

Media Legislation in Africa A Comparative Legal Survey

Guy Berger



United Nations
Educational, Scientific and
Cultural Organization

Ethiopia • Ghana • Kenya • Mali • Mozambique • Nigeria • Senegal • South Africa • Tanzania • Zambia

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by Professor Guy Berger



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LIST OF ACRONYMS AND ABBREVIATIONS

AU: African Union

ACDEG: African Charter on Democracy, Elections and Governance (agreed by the Assembly of Heads of State and Government of the African Union in 2007)

ACHPR: African Charter on Human and Peoples' Rights (adopted by the Organisation of African Unity in 1981)

AIM: Mozambique Information Agency

AIT: African Independent Television (Nigeria)

AMDI: African Media Development Initiative (a project of the BBC World Service Trust)

ANC: African National Congress (South Africa)

APRM: African Peer Review Mechanism

APS: Agence de Presse Sénégalaise (Senegalese Press Agency)

BMCC: Broadcast Monitoring and Complaints Committee (South Africa)

BCCSA: Broadcasting Complaints Commission of South Africa

CCK: Communications Commission of Kenya

CPJ: Committee to Protect Journalists

CRED: Conseil pour le respect de l'éthique et de la déontologie (Senegal's Council for the Respect of Ethics and Deontology)

CSCS: Conselho Superior da Comunicação Social (Mozambique's Superior Council of Media)

EBA: Ethiopian Broadcasting Agency

EFJA: Ethiopian Free Press Journalists Association

ECOWAS: Economic Community of West African States.

CNRA. Conseil national de régulation de l'audiovisuel (Senegal's Council for the Regulation of Broadcasting)

DPFEA: Declaration on Principles of Freedom of Expression in Africa (adopted the African Commission on Human and Peoples' Rights)

FH: Freedom House

FOI: Freedom of Information

GABINFO: Gabinete de Informação (Mozambique's Government Press Office)

GBC: Ghana Broadcasting Corporation

GTV: Ghana Television

GNCA: Ghana National Communications Authority

HCA: Haut Conseil de l'Audiovisuel (Senegal's High Council for Radio and Television)

HRC: United Nations Human Rights Committee

IBA: Independent Broadcasting Authority (South Africa)

IBA: Independent Broadcasting Authority (Zambia)

ICASA: Independent Communications Authority of South Africa

ICCPR: International Covenant on Civil and Political Rights (agreed by the UN).

ICT: Information and Communication Technologies

IFJ: International Federation of Journalists

INCM: Instituto Nacional das Comunicações de Moçambique (Mozambique's National Institute of Communications)

IPI: International Press Institute
IREX: International Research and Exchanges Board
KBC: Kenya Broadcasting Corporation
KHRC: Kenya Human Rights Commission
M&G: Mail & Guardian (South Africa)
NARC: National Rainbow Coalition (Kenya)
NBC: Nigerian Broadcasting Commission
NDC: National Democratic Congress (Ghana)
NTA: Nigerian Television Authority
MDDA: Media Development and Diversity Agency (South Africa)
MECOZ: Media Council of Zambia
MIBS: Ministry of Information and Broadcasting Services (Zambia)
MINAT: Ministry of Territorial Administration (Mali)
MISA: Media Institute of Southern Africa
NAB: National Association of Broadcasters (South Africa)
NCA: National Communications Authority (Nigeria)
NGO: Non-governmental organisation
NMC: National Media Commission (Ghana)
ODEP: Observatoire pour la déontologie et l'Éthique de la Presse (Mali's Observatory of Ethics of the Press)
ORTM: Office de Radiodiffusion Télévision du Mali (Mali's Radio and Television)
OSCE: Organization for Security and Co-operation in Europe
POATIA: Promotion of Access to Information Act (South Africa)
RSF: Reporters sans Frontières (Reporters without Borders)
RTS: Radiodiffusion Télévision du Sénégal (Senegalese Radio and Television)
SABC: South African Broadcasting Corporation
SADC: Southern African Development Community
STREAM: Strengthening African Media (a project of the UNECA)
SYNPICS: Syndicat national des professionnels de l'information et de la communication du Sénégal (National Union of Information and Communication Professionals of Senegal)
TBC: Tanzania Broadcasting Corporation
TCRA: Tanzania Communication Regulatory Authority
TI-KENYA: Transparency International Kenya
UDHR: Universal Declaration of Human Rights
UEMOA: Union économique et monétaire de l'Afrique de l'Ouest
UN: United Nations
UNECA: United Nations Economic Commission for Africa
UNESCO: United Nations Educational, Scientific and Cultural Organisation
US: United States of America
VOA: Voice of America
WSIS: World Summit on the Information Society
ZBC: Zanzibar Broadcasting Commission
ZNBC: Zambia National Broadcasting Corporation

Foreword

Over the last two decades, media independence and pluralism in Africa have rapidly increased. In several countries, vibrant civil societies and new media legislative frameworks have enabled the proliferation of private broadcasters and of community media. Some state media outlets have also undertaken reforms aiming at their transformation into public service broadcasters.

The success stories demonstrate how independent and pluralistic media can, in practice, foster participation and accountability, contributing to development, democratization and reconciliation across the continent. These are fundamental elements to promote good governance, democracy and human and social development. They also underscore how the basic human right of freedom of expression is central and irreducible for the attainment of the other rights enshrined in the Universal Declaration of Human Rights and in the African Charter on Human and Peoples' Rights.

The difficulties many media outlets in Africa face in achieving economic sustainability and editorial independence, and the tragedy that all over the continent journalists are regrettably still attacked and even murdered, remind us of how our ability to act as informed citizens depends on media that are sustainable and that can work freely and safely.

The recent continued expansion of the media sectors in most African countries has been accompanied by an extremely prolific and intense media-related legislation production. Several countries around the continent have equipped themselves with laws establishing for instance broadcast regulators that are formally independent from governmental interference, or recognizing systems of media self-regulation or co-regulation. In some African countries, the right to access to information has been recognized, while jurisprudence on defamation or hate speech has been evolving, and sanctions for press offences were reduced or decriminalized.

Many national media legislative frameworks have therefore been aligning towards international standards on freedom of expression. At regional level, the African Commission on Human and Peoples' Rights has adopted in 2002 the Declaration of Principles of Freedom of Expression. And the appointment of the judges of the African Court of Human and Peoples' Rights in July 2006 was the first step for equipping the continent with a regional body to rule over complaints against human rights violations, similar to the Inter-American and European Human Rights Courts.

In this fast-moving environment, a team of African scholars, under the coordination of the Rhodes University School of Journalism and Media Studies, has been researching on the media-related laws in a selection of African multi-party democracies. They have been analyzing national results in a comparative way, and verifying them against a set of benchmarks on press freedom, as defined by international standards and best-practices.

Our hope is that African journalists, media lawyers, officials, parliamentarians, the civil society and other stakeholders involved in promoting the right to freedom of expression will find in this study a source of reflection and assistance in their daily endeavors to put the principles into practice.

I fully share the hope of the research coordinator that this study will “add to the impetus in Africa for the continent not just to fulfill human rights, but to take its rightful place in the world as an exemplary place in this respect”. Let us remind ourselves that the date on which the Windhoek Declaration on Promoting an Independent and Pluralistic African Press was adopted in 1991, May 3, has become the date of the celebration of World Press Freedom Day worldwide.

Abdul Waheed Khan
Assistant Director-General for Communication and Information
UNESCO

Introduction

This chapter sets out the background, aims and methodology of this study

1. Overview

It is widely accepted that a vibrant and flourishing media is essential to democracy and development, and indeed to the development of an Information Society as set out in the World Summit on the Information Society. UNESCO has long championed media development for these reasons, with particular attention to the developing countries in general and Africa in particular.

This study is significant because although there are many factors impacting on the development of the media sector of a society, the reigning legal regime in any country is probably the most significant. A favourable dispensation does not guarantee media development, but it is an essential starting point if there is to be a sustainable quantity and quality of media enterprises that contribute to the challenges facing a given country. Most countries covered here have had an explosion of media in the past decade.¹ It is no coincidence that this has accompanied changes to earlier law (or, as in some countries, the non-application of some prior law as in Mali and Tanzania), especially reform which permitted the relatively free development of private media (whether commercial or community in character). Meanwhile, countries like Ethiopia, that keep a tight legal rein on the entire media landscape, are at the bottom of the list in terms of media density, and therefore in the per capita information services available to their citizenry. While state-owned media assets, especially in broadcast, still predominate in many countries — and usually under political control, the motors of growth and pluralism are usually to be found located outside them.

Against this backdrop, this study shows that there is still much progress to make in reforming legal environments in general, including state powers over the broadcast landscape and especially laws on state-owned broadcasting. This conclusion arises from the objective of this research which was to undertake a comparative analysis of media-related law in ten African countries, focusing particularly on changes in the period of January 2000 to December 2006, later updated to mid-2007.² The scope was to cover issues such as (a) studies prepared in the subject-area in these countries; (b) major characteristics identified of media legislation in these countries; (c) comprehensive review of media laws introduced during this period; (d) evidence of how media laws are respected; (e) legal status of information and professionals and (f) access to public information regulations. In a subsequent extension of this work, the findings were updated and an additional chapter added which locates African media and information legislation within the context of existing international instruments.³

1 See BBC World Service Trust (2007)

2 The project is within UNESCO's framework of Major Programme V, Communication and Information (CI) for 2004-2005, and under the supervision of the Division for Freedom of Expression, Democracy and Peace (CI/FED).

3 In order to keep the focus on the content, the report has not generally used detailed footnotes and references in the body of the write-ups, but has provided a full bibliography at the end. Information presented at the end of each country report, concerning events around communication rights, is drawn from the website annual reports of groups such as MISA, IPI, CPJ, FH, RSF and the US State Department country reports on human rights. It should be noted that part of this report inevitably covers legislation enacted prior to 2000 where this remains relevant, although there is an attempt to highlight changes since.

2. Selection of countries

Ten multi-party African democratic countries were chosen by UNESCO for this comparative study: Ethiopia, Ghana, Kenya, Mali, Mozambique, Nigeria, Senegal, South Africa, Tanzania, and Zambia. The criteria used to select these countries were not spelt out in detail, but it is readily apparent that they are all multi-party democracies with a constitution.

