a code is approved by the CA, the CA's Programming Code is the one in force and is dealt with in the Regulations section of this chapter.

6 COMMON LAW AND THE MEDIA

In this section you will learn:

- ❑ The definition of common law
- ❑ How Kenya's courts have dealt with a number of media-related common law issues, including:
  - Commentary versus hate speech
  - Contempt of court
  - The constitutional right of access to information as it relates to non-citizens and juristic persons

- The protection of freedom of the media under article 34 of the Constitution and the validity of licences issued by a non-independent body
- Violation of fundamental rights and freedoms by servants and institutions of the state
- Gazette notices that infringe constitutional rights
- Protection of whistleblowers
- Defamation
    - The defence of fair comment to an action for libel
    - Privilege as a defence for defamation
    - Remedies for defamation
    - Defamation of a public body

6.1 Definition of common law

The common law is judge-made law. It is made up of judgments handed down in cases adjudicating upon disputes brought by people, whether natural (individuals) or juristic (for example, companies). In common law legal systems such as Kenya's, judges are bound by the decisions of higher courts and also by the rules of precedent. This requires that rules laid down by the court in previous cases be followed, unless they were clearly wrongly decided. Legal rules and principles are therefore decided on an incremental, case-by-case basis.

This section focuses on a number of judgments that have a bearing on media law or freedom of expression in some way.

6.2 Commentary versus hate speech

In the 2010 case of *The AIDS Law Project (ALP) v Nation Media Group, Matuma Mthiu and Kwamchetsi Makokha[(Complaint No, 092 of 2010)*, heard by the Media Complaints Commission, the ALP complained that an article headlined 'Thou shalt not lie with mankind as with womankind', published in the *Saturday Nation* of 9 October 2010, was inaccurate, unfair, biased and in breach of article 1 (accuracy and fairness) of the Code of Conduct for the Practice of Journalism (Journalism Code). It claimed the article was inflammatory and promoted hate speech against the homosexual community in Kenya, in breach of article 25 (hate speech) of the Journalism Code.

The commissioners held that freedom of expression is the right to express one's own ideas and opinions freely through speech, writing and other forms of communication,

but without deliberately causing harm to others' character and/or reputation by false or misleading statements. Freedom of the press is part of freedom of expression.

The Media Complaints Commission found that the article was a satire and that the respondents did not aim to harm any person or persons with their opinion piece, which was clearly labelled as such.

The commissioners declined to make a recommendation to the director of public prosecutions to institute criminal proceedings against Mr Makokha for hate speech, as requested by the complainant, and advised that a complaint could be lodged with the National Cohesion and Integration Commission (NCIC) in relation to the hate speech aspects of the case.

Note: we are of the view that this was done because hate speech falls under the particular jurisdiction of the NCIC.

Having found that the article was a satirical piece and there was no malice either intended or proved, the Media Complaints Commission declined to order the respondents to publish an apology and correction.

6.3 Contempt of court

In general terms, the common law crime of contempt of court is made up of two distinct types of contempt, namely: the *sub-judice* rule; and the rule against scandalising the court. The *sub-judice* rule guards against people trying to influence the outcome of court proceedings while legal proceedings are underway. Scandalising the court is criminalised to protect the institution of the judiciary. The point is to prevent the public undermining the dignity of the courts with resultant loss of faith in the judicial system among the populace. This case is interesting because it deals with both aspects of contempt of court.

In Kenya, the law applicable to the High Court and the Court of Appeal in the exercise of their respective powers to punish for contempt of court are the same as those possessed by the High Court of Justice in England, following the coming into force of Order 52 of the Rules of the Supreme Court 1965.

The *Republic v Tony Gachoka and The Post Limited (Criminal Application No. Nai 4 of 1999)* was heard by the Court of Appeal and concerned the publication of two articles in *The Post on Sunday*, which the applicant contended contravened the *sub-judice* rule, as they related to matters still before the court because the court had not yet given the reasons for its decision.