Democratisation in Africa has exhibited two main waves—first in the 1950s and 1960s as independence from external domination by colonial powers; the second as the institution of multi-party democracy against single-system and authoritarian regimes during the 1990s. The second wave also corresponded with a shift away from concerns about external intrusions into African states, and gradual acceptance of the legitimacy of an interest by the continent as a whole in the internal affairs of each member.

The African Charter on Human and Peoples' Rights, adopted in 1981 by African heads of state, meant that human rights were now seen as international issues, rather than exclusive matters of national sovereignty. This development crystallised in 2000 with the replacement of the Organisation of African Unity (OAU) with the African Union (AU). This feature of the second wave of democratisation is important for the status and development of free expression, access to information and media freedom in Africa, as will be evident in Chapter 1.

The countries in this study are not identical democracies. Indeed, amongst them is a spread of countries from those belatedly democratised (South Africa), and those facing severe challenges to democracy (Ethiopia).

Some countries have experienced military dictatorships, and others one-party regimes that have been authoritarian as in Zambia and less so in Kenya or Tanzania. There are highly populated states like Nigeria, and lesser ones like Senegal.

The range also covers differences in language and media tradition (Anglophone, Francophone and Lusophone). Some have also experimented with socialist-oriented development paths (Mozambique and Tanzania), while others (like Kenya and Nigeria) have long allowed forms of capitalist initiative in newspapers at least. Each also exhibits its own degree of media development and its own media legislative system.

At the same time, what is fundamental is that any country organised as a multi-party democracy with a constitution as supreme law is a starting point for media freedom and pluralism. The ones selected for this study also all enshrine the right of free speech, and often also make reference to rights to access information:

- Senegal's constitution dates from 2001, and allows for judicial review of legislative acts in Constitutional Court, and the country had elections in 2007.
- Mali became a democracy in 1992, with its initial president Alpha Konare respecting the two-term limit and stepping down in 2002. The country also has judicial review of legislative acts in Constitutional Court (which was formally established in 1994).
- South Africa since 1994 has also been a multi-party democracy, with a constitution and Constitutional Court.
- Mozambique is a multi-party democracy with a constitution. Although there is constitutional provision for a separate Constitutional Court, this has not been established and the Supreme Court plays this role of reviewing constitutional cases.
- Zambia is also a multi-party democracy, and the constitutionality of legislation can be tested in court.
- Tanzania's constitution was revised in 1984, and provides for multi-party democracy. There is judicial review of legislative acts, although this is limited to matters of interpretation.
- Ethiopia officially became a constitutional democracy in 1995, although commitment was severely tested in 2005.

- Ghana is a democracy with a constitution adopted in 1992.
- Kenya is a multi-party republic whose laws are open to judicial review in the High Court. The constitutional amendment of 1982 making Kenya a de jure one-party state was repealed in 1991.
- Nigeria adopted a democratic constitution in 1999.

However, notwithstanding these commonalities, these ten states have received different rankings by the NGO Freedom House as regards media freedom. Three are scored as free—Ghana, Mali and South Africa; four as partially free—Nigeria, Kenya, Senegal and Mozambique; and two as not free—Ethiopia and Zambia. In contrast, the current study is not intended to produce a ranking, but instead highlights variations among the chosen countries as well as where there are similarities.

It is risky to generalise too much on the basis of this diverse sample, and likewise potentially problematic to declare any findings as further characterising Africa at large. For instance, no Arab-African country of the north has been included. Notwithstanding the focus on sub-Saharan Africa, however, the significance of this study goes beyond the ten countries concerned.

There are, indeed, often similarities between some of these under study, and the other 43 African member-states of UNESCO. By focusing on the legislative trends in these ten emerging democracies, this study also provides valuable information for any African country in a similar stage. Indeed, it shows how democratisation should also include the democratisation of the media landscape in three movements.

The first is in terms of movement away from a state monopoly on institutions and control of content, and towards allowing citizens to establish their own media. The second is the move to meet citizens' legitimate expectations for non-partisan information from state-owned media and elaborated access to state-held information. The third is acceptance of dissent and the freedom to criticise the authorities, instead of circumscribing this through licensing conditions, insult and criminal defamation laws, and a host of other legislation predating, and unfitting to, a democratic society.

The range of issues covered and the differential progress on them in the various states therefore constitute a useful resource for any person working on media law and policy reform in Africa. The expectation for this study is that it could assist law commissions, parliaments, governments, regulators, advocacy groups and media organisation professionals who might be interested in media development and its legislative foundations, as well as in issues that are also critical to Africa, such as the rise of the global Information Society and international jurisprudence.

3. Methodology

Once a research team was assembled (see Appendix 1), and a methodology and timeframe were worked out, consultations were initiated with resource persons, including the Rhodes University Librarians and representatives from Foundations (eg. Konrad Adenauer Stiftung; Friedrich Ebert Stiftung) and NGOs (Genderlinks, Media Institute of Southern Africa). Most of the work was conducted through online searches, but several persons in each country were also consulted in person and via email. In many cases, reliable information was extremely difficult to locate.

The most important part of the methodology was the elaboration of a common template that would have to be compiled for each country report to be able to have an instrument of comparison on media law issues among different countries. It echoes in some parts the criteria identified by IREX's Media Sustainability Index and also the African Media Barometer developed by the Friedrich Ebert Stiftung (FES) with the Media Institute of Southern

Africa (MISA).⁴ However, the focus of this work is on the legal regime in a given country, which is narrower than these two approaches. But the scope is also wider than the indicators used to monitor press freedom (such as those used by advocacy groups International Press Institute and Reporters Without Borders).

The logic in this template is linked to the criteria set out in the Declaration of Principles on Freedom of Expression in Africa, as devised by the African Commission on Human and Peoples' Rights (see Appendix 2). We have also observed the checklist for the implementation of the Declaration compiled by advocacy organisation ARTICLE 19⁵, although in this historical period our focus on mainstream media law has meant only limited attention to the Internet.

The presentation of every country's situation (on the basis of the template) is structured as follows:

- It commences with broad and contextual constitutional issues, and the relationship between the existing national jurisprudence and international laws;
- It then moves on specifically to assess licensing — i.e. what systems of conditions and permissions exist for citizens to practice journalism, to operate newspapers, or to engage in broadcasting;
- The third area covered is related to laws controlling access to information and to various kinds of content restrictions, including those in regard to reporting on courts and elections;
- Finally, the arena of ethics, self-regulation and respect for freedom of expression is also evaluated.

Most legislation is gender-blind, but the research did look out for laws where gender equality might be specified in regard to content prescriptions or quota systems for appointments to boards of regulators and the like (hardly anywhere, as it turned out). This is clearly an area of media law in these ten countries that calls out for attention).

In detail, the template for the research assessment consists of 32 areas of focus:

1. Relevant constitutional and broad provisions
 - freedom of expression in constitution,
 - whether limitations are constrained by being “reasonable” in a democracy;
 - freedom of the media (mentioned as an institution);
 - access to information rights;
 - other institutions mentioned (such as regulatory bodies);
 - constitution takes cognisance of international law;
 - power of courts to assess constitutionality of media law;
 - constitutional right to reply;
 - existence or not of a national media policy;
 - accession to international agreements relevant to media.
2. Laws relating to the status of journalists (do they need to be registered or licensed?).
3. Laws and regulations on licensing media (print, broadcast)
 - whether print media need a licence;
 - an independent licensing body exists for broadcast;

4 IREX has not, by mid-2007, been applied to sub-Saharan African countries. The African Media Barometer has been implemented in 16 countries (see FES 2006; Schellschmidt, 2005).

5 The name of this group will be spelt out in capital letters in this report, so as to avoid confusion with references to “Article 19” in the UN Declaration of Human Rights and the International Convention on Civil and Political Rights.

- if three categories of broadcasting are being licensed (public, commercial, community);
 - licence conditions impacting on content — including local content;
 - limits on private broadcasting (eg. not in television, no national licensing?);
 - independence of the board of the state-owned broadcaster from vested business and political interests;
 - public-service oriented statutes or licence conditions for the state-owned broadcaster.
4. Laws on ownership legislation (eg. limits on cross- or foreign ownership).
 5. Other media-relevant laws covering:
 - freedom of information and governmental or state secrets;
 - legal framework for state-subsidy of private media;
 - defamation — including where it is a criminal matter;
 - insult laws, mainly focused when related to state officials;
 - harmful content: hate speech, pornography
 - penal code and security laws.
 6. Laws on reporting courts.
 7. Laws and regulations on media and elections.
 8. Ethics and the law:
 - statutory mechanisms to oversee professional ethics
 - non-statutory mechanisms
 - right to reply provisions
 - confidentiality of sources
 9. Respect for freedom of expression and law by governments, media and others (including examples of whether the laws are enforced or not; if other laws — such as citizenship laws — are used against media).

It is tempting to pinpoint those areas which are of greater or lesser importance for the general picture, but this approach would also be to fall into a trap that misses that overall view, and that they generally constitute a package that hangs together in each given country. Thus, although there often are inconsistencies in the jurisprudence across many of these areas, it is also the case that each country studied does tend to exhibit a general outlook, with some being closer to international standards and others lagging behind.

4. Conclusion

In any country around the world, numerous developments today are prompting change in the media legislative landscape. There is the continuing evolution and application of anti-terrorism laws that give the State increased powers to monitor and censor communications between individuals and groups. New digital technologies, enabling online, cellphone and digital broadcasting are further stimuli. There are also new property regimes for electronic communications, tied to global systems devised at the World Intellectual Property Organisation and at the Internet Corporation for Assigned Names and Numbers. And finally, there are also practical politics which may either deepen or lessen democracy.

What this means is that the field of media law, and its implementation (or not, as the case may be), is a very dynamic one — and not least in the countries under the microscope here. It is likely therefore that there may be new developments between the time of completion of this study and its actual publication. Indeed new laws were on the verge of being passed in Kenya and Tanzania during June 2007.

Fortunately, there are a number of active organisations in the area, who monitor and publish their findings

(see Appendix 2 for a list of these groups). Recent large-scale studies have also been done by the Konrad Adenauer Stiftung, concentrating on countries of the Southern African Development Community (SADC); the Friedrich Ebert Stiftung; the BBC World Service Trust through its Africa Media Development Initiative (AMDI); and the United Nations Economic Commission for Africa (UNECA) through its “Strengthening African Media” (STREAM) consultative process. In addition, the UNECA continues to focus on the digital divide, and the development of ICT and new media policies. The present study pays tribute to all this work, which has substantially enriched the research required for this particular project. It must be stated, however, that even with all this, there are still some gaps in some of the information that could not be filled within the timeframe and budget of this study. Further, the focus and findings here are the responsibility of the researchers concerned and, in particular, the co-ordinator.

In conclusion, the uniqueness of this study lies mainly in its comparative quality, and in the analysis and recommendations that flow out of this and which are recorded in the final chapters, and which proposals ought to change a little less rapidly than the specific legislative situation in any of the given countries.

Chapter One

INTERNATIONAL PRINCIPLES AND STANDARDS

1.0 Introduction

This chapter summarises international principles on media and freedom of expression and information, starting from an overview of internationally relevant instruments before going on to explore those at the level of the Africa region and its sub-regions. The ten countries studied are also parties in various ways to many international accords germane to media freedom. Some are non-binding such as the Universal Declaration of Human Rights (UDHR), with its Article 19, while others have more teeth such as the 1993 International Covenant on Civil and Political Rights (ICCPR) and the 1981 African Charter on Human and Peoples' Rights (ACHPR). But even the non-binding ones may exercise a powerful influence on the development, administration and interpretation of law. The contents here tie in with Appendix 2 on international non-governmental organisations (NGOs) that are active in this whole arena, and with the Glossary that sets out abridged explanations of key terms.

1.1 Freedom of expression: international principles, regulations and future trends

There is a family of communication-related rights consisting of freedom of expression and the related rights to access information and to have media freedom. Normally, they are treated as universal human rights in democratic legal regimes and they are elaborated and enacted through principles, declarations and standards based on international co-operation, in some cases even enforced by international courts. In addition, most nation-states have their own specific inflections in law and regulations, which are not always aligned to the international standards. Some countries also have their own institutions for guaranteeing or overseeing the applicability of these rights such as human rights commissions, public protectors or ombudsmen to advance rights in general, including freedom of expression and associated rights. Members of the civil society and the private sector (especially where media-related groups are involved) are often active actors in the field (see Appendix 2).

The enshrinement of the right to free expression as a fundamental human right will have its 60th anniversary celebrated in 2008. It was in 1948 that the United Nations (UN) General Assembly developed and adopted its Universal Declaration of Human Rights (the UDHR) through which it insisted in Article 19:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Since then, international institutions and courts have made it very clear that the right to freedom of expression is one of the most important human rights. In addition, and distinctively, although free speech stands on its own as a universal right in any context, this human entitlement is especially seen as a critical requirement for democracy as such.¹

¹ See for example, Principle 1 of the Inter-American Declaration of Principles on Freedom of Expression, and the UN Human Rights Committee (HRC), 1998, *Tae-Hoon Park v. Republic of Korea-Communication No. 628/1995*, para.10.3

This draws attention to the way this freedom is intrinsic to the practice of representative governance and thereby to the right to vote. In addition, freedom of expression is also often seen as being crucial for the unveiling and exposure of violations of all human rights and for the fight against such violations. Therefore, in terms of international jurisprudence, freedom of expression is not only fundamentally important in its own right and for the functioning of democracy; it is also crucial to the fulfilment of all other rights.

Further arguments in favour of freedom of expression are based on the fact that this right is essential to individual autonomy and to the establishment of truth.

Bound up with freedom of expression is media freedom. As it is highlighted in Article 19 of the Declaration, the right to express ideas and opinions is clearly accorded to ‘everyone’ and through ‘any media’. It is worth noting, however, that the UDHR does not specifically mention ‘freedom of the press’ or ‘freedom of the media’ as such. Yet, since the media (print, radio, etc.) of a country is one of the main tools through which different publics speak to each other, it is generally assumed to be entitled to the individual right to free expression.

Subsequent international accords have explicitly elaborated on this topic, seeing media freedom as an extension of free expression. The Inter-American Declaration of Principles on Freedom of Expression (2000) says that “freedom of the press is essential for the full and effective exercise of freedom of expression and an indispensable instrument for the functioning of representative democracy, through which individuals exercise their right to receive, impart and seek information”. This declaration further maintains that because “(e)very person has the right to communicate his/her views by any means and in any form”, any compulsory membership or qualification to practice as a journalist amounts to an illegitimate restriction on every person’s right to freedom of expression through “any medium”. The same sentiment is expressed in 2003 joint declaration by the relevant rapporteurs of the UN, the Organisation for Security and Cooperation in Europe (OSCE) and the Organisation of American States in 2003. Their declaration accepts, however, that there could be a place for accreditation systems to provide access to certain places and/or events. But it insists that such systems should be overseen by an independent body, acting transparently with clear and non-discriminatory criteria published in advance to the concerned professionals or public. “Accreditation should never be subject to withdrawal based only on the content of an individual journalist’s work.” Terminology is significant here, because (as will be evident later) Tanzania uses the term “accreditation” to mean a form of registration that in turn also amounts to licensing of who can practice as a journalist. These are, however, different regimes.

However, there is sometimes a tension between singling out the rights of media as an institution which aggregates practitioners of free expression under particular ethics and codes, and simultaneously holding to a position that journalists are no different from other citizens in using free speech, and that they therefore have no greater or less privileges and responsibilities. This is discussed in more detail later in this chapter.

Article 19 of the UDHR has subsequently been refined in Article 19 of the International Covenant on Civil and Political Rights (ICCPR), the binding convention that was adopted by the UN General Assembly in 1966 and enacted in 1976. Among the international human rights laws, the ICCPR, which is highlighted in Table 1 below, is the single most important instrument in as far as it elaborates on the legal right to freedom of expression in the international domain.

Table 1. Article 19 of the ICCPR

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

African countries as members of the UN are parties to the ICCPR, and as such they are legally bound to protect freedom of expression in accordance with international law. Article 2(2) of the ICCPR states:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant. (UN 1966).

Global recognition of the importance of freedom of expression is reflected in many regional systems for the protection of human rights. Examples are the European Convention on Human Rights (1950), the American Convention on Human Rights, (1969) and the Arab Charter on Human Rights (2004), all of which guarantee the right to freedom of expression. In signing these documents, governments are thereby pledging to uphold the rights contained in them. While these particular instruments and (where relevant) the related courts under their jurisdiction do not directly refer to all African countries, they are important indications of the ways in which the right to freedom of expression is applied elsewhere in the world. They are thus significant for the interpretation of Article 19 of the ICCPR in African countries. Africa's own regional declaration is discussed later in this chapter.

1.2 Freedom of information

Freedom of information is a closely related right to freedom of expression, in the sense of being the other side of the same coin. In fact, in 1946, the UN General Assembly adopted Resolution 59(1), 9 which argued that freedom of information was “a fundamental human right and...the touchstone of all the freedoms to which the United Nations is consecrated”. In the UDHR and the ICCPR, plus in several other instruments, this right is phrased in terms of the right to “seek” and to “receive” information, and is stated alongside the right to express and disseminate information.

How this right links up with freedom of expression is motivated for by the Special Rapporteur on Freedom of Expression for the Inter-American Commission on Human Rights (2000). The text here declares that censorship constitutes “an extreme violation of the right to freedom of expression by impeding the free circulation of information, ideas, opinions or news”. It observes that censorship violates not only the right of each individual to express him- or herself, but also impairs the right of each person to be well informed.

The Commonwealth — which includes seven of the ten countries within this study — has also underlined the importance of the right to access information and its relevance to free expression. A 2003 Commonwealth report highlights the interdependence of these rights:

The right to access information underpins all other human rights. For example, freedom of expression and thought inherently rely on the availability of adequate information to inform opinions.

The Commonwealth interest in the right to receive and impart information as dimensions of freedom of expression can be traced back to a 1980 meeting of Law Ministers which insisted on “access to official information” and in the 1991 Harare Declaration which stated that the freedom of information included the right to access state information. Since then, member states have, under the guidance of the Commonwealth Secretariat, drawn up and endorsed a plethora of policy statements, guidelines and a model law on the subject so as to encourage member states to “regard freedom of information as a legal and enforceable right”.

Like freedom of expression, the right to access information is in general seen as both a basic human right for all forms of society, and also as a central issue to democracies. For example, the Special Rapporteur of the Inter-American Commission on Human Rights notes: “Without the information that every person is entitled to, it is clearly impossible to exercise freedom of expression as an effective vehicle for civic participation or democratic oversight of government management.” This right is also seen as essential to transparency, and as a critical guard against corruption — issues often seen as critical requirements for African development and democracy). Further noteworthy is that according to the Special Rapporteur of the Inter-American Commission (2000), “... the right to information encompasses all information, including that which we might term ‘erroneous,’ ‘untimely,’ or ‘incomplete.’”

Freedom of information subsumes a right known as “habeus data”, which is generally interpreted as specifying an individual’s right to access information about oneself in particular. The right to access information can also include access to certain private as well as public information. An example of when private information is of public concern is when private organisations carry out public functions or hold information vital to environment or health. Further considerations on the more specific details of this right are cost of access, language of access and time limits. In addition, access also requires that records are preserved, not destroyed. ARTICLE 19 suggests that obstruction of access or wilful destruction of records should be made, by national laws, a criminal offence. Freedom of information is sometimes linked to the protection of whistle blowers, and also to “sunshine laws” which specify open meetings.

The Special Rapporteur of the Inter-American Commission on Human Rights (2000) noted: “(A) successful access to information regimes is absolutely dependent on the substantial political will necessary to implement it.” This means allocation of funds to creating an independent appeal body and education of the public on this matter. It says that public servants have to develop a culture of openness and that civil society should use the right of access in the interest of the public.

The advocacy organisation ARTICLE 19 advises that the principle of freedom of access to information should be provided for in every country’s constitution (so to make clear that it is a basic human right), and further recommends that specific legislation thereafter should spell out the terms of this right.

Recent initiatives that have further sought to entrench both the right to freedom of expression and the right to freedom of information include the UN World Summit on Information and Society (WSIS). In the 2003, in the “Declaration of Principles — Building the Information Society: a global challenge in the new Millennium”, the WSIS participating states expressed the view that: “Communication is...a basic human need [that] is central to the Information Society”. It elaborated further:

We reaffirm our commitment to the principles of freedom of the press and freedom of information, as well as those of the independence, pluralism and diversity of media, which are essential to the Information Society. Freedom to seek, receive, impart and use information for the creation, accumulation and dissemination of knowledge are important to the Information Society (WSIS 2003:8).