Further, the articles were claimed to be a scurrilous and unjustified attack upon the court that was calculated to bring into disrepute and contempt the administration of justice in Kenya.

The first article alleged that the chief justice was involved in bribery and subversion of justice, and that a High Court judge and several Court of Appeal judges were involved in conspiracy and irregular conduct. The headlines used and the general tone of the articles were clearly sensationalist. The following week's publication carried several articles critical of the chief justice and some judges of the Appeal Court. Under section 5 of the Judicature Act, CAP 8 of 1967, the Court of Appeal has the power to consider, conduct a trial and make judgment on an allegation of contempt of court itself. The committal proceedings for contempt of court against the respondent were criminal in nature.

The first respondent did not deny publishing the articles, but averred that he wrote them pursuant to an investigation he carried out on the subject of corruption. He stood by the articles, for which he had sought the opinions of several legal luminaries prior to publication, and contended that he had not acted or sought in any way to ridicule, scandalise, abuse or bring the court into contempt. Further, he contended that once a ruling was made in a case, he was, as a lay man, at liberty to criticise it as what is left is a mere 'administrative exercise'.

The court disagreed, stating that the articles 'amount to scandalising the court' and were acts calculated to bring both the High Court and the Court of Appeal into contempt or lower their authority. The court also termed them 'a calculated attempt to interfere with the due process of justice'. In the court's opinion, contempt of court under the *sub-judice* rule is committed when comments are made on pending legal proceedings, and that a judgment cannot be conclusive in deciding on a dispute before it unless reasons are given for the finding.

According to the court, because the matter is one in which the court is directly involved, it must at all times appear that the main principle involved is the protection of the public interest that is paramount and not the protection of the judge or court from 'fair, temperate criticism' made in good faith, however strongly worded it might be. However, the innuendo from the words used, and the interpretation that an ordinary, reasonable person would attach to the language used was such that the articles amounted to scurrilous attacks and could not be viewed as fair criticism. According to the court, the publisher's language was insulting, abusive and derogatory, and it was clear that the motive was to scandalise the court and bring it into contempt.

Journalistic criticism of a judge's decision on principles of law is something the press

is entitled to do, but personal attacks impugning their honesty and integrity, and imputing improper motives to them, have to be provable and justifiable.

The court, by majority decision, found both respondents guilty of contempt of court. Tony Gachoka, the publisher and chief executive of the *Post on Sunday*, was sentenced to six months in prison. A large fine was imposed on The Post Limited and it was ordered to cease publication of its weekly magazine, the *Post on Sunday*, and any other publication by it until the fine was paid in full.

6.4 The Constitutional right of access to information as it relates to non-citizens and juristic persons

In *Famy Care Limited v Public Procurement Administrative Review Board and Others (Petition No. 43 of 2012)*, heard by the Constitutional and Human Rights Division of the High Court of Kenya, the petitioner was aggrieved by the tendering process for certain family planning commodities. Famy Care sought access to the complete record of correspondence between the interested parties and any other party in the matter.

Famy Care's second application related to requesting certified copies of Technical Committee and Tender Committee minutes and evaluation reports relating to the specific tender. These applications were based on the protection of fundamental rights and freedoms on its own behalf and in the public interest.

The defendants argued that the petitioner was a company incorporated in India, and thus a 'foreign citizen' not entitled to the access to information rights enshrined for citizens under article 35 of the Constitution. The petitioner's counsel contended that the petition was brought under article 22 to enforce fundamental rights and freedoms, and that these fundamental rights and freedoms relate to the petitioner, who is also acting in the public interest as provided in article 22(2)(c). Being a suit in the public interest, counsel contended that every member of the public affected is entitled to the full protection of article 35, and therefore the petitioner must be included in the definition of citizen.

The court held that article 260 of the Constitution states that a person 'includes a company association or other body of persons whether incorporated or unincorporated', so rights which accrue to a person apply equally to juristic persons. Although 'citizen' is not defined in article 260 of the Constitution, citizenship is dealt with in articles 12–18. The effect of these provisions is that citizenship is in reference to natural persons, as article 14 specifically uses 'birth', 'parents' and 'born' in its wording – all terms which apply only to a human being.

The court found that the protections of article 35 thus did not apply to a juristic person, and Famy Care was excluded from enjoyment of the right to access to information.

Famy Care's counsel argued that as a citizen of Kenya he was entitled to information under article 35(1) of the Constitution, but the court rejected what it termed 'actively and deliberately circumventing constitutional or other legal provisions by using his privileged position in the course of proceedings'. Further, the court decided that Famy Care's argument that the petition was brought in the public interest could not alone circumvent the clear limitation of article 35(1), as there is nothing in the article which permits the limitation of citizenship to be overwritten by public interest.

The petitioner's applications were struck out and costs were to abide by the petition.

The effect of this judgment was that juristic persons such as companies, NGOs and the like, whether foreign or Kenyan, did not enjoy the right of access to information, as such a right is available only to natural persons who are citizens. This was, of course, a disappointingly narrow interpretation of the scope of the constitutional right of access to information. However, the recently passed Access to Information Act, 2016 (also discussed elsewhere in this chapter) has defined 'citizen' as including 'any private entity that is controlled by one or more Kenyan citizens'. This is welcome as it restores the right of access to information to juristic persons controlled by Kenyan citizens which was taken away in this case.

6.5 The protection of freedom and independence of the media under article 34 of the Constitution

The Constitutional and Human Rights Division of the High Court heard the case between *Royal Media Services Ltd and Others v Attorney and Others (Petition No. 557 of 2013)*, which related to the nature and extent of the freedom of the media protected under article 34 of the Constitution, and whether it had been violated by the respondents in the context of the migration of terrestrial television broadcasting from the analogue to the digital platform.

The petitioners were Kenyan broadcasting companies that collectively controlled 85% of the television coverage in the country, and which had not been issued broadcasting signal distribution (BSD) licences. The first three respondents are bodies of the state, while the 4th and 6th respondents were companies that had been granted BSD licences by the CA. Other respondents included the holder of a temporary licence for a broadcast subscription management service, a television broadcaster in Kenya, and a media company licensed to broadcast by the CA.

From the petition, the court identified two broad areas relevant to the broadcast media that needed to be determined, namely:

- Whether and to what extent the petitioners were entitled to be issued with BSD licences by the CA, and whether the issue of the licences to the other licensees to the exclusion of the petitioners was a violation of articles 33 and 34 of the Constitution

- Whether implementation of the digital migration constituted a violation of the petitioners' fundamental rights and freedoms and, if so, whether the process should be stopped, delayed or varied in order to vindicate or ameliorate the petitioners' fundamental rights.

As digital migration occurs within a global context and the process is implemented through a framework established by the International Telecommunication Union Convention, which Kenya ratified in 1964, the court determined that the issues had to be resolved with that in mind.

The court found that the petitioners were not entitled to be issued with BSD licences by the CA on the basis of their established status, or on the basis of any legitimate expectation. Licensing is subject to statutory provisions which allow the CA, in the exercise of its mandate, to make certain considerations and impose conditions necessary for the achievement of the objects and purposes of the Constitution and the law. The issuing of BSD licences to other licensees to the exclusion of the petitioners, as alleged in the petition, was not a violation of articles 33 and 34 of the Constitution.

The court also found that the implementation of the digital migration was not a violation of the petitioners' fundamental rights and freedoms, and no basis had been made by the petitioner to stop, delay or vary the digital migration process. The process of migration of the broadcasting platform from analogue to digital had been consultative and participatory and in line with Kenya's international obligations.

Accordingly, the petition was dismissed with costs awarded to the respondents and the 2nd interested party as the court was convinced that the petitioners' motivation to bring the petition was intended to protect their commercial interests and not in the nature of public interest litigation.