All governments that took part in the WSIS, including the ten African countries of this study, signed the ‘Declaration of Principles’ in Geneva and the resultant WSIS II ‘Plan of Action’, in Tunis, in 2005. Significantly, the contribution of civil society organisations was recognised at WSIS alongside that of government and the private sector’s ones, giving additional energy and impetus to promoting the communication freedoms both internationally (for instance, in regard to Internet governance) and within many states.

1.3 Related rights

Also significant is the mention at WSIS of the principles of pluralism and diversity. These sentiments were also expressed in a joint declaration on freedom of expression by the rapporteurs of the African Commission on Human and Peoples’ Rights and the Organisation of American States in 2005, as follows:

Freedom of expression requires that many different points of view can be heard. State control of media, as well as laws and practices that permit monopolies in ownership of media companies, limit plurality and prevent the public from hearing certain points of view.

The pluralism and diversity principles have a direct impact on right to freedom of expression, information and the media. They are often seen to impose an obligation on governments to ensure their realisation.

This could be through various methods — such as limiting concentration of ownership in the media industry, recognising different tiers in broadcasting (public, private and community), requiring diversity on state-owned media, and subsidising weaker media enterprises so as to sustain pluralism. (The converse of this is abuse by governments of placements of state advertising on political grounds. This is a phenomenon experienced in many African countries including Botswana, Namibia, Tanzania, Swaziland and Kenya).

The diversity link to freedom of expression has also been made in regard to the character of state-owned media. For the European Commission for Human Rights, while freedom of expression does not entitle every citizen to airtime, denying political parties a platform on state-owned media during election time would amount to a violation.² Similarly, a state monopoly on broadcasting can be interpreted as violating rights to apply for private licenses.

International jurisprudence does not clearly specify a “right to reply” as part of media pluralism and freedom of expression. However, one can see this as a sub-component of those principles. It is enshrined in the American Convention (Article 14), which designates the right to individuals who are injured by information to have a reply using the same communications outlet. The Inter-American Court has found that this right should be given effect to by state parties to the convention. However, the organisation ARTICLE 19 has suggested that this right may also violate rights to editorial independence .

2 Admissibility Decision of 12 July 1971, App. No. 4515/70, 38 Collected Decisions 86 (1971)

1.4 Regional Standards

At the regional African level, freedom of expression is guaranteed (with a qualification to be analysed later in this review) in Article 9 of the continent's 1981 Charter on rights (ACHPR), which has been ratified by the member states of the African Union (AU), and therefore, similar to the commitment to the ICCPR, it should be also legally binding. Some African countries have also incorporated the ACHPR into national law, meaning that its applicability has been enforced by local courts such as in Nigeria, Tanzania and Botswana. The ACHPR states:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

In addition, Article 6 of the Charter provides that “(n)o one may be deprived of his freedom except for reasons and conditions previously laid down by law”. The issue this raises, however, is when an existing law contradicts the Article 9 rights, and which instrument should then have precedence. The ACHPR itself gives no guidelines for this matter, which thus leaves open the possibility for national laws to have priority or to be used as justification by governments even if there is a violation of the Article 9 rights as set out in the Charter.

Also significant for Africa is the Windhoek Declaration. In 1991, the continent was the site of elaboration of a powerful statement about freedom of expression during a UNESCO organised seminar. Focused particularly on the printed press, the Declaration stated that “an independent, pluralistic and free press is essential to the development and maintenance of democracy in a nation, and for economic development”. It condemned media repression and called for African states to provide constitutional guarantees of freedom of the press and freedom of association in their societies. Researching, organising and funding activities around these issues were urged, and follow-up attention to broadcasting was proposed. In 1993, the UN General Assembly took note of the Windhoek Declaration, and agreed to proclaim 3 May (the date of Windhoek declaration formulation), as World Press Freedom Day. In 1995, the UNESCO General Conference of member states itself adopted the Windhoek Declaration.

Such international recognition helped set the tone for much subsequent standard-setting on the communication field in the African continent. At the centre of the debate has been concern with developing and deepening the right to freedom of expression in all African countries.

Further impetus has come from the 2000 Constitutive Act of the African Union (AU), ratified by 53 African countries (except Morocco), which commits them to objectives that include international cooperation on the basis of the Universal Declaration of Human Rights, and to promoting democratic principles and institutions. In addition, the signatories agreed to advance “human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments”.

Article 4 includes “respect for democratic principles, human rights, the rule of law and good governance”. The parties to the Constitutive Act have also signed up to provisions that allow for sanctions against countries violating the principles of the Act. Article 23 proclaims: “... any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.”

It is important to note the existence of the AU’s African Commission on Human and Peoples’ Rights. This is the intergovernmental body that supervises the implementation of the African Charter. In 2002, it adopted an authoritative “Declaration of Principles on Freedom of Expression in Africa” (DPFEA), which is reproduced in

Appendix 3. The DPFEA pays tribute to the Windhoek Declaration, and calls on state parties to the ACHPR to give effect to its elaboration of the right to free expression. The Declaration sets out in elaborated detail the main principles of freedom of expression that follow from Article 9 of the Charter. It also highlights the “(i)mportance of freedom of expression and information as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all...freedoms”. It further insists that: “[L]aws and customs that repress freedom of expression are a disservice to society.”

A possible weakness in the Declaration is that it does not explicitly specify media freedom as a distinctive form of free expression, referring instead only to “a key role of the media”. Nevertheless, this latter reference at least indicates that freedom of expression applies with particular force to the conditions of media practice. In full, the document describes “the key role of the media” as “ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy”. In the same text, other particularly important statements for national media laws are:

- Independent media regulatory bodies must be free from governmental interference;
- Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary, and within the context in a democratic society;
- States should promote a diverse and independent private broadcasting sector, including opportunities for community broadcasting;
- Government-controlled broadcasting should be transformed into public service broadcasters that are accountable to the public through Parliament;
- Bodies that regulate broadcasting and telecommunications should be independent and protected from external interference, particularly of a political and economic nature. Such bodies should be appointed through an open and transparent process;
- Registration requirements for print media should not restrict free expression, and all print media should enjoy editorial independence;
- A public complaints system for both print and broadcasting media based on rules and codes of conduct agreed to by all stakeholders should be promoted, preferably under self-regulation;
- There should not be any undue legal restrictions on the exercise of an individual’s rights as a media practitioner;
- States should help prevent attacks on media workers and, when they do occur, respond effectively;

On accessing information, the Declaration lists as one of its principles, the “(r)ight of access to information held by public, and to an extent private, bodies”.

Given its genesis in an official structure of the AU, the DPFEA is probably the potentially most powerful instrument for promoting a conducive legal environment for media freedom in Africa.

Another influential document that has helped drive forward the principles of freedom of expression in Africa is the 2001 African Charter on Broadcasting, arising out of the original recommendation of the Windhoek Declaration. Although not adopted by any state-based bodies, this Charter has been powerful in mobilising civil society for reform in broadcasting. It sets out clearly-defined objectives for basing regulatory frameworks on “respect for freedom of expression, diversity, and the free flow of information and ideas, as well as a three-tier system for broadcasting: public service, commercial and community”.

In terms of telecommunications and convergence, the same document declares: “The right to communicate includes access to telephones, email, Internet and other telecommunications systems, including through the promotion of community-controlled information communication technology centres”.

Based on the recognition that economic, social and political development in Africa can be enriched by access to ICTs, this particular aspect of the Charter resonates with more recent international discussions at WSIS. The UN Economic Commission for Africa has been another institution pushing for African countries to adopt ICT-related policies. These considerations are of importance given that ICT laws in Africa are still often being developed in isolation from media laws, and without being guided by the rights and freedoms that are applied to traditional media. Particular promotion of an integrated approach to ICT and media realms has come from Highway Africa, the continent’s largest network of African journalists, which focuses upon ICT applications and policy issues.³ The network has adopted numerous declarations in this direction at annual conferences over a ten year period. Among the legal issues surrounding ICT in African countries are state powers to block and intercept electronic communications, and to control Internet domain-name registration. There are also the matters of universal service and access, information security, legal liability of service providers and website hosts, and consumer protection, among others.

Recent events and processes directed at entrenching freedom of expression at the African regional level include civil society’s June 2006 ‘Recommendations from the Forum of Freedom of Expression in Africa’ to the AU. In these recommendations, the AU is called upon to “adopt a treaty that will reinforce the existing principles on press freedom and freedom of expression in Africa”. This call is part of a campaign that aims at strengthening the enforceability of commitments to freedom of expression in Africa by persuading countries to upgrade their commitments to the level of an enforceable treaty and to intervene in cases of violation of this right. Although there is not a clear international precedent for such a treaty, an alternative can be found in the Inter-American Declaration on Freedom of Expression, which was signed by many heads of State in that hemisphere, thereby conferring a degree of binding government commitment to the document.

The same Forum of Freedom of Expression in June 2006 called on the AU’s African Peer Review Mechanism (APRM) to include freedom of expression and press freedom among the existing criteria used for assessing good governance in any given African country. This appeal was echoed in the Declaration of Table Mountain, adopted in Cape Town by the World Newspaper Congress in June 2007. In response, the South African President Thabo Mbeki, one of the architects of the APRM, said the omission was an oversight and would be addressed. Although participation in the APRM is a voluntary process, the reports that result carry a lot of weight in the countries agreeing to peer review.

Another recent intervention concerning freedom of expression in Africa is the specialised African Charter on Democracy, Elections and Governance (ACDEG), which was agreed by the Assembly of Heads of State and Government of the AU in January 2007. This document must still be ratified by at least 15 member states before being taken as adopted. It includes as an objective the promotion of “the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs”.

In relation to this, Article 17(3) also requires state parties to “ensure fair and equitable access by contesting parties and candidates to state controlled media during elections”. Further on, in Article 27(8), signatory member states commit themselves “to promoting freedom of expression, in particular freedom of the press and

3 Disclosure: Highway Africa is a project of the Rhodes University School of Journalism and Media Studies.

fostering a professional media” for the benefit of socio-economic and political governance. In sum, there are many Africa-wide initiatives with a bearing on legislation around the media.

1.5 Sub-regional instruments

With regard to the African sub-regional level of operation, some of the relevant state-endorsed legislative tools are the 1992 Declaration and Treaty of the Southern African Development Community (SADC) and the 1993 Treaty of the Economic Community of West African States (ECOWAS).

The 1992 SADC accord says that member states “shall take all steps necessary to ensure the uniform application of this Treaty”, and adds that they “shall take all necessary steps to accord this Treaty the force of national law”. In Article 4, the SADC says that the signing countries shall act in accordance with inter alia the “principles of human rights, democracy, and the rule of law”. It also allows (in Article 33) sanctions against any member state that “persistently fails, without good reason, to fulfil obligations assumed under this Treaty”. The SADC has developed several relevant instruments as extensions of this treaty. Four countries in this study (South Africa, Mozambique, Tanzania and Zambia) fall within the SADC and are thus expected to comply with:

- the 2000 SADC Protocol on Culture, Information and Sport;
- the 2001 SADC Declaration on Information and Communication Technology;
- the SADC Protocol on Transport, Communications and Meteorology.

The first of these instruments, approved in 2000 and ratified by eight members by May 2005 (including in regard to this study, Mozambique, South Africa, Zambia and Tanzania), lays down guiding principles for harmonising policies on culture and information among its signatory governments. It expressly affirms a “commitment to the right of access to information”. While it is silent on freedom of expression, the document does say that it is guided by the Windhoek Declaration.

Non-controversially, it sets out three useful definitions:

- “Media policy”: A general framework and guidelines adopted by member States, which set out the basis for media diversity and development;
- “Media practitioners”: People involved in all forms of communications, such as the print media, broadcast media, film, video, and new information technologies (The Protocol specifies no registration process or academic qualifications for eligibility to be a recognised as a practitioner);
- “Pluralistic media”: Diversified media in terms of ownership, control and content.

The section of the Protocol dealing specifically with information (Chapter 3, Articles 17 to 23) is also largely positive and non-controversial. It obliges signatory countries to:

- take necessary measures to ensure the development of media that are editorially independent and conscious of their obligations to the public and society at large;
- encourage the establishment or strengthening of codes of ethics to boost public confidence in the media and develop good professional practice in the information sector;
- create the political and economic environment conducive to the growth of ethical, diverse and pluralistic media.

The document also distinguishes between various kinds of media. Thus the Protocol refers to “Community media” as non-profit and community-based media which serve a geographically founded community or any group

of people or sector of the public having an ascertainable common interest. “Independent media” are defined as “media which are editorially independent of their owners, be they private, public or community based”. Significantly, this therefore provides for state-owned media as (potentially, at least) being independent, and, at the same time, that there could be private or community media that are not independent. “Media independence” is defined as “(e)ditorial independence, whereby editorial policy and decisions are made by the media without interference”. These provide interesting nuances when analysing the state of media law and communication rights in the countries covered in this study.

However, somewhat more controversial is the Protocol’s reference to “Accreditation” — defined as “Adoption by Member States of regionally and commonly accepted standards of registering or accrediting practitioners in the fields of culture, information and sport”. A “journalist” is defined as a person involved in the collection and dissemination of news and information. This provision could therefore possibly be read as meaning that licensing of individual journalists is an agreed value among its member states. Such an interpretation could conflict not only with international jurisprudence but also with member countries such as South Africa, where it would be unconstitutional to licence journalists. Such a provision has also been criticised by media freedom groups like the Media Institute of Southern Africa (MISA).

A slightly different comprehension of the Protocol, however, is possible. Chapter 3 of the Information section obliges States to “(e)stablish a regionally and internationally recognised SADC accreditation system or procedure for media practitioners with specific guidelines in order to facilitate the work of such personnel in the rest of the world.” The instrument, in short, is somewhat ambiguous as to whether it applies to domestic reporters or to visiting foreign correspondents. It would be a lesser problem if such a system it applied to foreigners only, even though this would still amount to a problem from a free speech point of view. Certainly, the issue of nationality as a means of exclusion of persons from practising journalism is an issue in many African countries — such as in Tanzania. A further potentially restrictive aspect in the Protocol is the view of “media freedom” defined as “an environment in which the media operate without restraint and in accordance with the law”. This latter clause could make media freedom subordinate to any law, seemingly independent of the question of how such law may relate to the freedom of expression.

The SADC Declaration on Information and Communications Technology (ICT) of 2001 is a declaration of intent concerning ICT policies. While it is silent on the issues around the convergence of media and ICTs, it does promote the creation of a three-tier separation of powers in each country: the government is responsible for creating a conducive national policy framework, independent regulators responsible for licensing, and a multiplicity of providers in a competitive environment are responsible for providing ICT services.

The SADC Protocol on Transport, Communications and Meteorology has a chapter (10) on telecommunications with a section on broadcasting (Article 10.4). It acknowledges the convergence of telecommunications and broadcasting technologies, and the need to strengthen coordination between the broadcasting and telecommunications sectors, but the document proposes retaining “the structural separation between the operating organisations”. This recommendation goes against the situation in some countries such as South Africa and Tanzania which have merged regulators.

Also significant is a fourth document, the 2004 SADC Principles and Guidelines Governing Democratic Elections. These include (2.1.5): “Equal opportunity for all political parties to access the state media” (referring to state-owned media).

In regard to West Africa, the 1993 ECOWAS Treaty reaffirms the provisions of the ACHPR and outlines, in Article 66 under Chapter XI, a range of principles concerning the press. The Article says that:

1. In order to involve more closely the citizens of the Community in the regional integration process, member states agree to co-operate in the area of information.
2. To this end they undertake as follows:
 - a) to maintain within their borders, and between one another, freedom of access for professionals of the communication industry and for information sources;
 - b) to facilitate exchange of information between their press organs; to promote and foster effective dissemination of information within the Community;
 - c) to ensure respect for the rights of journalists;
 - d) to take measures to encourage investment capital, both public and private, in the communication industries in member states;
 - e) to modernise the media by introducing training facilities for new information techniques; and
 - f) to promote and encourage dissemination of information in indigenous languages, strengthening co-operation between national press agencies and developing linkages between them.

ECOWAS member states have also agreed to a 2001 protocol on constitutional principles. In its terms, media law in member countries (including those studied for this project, i.e. Ghana, Nigeria, Senegal and Mali) ought to abide by the following principles:

- Popular participation in decision-making, strict adherence to democratic principles, and decentralisation of power at all levels of governance
- The freedom of the press shall be guaranteed.

Article 32 of the Protocol says that member states agree that good governance and press freedom are essential for preserving social justice, preventing conflict, guaranteeing political stability and peace and for strengthening democracy. Article 37 commits each member state to “work towards ensuring pluralism of the information sector and the development of the media”. In addition, it provides that each member state may give financial assistance to privately-owned media. An important caveat is added: “The distribution and allocation of such assistance shall be done by an independent national body or by a body freely instituted by the journalists themselves.”

Where there is gross violation of human rights in a member state, ECOWAS may impose sanctions.

Another relevant ECOWAS document is the 2000 Decision A/DEC.7/12/00 “Adopting a new ECOWAS information and communication policy”. It proposes that the Secretariat should train journalists in the sub-region on topics related to economic integration, peace-making, peace-building, peace-keeping and on the use of new information technologies through the organisation of seminars and/or award of scholarships. Somewhat controversially it proposes: “Further, member states shall promote and support the establishment of an ECOWAS radio/television station. ... The programmes to be produced on ECOWAS activities shall be broadcast in all Member States.” These governments are also expected to “organise enlightenment campaigns on ECOWAS achievements in their media”, and “explore the possibility of launching a television broadcast satellite for the West African region”. Article 10 says that member states should establish a “National Media Fund on Regional Integration” to improve and increase reporting of the West African regional integration process.

Finally, and potentially problematically, an ECOWAS Press Card would be issued to “recognised” and “qualified” journalists selected in each member state by the West African Journalists Association or any other recognised national media organisations.

1.6 Freedoms, responsibilities and restrictions

Based on the international and African standards discussed above, it is evident that with specific regard to media freedom, the right to expression and to access information ‘through any media’ is a right which belongs to all individuals and which must in turn be respected by all states. It is also now clearly established in international law that states should allow all types of media to operate and therefore permit media enterprises to be founded by private persons or groups. This ought to apply to printed media, broadcasting, the Internet and the evolving cellphone platforms.

While this freedom is the starting point of international jurisprudence, it is also important to acknowledge a critical subsidiary issue: the right to freedom of expression, whether exercised individually or via the media, is not an absolute right. As indicated in the ICCPR, it may, in certain narrow circumstances, be restricted. For instance, in the case of broadcasting it can be argued that freedom of broadcasting has always been legitimately subjected to some state control to combat broadcasting that may cause harmful technical interference such as pirate or *ad hoc* transmission. In addition, Article 20 of the ICCPR explicitly obligates states to exercise their sovereignty rights in certain matters of international communications. The European Convention for the Protection of Human Rights and Fundamental Freedom explicitly says (Article 10.1) that the right to free expression “shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises”. These are not especially controversial cases for limitations of free expression. The same applies to cases of restricting that “speech” which constitutes a copyright infringement, although this issue also introduces the entire domain of intellectual property and debates around what is, or should be (come), shared human heritage, and thus common and replicable property in one degree or another.⁴

However, because of the fundamental status of free expression, international jurisprudence holds that these and any other restrictions on free speech must be precise and clearly stipulated in accordance with the principle of the rule of law. Moreover, such restrictions must pursue a legitimate aim. Freedom of expression may not be restricted merely because a certain statement or form of speech is considered “offensive” or because it challenges established doctrines. Indeed, it is sometimes argued that the real test of free speech is when speech offends some parties — and that this is seen as a price worth paying because it is a preferable situation to having governments define what is acceptable or not according to their perspectives.

As is indicated in Table 2 below, Article 19(3) of the ICCPR lays down the conditions which any limitation on freedom of expression must meet. The rationale it gives for limitations is because it perceives “special duties and responsibilities” accompanying the right to free expression:

Table 2. Article 19 of the International Covenant on Civil and Political Rights

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
- (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

⁴ See the debates around “Creative Commons” licensing and Open Source Software for example.