The petitioners were aggrieved by this ruling and filed *Civil Appeal No. 4 of 2014: Royal Media Services Limited and Others v Attorney General and Others*. The judges of the Court of Appeal delivered separate but largely concurring judgments setting aside the judgment of the High Court and issuing a number of orders including:

- That the CA's direction to the 4th, 5th, 6th and 7th respondents to air the appellant's free-to-air programmes without their consent was a violation of the appellant's intellectual property rights and was declared null and void

- In its composition at the material time, the CA was not the independent body envisaged by article 34(3)(b) of the Constitution, and consequently its public procurement process of determining applications for BSD licences was null and void, and that an independent body constituted strictly in accordance with the above constitutional article should conduct the tendering process afresh

- That a BSD licence was to be issued to the appellants upon their meeting the terms and conditions set out in the appropriate law and applicable to other licensees, in view of their massive investment in the broadcasting industry

- That the BSD licence issued to the 6th respondent was null and void and that the CA should refund whatever fees it was paid for the licence

- That the 2nd and 3rd respondents were restrained from switching off the appellants' analogue frequencies, broadcast spectrums and broadcasting services and that the new switch-off date should be no later than 30 September 2014.

These and consequential orders prompted the original respondents to file applications under certificate of urgency in the Supreme Court of Kenya, and after hearing the parties on 11 April 2014 the court made orders, including the following:

- Signet Kenya Limited, Star Times Media Limited, Pan Africa Network Group Kenya Limited and GOtv Kenya Limited were prohibited from broadcasting any content from Royal Media Services Limited, Nation Media Group Limited and Standard Group Limited without their consent, pending the hearing and determination of the intended appeal.

- The CA was prohibited from switching off any frequencies, broadcast spectrums or broadcasting services pending the hearing and determination of the intended appeal.

- The legal effect of the Court of Appeal's declaration that the CA was not the independent body envisaged under article 34(3)(b) of the Constitution as a regulator of airwaves was held in abeyance pending the hearing and determination of the intended appeal.

- The new switch-off date of 30 September 2014 would remain valid pending the hearing and determination of the intended appeal.

The petitions were consolidated – *Petitions 14, 14A, 14B and 14C of 2014*.

The Supreme Court of Kenya upheld the constitutionality of the CA and its independence to consider and issue licences under article 34(3), as flowing from the Constitution's supremacy clause it was imperative to provide a formula by which old legislation would transit into the new constitutional dispensation without creating a vacuum.

In its conclusion, proposal and orders, the court signalled certain directions that will have bearing on constitutional initiatives by other agencies of governance, including the following:

- The CA was urged to ensure that the sale of set top boxes was open to competition to avoid creating a monopoly or duopoly. Towards this end, the CA could consider incorporating subsidising the cost of set top boxes as part of the requirement for signal distribution licensees.

- The CA must realign operations and licensing procedures to be in tune with articles 10, 34 and 227 of the Constitution.

The court then went on to make the following orders:

- The Orders of the Court of Appeal were set aside.

- The annulment of the issuance of a BSD licence to Pan African Network Group Kenya Limited by the CA was set aside.

- The order by the Court of Appeal directing the independent regulator to issue a BSD licence to the 1st, 2nd and 3rd respondents was set aside.

- The CA was required to consider the merits of applications for a BSD licence by the 1st, 2nd and 3rd respondents, and any other local private sector actors in the broadcast sector, whether singularly or jointly, within 90 days of the judgement.

- The CA was to ensure that the BSD licence issued to the 5th appellant be duly aligned to constitutional and statutory imperatives.

- The CA, in consultation with all the parties to this suit, had to set timelines for the digital migration, pending the international analogue switch-off date of 17 June 2015.

6.6 Gazette Notice requiring certificates of approval prior to publicly exhibiting films, including on television

The Constitutional and Judicial Review Division of the High Court heard the civil application of *Nation Media Group Limited v The Attorney General (Mic. Civil Application No. 821 of 2002)*, which hinged on a Gazette notice issued by the Minister for Information, Transport and Communication in terms of the Films and Stage Plays Act (CAP 222 of 1962), which Nation Media Group contended infringed its constitutional rights and freedoms. Judgment was delivered in 2007.