This important elaboration includes the provision that limitations must, explicitly, be “provided by law”. Accordingly, such limitations should be spelt out so as to prevent arbitrary or *ad hoc* infringement of freedom of expression and media. Further, the word “necessary” implies that limitations should be justifiably proportionate in degree to the issue at stake.

The criteria proposed by the ICCPR are echoed in the DPFEA, the American Convention on Human Rights, as well as the Arab Charter as applicable for limitations in the countries of the Arab League (see Article 32. 2). The European Convention adds as legitimate limitations the rationales of territorial integrity, the prevention of crime and the disclosure of information received in confidence, and for maintaining the authority and impartiality of the judiciary (Article 10.2). However, much jurisprudence also takes cognisance of the argument that public order rationales, such as the classic man who shouts “fire” in a crowded theatre, have to be established in each and every specific case as to whether the circumstances are indeed actually such to constitute the speech into a “clear and present danger”.

In addition to all these ‘limitations on limitations,’ a further consideration is sometimes made. This is that any infringements also have to be justifiable in terms of a democratic system. This provision is included in the European Convention, and also in Africa’s 2002 DPFEA. Thus the latter document observes, in Principle II:

- No one shall be subject to arbitrary interference with his or her freedom of expression;
- Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.

The wording of “in a democratic society” implies that what is seen as being “necessary” in a democracy must respect parameters that are very different from what would be the case in a dictatorship.

Provisions on limitations are also further elaborated in the Johannesburg Principles of 1995, which state that the onus of demonstrating that a restriction is justified in terms of these criteria, should rest with the government. In addition, there should be provisions for independent judicial scrutiny of the validity of the restriction. Finally, the Johannesburg Principles state that certain stated kinds of expression should be completely protected — such as criticism of the government, advocacy of non-violent change and communicating human rights violations.

Significant to mention here are some of the implications about limitations, as elaborated in 2000 by the Special Rapporteur for free expression of the Inter-American Commission on Human Rights. Accordingly, the following points can be noted:

- It would not be a legitimate limitation to require truthfulness as a prior conditionality for free expression, as sometimes advocated by those seeking “responsible” free speech. The Special Rapporteur argues that this could lead to virtually automatic censorship of all information that cannot be proved, and would eliminate “virtually all public debate based primarily on ideas and opinions, which are inherently subjective”. Further, “(e)ven in cases of information regarding concrete events that may be factually proven, it is still impossible to demand veracity since, unquestionably, there may be a considerable number of markedly different interpretations of a single fact or event.”
- A limitation related to “truthfulness” would also impair the right to information. This is because “(t)he prospect of penalties for reporting on a subject that free debate later shows to be incorrect creates the potential that informants will engage in self-censorship to avoid penalties, with the attendant harm to citizens who are unable to benefit from the exchange of ideas”. This argument rests on the point that “(p)rior imposition of a

requirement to report only the truth expressly precludes the possibility of engaging in the debate necessary to reach it". In this view, only false information found to be produced with "actual malice" is punishable.

- The Special Rapporteur argues that even in cases of punishable speech, the sanction should be carried out through the subsequent imposition of liability rather than the establishment of prior conditions. This position on post-publication liability accords with the Inter-American Court which has stated that abuses of freedom of expression cannot be subject to preventive measures such as prior censorship of unpublished expression. What this means is that: "Restrictions on freedom of expression are only permissible through the subsequent imposition of liability, which must be expressly established by law, where the ends sought to be achieved are legitimate, and the means for establishing liability are necessary to achieve those ends."

The conditionalities on restricting freedom of expression provide a basis for gauging balances between the rights around freedom of expression on the one hand, and the rights to dignity (and therefore reputation), and to privacy, on the other. In turn, this raises the issue of defamatory speech. There are a host of issues here — related to whether such speech is truthful and whether it is also in the public interest. In addition, as to whether the onus is on the accused or the complainant to prove truth, public interest, or that the content did not diminish dignity. The DPFEA noted above proposes that "(p)rotection of reputations and defamation should ensure a balance with upholding the right to free of expression."

International jurisprudence has made other contributions in this area. Thus the Inter-American Special Rapporteur has noted: "Rather than protecting people's reputations, libel or slander laws are often used to attack, or rather to stifle, speech considered critical of public administration." The obverse is that laws which penalise criticism of officials restrict both freedom of expression and the right to information. The Special Rapporteur makes the case that having such "insult laws" to shield public officials "unjustifiably grants a right to protection to public officials that is not available to other members of society". In contrast, fundamental to democracy is the "individual and the public's right to criticize and scrutinize the officials' actions and attitudes in so far as they relate to public office".

A related, but distinct, issue is the criminalisation of any defamation — not only of the authorities as discussed above. A joint declaration by the rapporteurs of the African Commission on Human and People's Rights and the Organisation of American States (2005) says that criminal defamation intimidates individuals from exposing wrongdoing by public officials and is therefore incompatible with freedom of expression. Such international thinking has not yet borne fruit in most of the African countries selected for this study.

In sum, much valuable international jurisprudence exists around legitimate limitations of freedom of expression and, by implication, of the media as well. (Limitations on freedom of information are discussed below). The detailed and comprehensive character of justifications provides guidelines for national legislation and for assessing shortfalls in legal regimes that unjustifiably curtail the exercise of this right.

1.7 Limitations on the right to information

As with the right to free expression, so too can there be justifiable limitations of the right to access information. According to the Special Rapporteur on the Inter-American Declaration on Freedom of Expression, such departures from the right require "a specific, clear and transparent system of exceptions". These instances for legitimate limitation are generally seen in international jurisprudence as the same areas as those valid for limiting free speech, such as public order and safety. They also include law enforcement, privacy, commercial and other confidentiality, and the effectiveness and integrity of decision-making. Other reasons that are sometimes

valid include the maintenance of national security (European Convention) and “public order, or public health or morals” (American Convention on Human Rights).

Both ARTICLE 19 and the Special Rapporteur of the Inter-American declaration argue that refusal to give full access to information can only be justified if all three points on a test are met:

- the information being withheld must relate to a legitimate aim listed in law;
- disclosure would threaten to cause substantial harm to that aim;
- the harm would be greater than the public interest in having that information.

ARTICLE 19 gives the example of information about corruption in the military being withheld because it can relate to national security and cause harm to this cause — but could then well fail the third aspect of the test, because of the greater public interest in such a phenomenon.

Another important aspect of limitations on the right to access information is the onus of proof. Most jurisprudence argues that it is for the body being asked for the information to provide reasons for refusal, rather than the requester needing to motivate. Further, that there is a need for recourse to appeal against a refusal, and that this should be via a body independent of that which opposes the disclosure, and ultimately to the courts.

Legitimate limitations may also apply to the openness of government meetings. However, ARTICLE 19 argues that the decisions themselves to close meetings should be open to the public. The criteria could include public health and safety, law enforcement, personnel matters, privacy, commercial matters and national security.

The right to access information also sometimes has to be balanced against the right to privacy. However, in the case of the media, this latter right is also sometimes interpreted as the right to keep certain information private — as in the case of journalists refusing to disclose the identity of confidential sources of information to police or to the courts. An argument can be made for journalists to have special rights in this regard, because of their special responsibilities. However, a counter is that journalism ought to be treated no different from general rights to expression and information, and that special treatment raises the question of what and who then defines (and excludes) individuals from practicing journalism.

Without going into the complexity of definitions, however, the 2002 DPFEA includes a provision on dealing with protection of sources and other journalistic materials: “Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes ...”. However, it specifies instances of exception, saying that these may operate in accordance with the following principles:

- the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;
- the information or similar information leading to the same result cannot be obtained elsewhere;
- the public interest in disclosure outweighs the harm to freedom of expression; and
- disclosure has been ordered by a court, after a full hearing.

What this section shows is that while rights to information and to withhold information are not unqualified, there is also a wealth of jurisprudence about when and how these rights may be acceptably limited.

1.8 Independent regulatory agencies:

In an attempt to manage the rights to freedom of expression, information and the media, and especially regulate limitations, specialised institutions have been set up in some countries. These are often, but not exclusively, in broadcast and/or telecommunications sector. From an international perspective, it is well established that such bodies with regulatory or administrative powers should be independent and free from political interference. For

example, a joint statement by the relevant rapporteurs of the UN, the Organisation for Security and Co-operation in Europe (OSCE), and the Organisation of American States in 2003, explicitly condemns limits on free expression through “regulatory mechanisms which lack independence or otherwise pose a threat to freedom of expression”. The statement also stresses the importance for independent regulatory bodies of “an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party”. It further argues that “imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided”. Registration systems that allow for discretion to refuse registration or impose substantive conditions on print media are “particularly problematical”. In Africa, Principle VII(1) of the DPFEA states:

Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.

ARTICLE 19’s principles on broadcast regulation state:

- All public bodies which exercise powers in the areas of broadcast and / or telecommunications regulation, including bodies which receive complaints from the public, should be protected against interference, particularly of a political or commercial nature.
- The legal status of these bodies should be clearly defined in law. Their institutional autonomy and independence should be guaranteed and protected by law, including in the following ways:
 - specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution;
 - by a clear legislative statement of overall broadcast policy, as well as of the powers and responsibilities of the regulatory body;
 - through the rules relating to membership;
 - by formal accountability to the public through a multi-party body; and
 - in funding arrangements.

With regard to the print media, the DPFEA concurs with the long-standing recognition that “effective self-regulation is the best system for promoting high standards in the media”.

The principle of necessity in regard to limitations of rights also requires that such regulatory systems are implemented in a manner that minimises the restrictive impact on the practical exercise of the right to freedom of expression. With regard to content in particular, it is internationally recognised that it is not appropriate for media regulatory or complaints bodies to ‘police’ the media. Rather, they should ensure that the sector functions smoothly by establishing a climate of dialogue, tolerance, openness, trust and responsiveness to content. As the DPFEA states: “Any regulatory body established to hear complaints about media content, including media councils, shall be protected against political, economic or any other undue interference.” It adds that powers should be administrative in nature, and that the body should not usurp the role of the courts.

In research done for debates in South Africa (see Cheadle et al, 2005; Chief State Law Adviser, 2005), the following criteria were mustered for assessing the extent of independence of governmental or other interests:

- Legislative (constitutional or other) mandate specifying independence of outside interests;
- Institutional separation and uniqueness in scope of jurisdiction and function;
- Institutional authority, powers and competencies over the relevant area;

- Personnel untarnished by conflicts of interests;
- Appointments in an open and transparent manner;
- Public involvement in appointments (e.g. Through a multi-party committee in parliament);
- Security of tenure so that incumbents can only be removed for just cause;
- Financial security so as to be free from arbitrary controls through budgeting;
- Accountability only for the legality and financial aspect of activities;
- Accountability that is transparent and includes public mechanisms.