In Gazette Notice No. 4014, dated 6 June 2001, the minister issued a legal notice requiring 'broadcasting networks, cinema theatres, production houses, advertising agents and all those involved in films (including television commercials, television dramas, comics, documentaries and features) for public exhibition, screening or broadcast, whether foreign or locally produced' to obtain a certificate of approval from both the Film Licensing Officer and the Kenya Film Censorship Board prior to being exhibited. Further, according to the notice, any person who exhibited any film in contravention of this requirement committed an offence.

The applicant's counsel contended that the minister's action was unconstitutional and, according to precedent, the burden of proof had shifted to the respondent to justify the law, and that the state had to justify the reasonableness of the limitation to the right. Since the publication of the Gazette Notice, the respondent had demanded the applicant's compliance by two letters. Further, the applicant's counsel submitted that the minister could not issue orders which make it impossible to run a modern television station. For a constitutionally guaranteed right to be taken away, it had to be done in accordance with the law, and not by a mere Gazette Notice. According to Counsel, the Communications Commission of Kenya was the body with licensing authority for television, and the minister was extending provisions meant for stages, theatres and cinemas to the broadcast and television media.

The court held that the Films and Stage Plays Act was meant to control the making and exhibition of films, and the places where exhibition is contemplated are cinema halls, stages and theatres – closed areas or rooms – especially in the light of the opening words of section 12(10): 'No person shall exhibit any film at an exhibition to which the public are admitted unless the board has issued a certificate of approval in respect thereof approving it for exhibition'.

It held that the Films and Stage Plays Act did not envisage or make reference to the licensing of media houses or the regulation of their broadcasts, and the Constitution requires any curtailment of right to be according to the law, thus the extension by the

minister to include television communication was not valid according to any existing law.

Additionally, the regulations could not be deemed to pass the test of reasonableness as the way they are stated means they would even cover live broadcasts. It is not reasonable to expect the applicant to submit a live coverage film for approval before airing. If the legal notice was found to be inapplicable to media houses that broadcast into Kenya from other countries, that would be a case of discrimination against local media houses, which is outlawed under the Constitution.

The requirement to obtain a certificate of approval from two bodies – the Licensing Officer and the Kenya Film Censorship Board – for the same licence, was viewed by the court as a waste of time and an unnecessary expense. Further, no criteria were provided as to how the two bodies would exercise their power in approving or rejecting a film, and the court was of the opinion that objective standards should be applied to avoid arbitrary decisions and possible abuses of power.

The Film and Stage Plays Act came into force in 1963, at which time videos, DVDs, and the like did not exist. The court stated that the legal notice as promulgated was out of time and tune with current trends in information technology, and in the court's opinion it was impracticable, oppressive and unreasonable.

The Gazette Notice did not, according to the court, pass the tests of legality, reasonableness or of being in the interest of defence, public safety, order, morality or health, and the respondents did not demonstrate that the decision to have the notice or its contents was informed by those tests. Consequently, the notice and its contents were ineffective, restrictive and limited the applicant's right to freedom of expression. The court issued declarations that:

- The order by the Minister of Information Transport and Communication infringed upon the applicant's right of freedom of expression and related rights

- The order by the minister published in the Gazette was null and void and of no legal effect in that it did not satisfy the principle of legality set out in the Constitution, and that it was not necessary or justifiable in a democratic society such as Kenya.

6.7 Defamation

In this chapter, we have already dealt extensively with the general issue of defamation as it arises in respect of criminal defamation. However, it is important to note that

defamation is more usually dealt with as a civil matter, where a person who has been defamed seeks damages to compensate for the defamation. All of the cases dealt with in this section arise in the context of civil cases of defamation, which is also known as 'libel' in Kenya. That term will be used in this section.

6.7.1 The defence of fair comment to an action for libel

This case deals with the 'fair comment' defence to an action for libel. The High Court of Kenya heard the case of *CFC Stanbic Bank Limited (Stanbic) v Consumer Federation of Kenya (COFEK) (Civil Case No. 315 of 2014)*, in which the plaintiff claimed it had been defamed and claimed damages for libel, aggravated damages and for a permanent injunction to restrain the defendant from publishing the article under contention.

At the beginning of October 2014, COFEK published on its website an article entitled 'How true is this allegation on Stanbic Bank Juba Branch on Foreign Exchange Transactions'. The article contained allegations of lack of integrity in foreign exchange dealings, breach of Central Bank regulations, arrogance by the plaintiff's foreign exchange dealer, breach of consumer rights and lack of integrity and responsibility by the plaintiff's management team.

Stanbic's advocates demanded the immediate removal of the article from the COFEK website, Facebook and Twitter accounts. COFEK responded that they were not the authors of the anonymous article, but had brought the article to the attention of the public in general to elicit complaints and have a public explanation given. Stanbic sought various injunctive orders against COFEK, contending that the website, Facebook and Twitter accounts were open to millions, and that COFEK had declined to remove the article and, further, had published it to the Central Bank of Kenya, as well as intimating it would continue to publish the article and invite comments from the public.

Stanbic's position was that the article was affecting its reputation, and the re-publication of the article to the Central Bank of Kenya and the public was actuated by malice as COFEK has the power to control who posts on its site by blocking users. The plaintiff claimed that the company's reputation was at stake, the continued publication of the article was causing immense reputational damage to it, and the publication on the Twitter account amounted to a republication. Further, it stated that the defences of fair public comment and justification were not open to the defendant.

COFEK contended that the article constituted fair public comment and was not defamatory, and since Stanbic had not produced a report to show what was contained

in the article was false or unfounded, or that it was actuated by malice, the defendant was entitled to rely on the defences of fair public comment and justification.

The court found that the words of the article would indeed tend to lower Stanbic's reputation in the estimation of right thinking members of society, and therefore on a *prima facie* basis the words may be defamatory. Regarding the issue of malice, the court found that COFEK did not seek to verify the authenticity of the contents of the article before republication, then published it further to the regulatory authorities. COFEK had received the article at its email address and then chosen to post it to its website, Facebook and Twitter accounts, and the court regarded this as 'publishing'.

The court referred to a number of previous cases in its judgment, and thus held that by republishing what was libellous, COFEK assumed responsibility in respect thereof – precedent being that every republication of a libel is a new libel. COFEK put forward the defences of public fair comment and justification, but at the time the application was being argued, no defence had been filed, so the court was unable to dismiss or uphold those defences.

The court judged that the article complained of was not only defamatory, but its continued publication on the worldwide web may continue to damage Stanbic's international reputation and business. This could be remedied by summary removal of the offending publication and the court so ordered the removal thereof. The costs of the application were awarded to the plaintiff.

6.7.2 Privilege as a defence for defamation

The High Court heard the case of *Ndungu Njoroge and Others v The Standard Limited and Others (Civil Case No 117 of 2004)*.

The 1st plaintiff is a law firm in which the 2nd plaintiff is a partner. The 2nd plaintiff was also the chairman of the Presidential Commission of Inquiry into Illegal/Irregular Allocation of Public Land, known as the Ndungu Commission. The suit was filed against a media house, its managing editor and the reporter of an article published in the *East African Standard*, in which was written: 'The head of the presidential commission investigating irregular land allocations could be forced to resign following allegations involving him in an irregular land deal. The National Academy of Sciences claims that Ndung'u Njoroge and Company Advocates, where the commission Chairman is a partner, conspired with "powerful conmen" to grab the land … .'

The article quoted both the 2nd plaintiff and documents forwarded to the newspaper

by staff of the Kenya National Academy of Sciences, the public body which claimed the law firm was involved in the transaction in which the National Academy was 'duped' into swapping a piece of land it had been allocated for a plot that was found to be non-existent. As the 2nd plaintiff was chairman of the commission investigating these issues, he would thus be in the position of investigating his own firm, which was against the rules of the commission. The 2nd plaintiff stated that commission investigations indicated that the swap involved the then commissioner of lands, and the then permanent secretary in the Ministry of Research, Technical Training and Technology, and that none of the commission's members had raised the issue of his stepping down.