This area of international jurisprudence is of particular relevance to African countries, most of which fall far beneath such standards.

1.9 Freedom and judicial authorities

Accords and declarations may often have most effect when they are canonised in law. In turn, law is most effective when its application and interpretation is open to review and resolution by an independent judicial system whose decisions are respected and binding. In this light, it may be noted that the DPFEA enjoins state parties to the African Charter (the ACHPR) to “make every effort to give practical effect” to all the principles it elaborates. However, on its own, the authority of the Declaration is mainly symbolic. What may, in time, give more ‘teeth’ to this document, however, is the emergence of two African judicial instruments — namely, the African Court on Human and Peoples’ Rights, and the (not yet formed) African Court of Justice. The first has been set up to complement the work of the African Commission on Human and Peoples’ Rights. The second is mainly aimed at addressing inter-state conflicts, but may also hear rights cases — whether civil, political, economic, social and cultural as guaranteed under the ACHPR. A complication is the envisaged administrative merger of these two courts, and a concern has been raised by Amnesty International that the authority of the African Court of Justice could prevail in the event of any differences between the two institutions.

The African Court of Human and Peoples’ Rights focusing specifically on rights had its 11 judges sworn in during July 2006, and derives from a 1998 protocol originally drafted by the Organisation of African Unity (forerunner of the African Union — the AU). Its jurisdiction applies only to the state parties who have ratified the protocol, with these countries thereby undertaking to comply with judgements to which they are parties. The countries in this study that have signed up in this regard are listed in Table 3 below:

Table 3: List of Countries which have Signed, Ratified/Acceded to the African Union Convention on Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights.

Country	Date of signature	Date of ratification	Date deposited
Ethiopia	09/06/1998	-	-
Zambia	09/06/1998	-	-
Ghana	09/06/1998	25/08/2004	16/08/2005
Kenya	07/07/2003	04/02/2004	18/02/2005

Mali	09/06/1998	10/05/2000	20/06/2000
Mozambique	23/05/2003	17/07/2004	20/07/2004
Nigeria	09/06/2004	20/05/2004	09/06/2004
South Africa	09/06/1999	03/07/2002	03/07/2002
Senegal	09/06/1998	29/09/1998	30/10/1998
Tanzania	09/06/1998	07/02/2006	10/02/2006

If a violation of rights has been found, the Court may make appropriate orders including the payment of compensation or reparations. The AU itself is supposed to monitor compliance with the Court through its Council of Ministers, but it has no specific enforcement mandate. (The Assembly of the AU, however, can in theory impose sanctions on any state that fails to comply with decisions and policies of the Union.)

One potentially problematic matter is that although states have access to the court, individuals and NGOs can only bring cases if they have been granted AU observer status. It will therefore largely fall on institutions like the African Commission on Human and Peoples' Rights to initiate actions. What is more positive is that the Court can apply any instrument or source of law that is ratified by the States concerned, meaning that the DPFEA is likely to be taken into cognisance. The Court may issue an advisory opinion on the interpretation and application of the Charter, as well as any other relevant human rights instruments ratified by the States concerned, such as the ICCPR.

Another factor to consider in regard to courts is the existence of sub-regional judicial instruments. One is the ECOWAS Court of Justice, adopted by a protocol of 1991, and which may evolve as complementary to the African Court of Human and Peoples' Rights. The second is the UEMOA Court of Justice being the "Union économique et monétaire de l'Afrique de l'Ouest". The East African Community Treaty of 1999 provides for the East African Court of Justice, which could deal with member state obligations to protect human rights in accordance with the African Charter.

A Court of Justice of the Common Market of East and Southern African States was created in Lusaka in 1998. The SADC region in 2000 adopted a protocol on a Tribunal which involves promotion of democracy and human rights in terms of the Charters and Conventions of (O)AU and the United Nations. There is also the Arab Maghreb Union Judicial Authority, the Economic Community of Central African States Court of Justice, and the Economic and Monetary Community of Central Africa Court of Justice.

Some of these sub-regional courts may be further vehicles for promoting respect for aspects of freedom of expression. For instance, in mid-2007 journalist Musa Saidykhan laid torture charges against the government of The Gambia with the ECOWAS court of justice in Abuja.

The significance of an international court can be seen from the experience of the Inter-American Court which has delivered a symbolically strong opinion on the compulsory membership of journalists in professional associations. It reads that: "(T)he professional journalist is not, nor can he be, anything but someone who has decided to exercise freedom of expression in a continuous, regular and paid manner."

Accordingly, it continued, compulsory licensing would have the effect of permanently depriving those who are not members of the right to make full use of the rights granted to each individual and would thus violate basic democratic principles.

Statements such as these would make it difficult for any member state of the Organisation of American States to operate a licensing system for journalists with any legitimacy. Thus, the existence in Africa of a recognised continental judicial structure in the form of the African Court on Human and Peoples' Rights, which may well take cognisance of instruments such as the DPFEA, can help to strengthen communication rights and freedoms around the continent.

Judicial procedure itself is also a point of relevance for freedom of expression and access to information. The European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol no. 11) states:

Judgement shall be pronounced publicly but the press and the public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

In other words, while media access to courts can be limited, this is for specified reasons and conditions. Such international practice is also relevant for Africa.

1.9 Conclusion

This chapter demonstrates that freedom of expression and the associated rights to information and media freedom are well accepted and elaborated internationally. For many people, these communication rights are also central to other human rights. At any rate, they should also be the basis for national media legislations. As indicated in this chapter, there are some negative aspects of some of the instruments — such as the ambiguity when national law conflicts with the principles in the African Charter. Similarly, the 2000 SADC Protocol on Culture, Information and Sport has a potentially restrictive view of media freedom defined as “an environment in which the media operate without restraint and in accordance with the law”. Such clauses make rights subordinate to law, rather than specifying that laws should be in accordance with rights. On the whole, however, the jurisprudence is very clear as to the fundamental nature of these rights and how laws or other actions may legitimately restrict them. In short, the broad international jurisprudence amounts to best practice as regards rights around expression, information and media.

As argued in this chapter, these rights are regarded as relevant to any social order, but in addition they are indispensable components of any form of democracy. The relationship between freedom of expression, information and the media on the one hand, and democracy on the other, can be traced back to the long-standing libertarian beliefs. However, other perspectives on press freedom stress not only liberty as an absence of constraint, but also as an enabled freedom which positions citizens to take practical advantage of free expression, information and media. In turn, this leads to policy and law around empowerment environments and institutions conducive to realising communications rights in practice.

It is in this vein of thought that the DPFEA states, for instance: “States should promote an enabling economic environment for diverse media.” In this regard, systems of media supported by the state and other actors

have emerged, particularly in Francophone countries. There has also been an emphasis on community media which is seen to promote grassroots and local communication. Universal service, language and local content obligations have been imposed on broadcasters.

All of this, however, should be measured by the same benchmarks of international jurisprudence (eg. independence, minimal impact on content) as the standards described above for the more conventional regulatory systems which accord with the broad right to free expression.

Much human effort and sacrifice has gone into the international development of the rights and freedoms as outlined in this chapter. There is no reason why Africa, with its long march to freedom, ought not to be in the vanguard of progress. The world today cherishes 3 May as World Press Freedom Day, thanks to Africans working with UNESCO. It should not be the case that there are still African countries listed as among the globe's top violators of freedom of expression and associated rights. It should also not be the case that some countries such as Ethiopia, discussed in the next chapter, are cited as backsliding, nor that most countries in this study are laggards in developing access to information laws or considering systems to register journalists as in Kenya and Tanzania.

The point of this study is to add to the impetus in Africa for the continent not just to fulfil human rights, but to become an exemplary place in this respect. In 2007, it is 50 years since Ghana's independence triggered the end in Africa of colonial rule with all the derogation of human rights that this experience entailed. In putting more distance away from this period, African actors are uniquely positioned to implement human rights in a way that directly opposes both this memory as well as the enduring legacies of law and practice that are suited only to the past. African countries have much to gain from international experience in law related to communications, and the continent's challenge is to reach a point where it has also much to contribute back. Certain legislative elements in Ghana, Mozambique, South Africa and Mali are showing the way. But there is still much work to be done.

Chapter Two

AN OVERVIEW OF THE EXISTING MEDIA LEGISLATION IN EACH COUNTRY

2.1 ETHIOPIA

2.1.1 Relevant constitutional and broad provisions:

Freedom of expression

Article 29 of the 1994 Constitution of the Federal Democratic Republic of Ethiopia guarantees right of thought, opinion, and freedom of expression in the following terms:

1. Everyone shall have the right to hold opinions without any interference;
2. Everyone shall have the right to freedom of expression without interference. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through other media of his choice.

Freedom of the media

Article 29 continues:

3. Freedom of the press and mass media as well as freedom of artistic creation is guaranteed. Press freedom shall, in particular, include the rights enumerated hereunder:
 - a) that censorship in any form is prohibited;
 - b) the opportunity to have access to information of interest to the public.
4. In the interest of free flow of information, ideas and opinions which are essential to the functioning of a democratic order, the press shall, as an institution, enjoy legal protection to ensure its operational independence and its capacity to entertain diverse opinions.

Article 29 of the Constitution says:

5. Any media financed or controlled by the government shall be operated in a manner suitable for the accommodation of differences of opinion.

Right of access to information

Partly — “freedom to seek... information”. (Article 29)

Whether limitations are “reasonable” in a democracy

According to the Constitution, Article 29, Clause 6:

These rights can be limited only through laws which are guided by the principle that freedom of

expression and information cannot be limited on account of the content or effect of the point of view expressed. Legal limitations can be laid down in order to protect the well being of the youth, and honour and reputation of individuals. Any propaganda for war as well as the public expression of opinion intended to injure human dignity shall be prohibited by law.

Clause 7 adds: “Any citizen who violates any legal limitations on the exercise of these rights may be held liable under the law”.

Other institutions mentioned in constitution (eg. regulatory bodies)

None.