According to the plaintiffs, the publication of the claims was done knowing, or with reason to know, they were false, or reckless or without taking any care to ensure that the words were true. They claimed the publication defamed them as they were depicted, among other things, as having plotted and conspired with conmen to defraud the Kenya National Academy of Sciences of its land. The plaintiffs stated that, prior to publication, the full facts and documentary material had been provided to the defendants showing that the allegations linking the plaintiffs in such a conspiracy were false. The plaintiffs claimed that the defendants failed to tender an apology, and the plaintiffs had to place advertisements in the media to correct the position. They further claimed that their reputation and goodwill were seriously injured, they suffered embarrassment in the eyes of the reasonable man, business was adversely affected, and they were subject to public ridicule, odium and had suffered loss and damage. They therefore claimed special damages, general damages for libel, damages on the footing of aggravated or exemplary damages, an injunction restraining further publication of similar statements as well as costs of the suit and interests.

The defendants filed a joint defence that while admitting the publication of the material, denied it was published falsely or recklessly and stated that it was not defamatory of the plaintiffs. They pleaded that they had made an offer of rejoinder to the plaintiffs, which the plaintiffs ignored and proceeded to file the suit. As a rejoinder had been published, it was the defendants' view that there was no need to publish the advertisement. Alternatively, they pleaded that the material was published as fair information in a matter of public interest and concern – the Kenya National Academy of Sciences is a public institution – without malice towards the plaintiffs and under a common interest with and duty to the public, hence the occasion was privileged. According to the defendants, the publication was meant to bear the meaning attributed to them by the plaintiff and therefore denied that the plaintiffs had been injured thereby. The defendants therefore denied that the plaintiffs were entitled to the claims sought.

The court referred to article 32(1) of the Constitution relating to the right of freedom of conscience, religion, thought, belief and opinion, and the right to express that opinion, and article 33 which gives the right to freedom of expression, but drew special attention to clause (3), which provides that in exercising freedom of expression, the rights and reputation of others are to be respected. The court therefore has the duty, it said, to balance the public's rightful interest in how its affairs are being administered with the protection of the dignity and reputation of others.

However, according to the court, the law recognises certain defences that may be invoked by a defendant in cases of defamation. Also, there are occasions when the freedom of communication without fear of an action for defamation is more important that the protection of a person's reputation, and such occasions are said to be 'privileged' – either absolute or qualified. Qualified privilege is a valid defence only when the maker of a defamatory statement acts honestly and without malice. It is up to the plaintiff to prove malice. Further, the protection of privilege is not valid unless the publication is in the public interest and the newspaper can be said to be fulfilling a duty in revealing it.

The court found that the plaintiffs' reputation, credibility and goodwill must have been dented by the publication, but in publishing the article the defendants were not motivated by malice. This means that the plaintiffs would, in the absence of privilege, have been entitled to compensation.

The defendants had offered rejoinder to the plaintiffs, and on the day following the original publication a rejoinder was published in the newspaper, which, in the court's view, was appropriate to what had been published the previous day, even though it was not published on the first page.

From this, the court declined to give the plaintiffs the relief claimed, as the defendants were covered by the defence of qualified privilege. However, as the court felt the defendants could have conducted more thorough investigations into the matter before publishing, costs would not be awarded to them.

The court further stated that the publication was not done 'with guilty knowledge', and as aggravated damages would have been appropriately ordered against a defendant that acted out of improper motivation, this was not the case. Also, a rejoinder was duly published. The court referred to article 34 of the Constitution, which provides for the freedom of the media, and that the state is prohibited from 'penalising any person for any opinion or view of the content of any broadcast, publication or dissemination'. This being the court's finding, the suit was dismissed.

6.7.3 Remedies for defamation

Kipyator Nicholas Kiprono Biwott v Clays Limited and Others (Civil Case 1067 & 1068 of 1999) was heard in the High Court. The case was brought by Kenyan Minister of Tourism, Trade and Industry Nicholas Biwott against the authors, publishers and printers of a book entitled *Dr. Ian West's Casebook*, which Biwott claimed defamed him by implying that he killed, or participated in the murder of, Dr Robert Ouko, as well as implicating him in corruption. The book was published in the United Kingdom (UK) and was sold in many parts of the world, including Kenya. Biwott held that the book had damaged his reputation both locally and internationally.

Papers for each of the cases noted above were served on the UK-based companies and the co-authors, but all failed to enter appearance within the prescribed time. Default judgments were entered against all of them, and this consolidated case was before the court for the determination of damages. Book Point Ltd and Chandermohan Bahal t/a Bookshop (which distributed and sold the book) are both Kenyan defendants, and although they initially entered a defence, Salim Dhanji & Co eventually admitted liability and a consent judgment was entered against them. They were required to pay damages to the plaintiff and make an unqualified apology for their publication of the offending material by its sale. For this reason, although the Kenyan defendants were not part of this case, the award against them was judged to be relevant and taken into account in making the ultimate award against the UK-based defendants.

In looking at precedent cases, the judge expressed being 'particularly troubled by the inordinately low awards made by the High Court in libel cases'. In assessing the measure of damages in this case, the court used the settlement amount reached with the Kenyan defendants as a starting point – their role in the perpetration of the libel was viewed by the court as 'rather marginal' and in addition they tendered an acceptable apology. The UK-based defendants had refused to either apologise or withdraw the publication, and the court judged that this constituted aggravation of the damage. 'They have continued to repeat the libel, have refused to apologize and continue to make profits from their wrong.'

Larger damages were adjudged against them – indeed, the highest ever made in Kenya for libel. The court justified this by stating as follows: 'I believe that time is propitious to send a clear message to all those who libel others with impunity, and who get away with ridiculously small awards, that the Courts of law will no longer condone their mischief. No person should be allowed to sell another person's reputation for profit where such a person has calculated that his profit in so doing will greatly outweigh the damages at risk.'

The court also awarded a permanent injunction against the selling and circulation of the book within the jurisdiction of the Supreme Court. Costs were awarded to the plaintiff.

6.7.4 Defamation of a public body

In the case *Media Council of Kenya v Eric Orina (Civil Suit No. 540 of 2012)* heard in the High Court, the Media Council sought an injunctive order to restrain the defendant, a member of the Media Council, from writing, printing and publishing further 'defamatory' statements against the Media Council and its members, pending the hearing and determination of this suit.

The respondent published six emails in five publications online via the portal Jackal News, and the applicant's contention was that the nature of the statements were erroneous and damaging to the Media Council's reputation, its functions and the best interests of the public at large. The applicant further argued that the respondent was likely to continue to publish more derogatory material, which was likely to be published by the Jackal News, that such statements would hamper the core aims and objectives of the Media Council, and that he should therefore be restrained.

According to the applicant, the defendant's conduct was not in keeping with the applicant's constitutional right to have its reputation respected and not compromised in the minds of right thinking members of society, and that further publications by the defendant would so damage the Media Council as to be beyond being compensated by damages.

The respondent admitted publishing the emails, but as a member of the Media Council he had correctly challenged and questioned the applicant in respect of the state of affairs in the Media Council and the unlawful manner in which its members were conducting the Council's mandate. He contended he was not throwing mud at the Media Council, but was an insider 'blowing the whistle' in a justified and fair manner in the realm of 'fair comment'.

The court's view was that, although the plaintiff had a *prima facie* case with a probability of success, the Media Council itself was established for the purpose of protecting the right to freedom of speech and free expression – a right the respondent was trying to assert in his publications that were in question. The Media Council is accordingly expected to be more tolerant on the issue than private individuals, and the court therefore ruled, because the plaintiff was not a private person but a public body, any damage done to it in respect of its reputation could sufficiently be compensated with damages.

The court found the application for an injunction of restraint therefore had no sufficient merit and the case was dismissed with costs.

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