Constitution takes cognisance of international law

The constitution further provides: “All international agreements ratified by Ethiopia are an integral part of the law of the land,” and that: “The fundamental rights and freedoms specified in this chapter [Chapter 3 of the Constitution on fundamental rights and freedoms] shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia.”

Accession to international agreements relevant to media

International Convention on Civil and Political Rights accession	1993
African Charter accession	1988

Power of courts to assess constitutionality of media law

Unclear. Article 80 of the Constitution states that the Federal Supreme Court has the highest and final jurisdiction over federal matters.

Constitutional right to reply

None.

Is there a national media policy?

No.

2.1.2 Laws relating to the status of journalists (do they need to be registered?)

Proclamation No 34 of 1992 is titled “A Proclamation to Provide for Freedom of the Press”. In terms of Article 5 “any person who is an Ethiopian national may singly or jointly or with other persons having Ethiopian nationality, carry on any press activity”. However, Article 6 requires the registration of these journalists.

A draft “Proclamation to Provide for the Freedom of the Press” to replace that of 1992 was released by Ethiopia’s Ministry of Information in May 2004. The proposed legislation has been criticised by a number of media watchdog bodies including ARTICLE 19 which commented on earlier drafts in 2003 and expressed concern, in their comments on the 2004 draft, that many of the shortcomings they identified in 2003 had been carried forward into the current draft proclamation.

- In their 2004 briefing note, ARTICLE 19 expressed concern about the following:
- the broad scope of the proclamation;
 - restrictions on who may practise journalism;
 - government-controlled registration and certification systems;
 - broad exceptions to the right to access information held by public authorities;
 - the granting of a right to reply remedy that undermines the principle of editorial independence;
 - the establishment of a government-controlled Press Council with powers to prepare and enforce a Code of Ethics;
 - powers vested in the courts to engage in prior-censorship;
 - powers vested in the prosecutor to suspend media outlets; and
 - an excessively harsh regime of sanctions for offences that have no defences.

Article 7 of the draft proclamation imposes a licensing requirement on individual journalists. It also defines a “journalist association” in a way that contains a restriction on membership: no person who owns or has a “substantial” proprietary interest in a press organisation, or who is involved in management of a press organisation may join.

Article 5(1) of the draft proclamation excludes from working in the media, individuals who are not Ethiopian citizens and residents, who have not attained 18 years of age or who have been deprived of their legal rights may not work as journalists. Additionally, no person may work in broadcasting who has been stripped of his parental authority or who has been legally accused of a serious crime or offences against good conduct and the family. Article 5(3) imposes restrictions on who may be on the board of management of a print publication.

2.1.3. Laws and regulations on licensing media (print, broadcast)

Do print media need a licence?

The Proclamation of 1992 focuses primarily on print media although it defines “press” as “any establishment of mass medium activity such as newspapers, magazines, periodicals, journals, pamphlets, news-agencies, radio, television, motion pictures, pictures, films, cartoons, books, music, electronic publishing, plays and include[ing] all media of mass communication”. In 1999 (see below) a proclamation more specific to broadcasting was published.

Under this 1992 law, publications owned by private organisations, religious organisations, political organisations (besides the government) are legal. From July 2001 to July 2002, 235 print media outlets were registered at the Federal Ministry of Information. Of these, 205 were private newspapers, 14 were owned by religious organisations, seven were owned by political organisations and nine by the government.

Article 7 of the 1992 Proclamation sets out the procedures for obtaining a print media licence. That licensing is required for print media (issued by the Minister of Information) is a matter of great concern to freedom of expression observers. In fact, any press activity such as the production of leaflets and pamphlets in even small print runs requires a license. The fine for non-compliance is 10000 birr (around US \$1.200).

Article 10 of the Proclamation describes the responsibilities of the press as follows:

1. Every press has the duty to ensure that any press product it circulates is free from any content that can give rise to criminal and civil liability;
2. Without prejudice to the generality of sub-article 1 of this Article,
Any press shall have the duty to ensure that any press product it issues or circulates is free from:

- a. Any criminal offence against the State or the administration established in accordance with the Charter or the national defence force;
- b. Any defamation or false accusation against any individual, nation/nationality, people or organization;
- c. Any criminal instigation of one nationality against another or incitement of conflict between peoples; and
- d. Any agitation of war.

Several of these prohibitions repeat prohibitions that have already been established under existing laws. The Civil Code and the Penal Code have prohibitions on defamation, offences against national interest, offences against law and order, and breaches of the peace. ARTICLE 19 suggests that this gives journalists a “double warning” which suggests that they are watched more closely than others. For a breach relating to content the penalty is imprisonment of not less than one year and up to three years or a fine of between 50000 and 100000 Ethiopian birr (approximately US \$6.000 or \$10.000) or both imprisonment and a fine.

The 1992 Press Law also imposes a penalty of imprisonment for up to one year, or a fine of 5000 birr (approximately US \$600) or both, for failing to comply with duties set out in the law. These include minor matters such as forgetting to publish commercial advertisements in a classified format, neglecting to publish the name of the editor or proprietor, failing to submit a copy to the Ministry of Information or the Regional Information Bureau within 24 hours of dissemination, not indicating the use of a pen name in a prominent place, and forgetting to acknowledge a news-agency source.

The 2004 draft Press Law, Article 9, requires all forms of media outlets to obtain a licence from the Ministry of Information. Applicants must provide extremely detailed information, including the names, addresses, date of birth and employment contract of all journalists working for the media outlet, as well as the schedule of publication, and the time, method and places of distribution. The authorities must be notified of all changes to this information. The draft law includes every form of mass communication, regardless of the means of transmission or the frequency of publication. Thus, it would apply to all print publications, large or small, as well as plays, films, cartoons, books, leaflets and even posters and pictures, as well as to all broadcasters and Internet publications.

In terms of Article 94) an application can be rejected due to an applicant’s failure to meet any of the requirements set out in the entire draft law. Article 98) states that the fee for registration and renewal, and the time limit for which the registration will be valid, will be determined by the Ministry of Information.

Article 10 sets out grounds according to which a licence may be refused, including if the applicant fails to adhere to the obligations stipulated throughout the draft law. Many of these obligations consist of vague content restrictions. Article 8 requires anyone engaged in the wholesale distribution of printed matters to be licensed by the Ministry of Information or by the Regional Information Bureau.

By June 2007, there was no news about the status of the draft law (some provisions of which had been incorporated into other laws).

Is there an independent licensing body for broadcast?

The Broadcasting Proclamation of 1999 provides for the establishment of the Ethiopian Broadcasting Agency (EBA) which issues licenses. The Government opened this agency in 2002.

Article 4 establishes the EBA as an “autonomous Federal Administrative Agency” with responsibility over

broadcasting. However, Article 42) states that the Agency is accountable to the Prime Minister. Articles 9 and 12 provide that the members of the governing board (the number not specified), and the general manager should both be appointed by the government, although the latter is accountable to the Board. There are no provisions for the autonomy of the Board.

Are there three categories of broadcasting licensed (public, commercial, community)?

No.

Are there limits on private broadcasting—eg. not in television, no national licenses offered?

The state controls all broadcast media and operates the only television station. The 1999 Broadcasting Proclamation permits private radio stations. According to ARTICLE 19 in 2005, no truly private license had been issued (the two supposedly private licenses were held by a company connected to the ruling party) and broadcast thus remained a government monopoly.

Is the board of the state-owned media independent?

In 2001, the Ethiopian Press Agency, the Ethiopian News Agency and the Ethiopian Radio and Television Agency were legally established as autonomous public agencies. The three proclamations initially provided that the general managers would be appointed by government and the members of the governing boards would be appointed by the legislature after government nomination. The autonomy of the agencies would be partly ensured in that the appointment of board members would be through an all-party committee of parliament and the general managers would be accountable to their boards rather than the government. However, a few days following these proclamations, Parliament was convened to consider an “amended proposal” which provided for the Information Minister to become the chairperson of the Radio and TV Agencies and the State Minister of Information to be the chairperson of the News Agency. This “amended proposal” was approved by Parliament with only five opposing votes and three abstentions. These agencies are thus not autonomous public service bodies.

Are there public-service oriented statutes or licence conditions for the state-owned media?

Clause 5 of Article 29 of the Constitution, as quoted above, states that any media financed or controlled by the government must be operated in a manner suitable for the accommodation of differences of opinion.

Are there licence conditions impacting on content—including local content?

Article 27 of the Broadcasting Proclamation sets out wide-ranging restrictions on the content of what may be broadcast. These apply to every programme broadcast rather than to overall programming. They prohibit programmes which:

- do not reflect varying viewpoints;
- fail to verify the accuracy of their sources;
- violate the dignity and liberty of mankind or the rules of good behaviour, or undermine the belief of others;
- commit a criminal offence relating to State security or defence, or the constitutionally established government;
- defame individuals, the nation, nationalities, people or organisations;

- instigate dissension among nationalities or promote dissension among peoples; and/or
- incite war.

Breach of Article 27 can lead to the revoking of licenses. Many of these prohibitions are also already dealt with in other legislation.

Article 28 prohibits programmes shown before 11pm which could adversely affect children. Article 31 restricts a number of types of advertisements including those relating to cigarettes and alcohol.

Article 42 prescribes sanctions for breach of the Proclamation. Minimum terms of imprisonment of between 6 months and 3 years and maximum terms of 2 to 5 years, along with severe fines, are imposed for offences including:

- broadcasting without a license;
- failure to allow the agency to investigate a station;
- not providing a right of reply;
- carrying prohibited advertisements or sponsored programmes;
- carrying programmes before 11pm that corrupt children;
- failing to notify the Agency of the person responsible for a programme or to broadcast the name of the station and producer at mandated times;
- breaching the rules on political party advertising.

The draft Press Law of 2004 contains various provisions that are prescriptive with regard to the content of what may be published and what the objectives of press organisations should be. Article 4 states that the goal of all Ethiopian press should be “ensuring the basic freedoms and rights enshrined in the constitutions, the prevalence of peace, democracy, justice and equality, as well as accelerating social and economic development”. Article 42 prescribes further working methods for the press. Article 40 states that the press has a duty to ensure that any information published is free from content that may give rise to legal liability.

The draft law also imposes various conditions on the dissemination of foreign press. Specifically, the Minister of Information may suspend the circulation of foreign media that “spreads false accusations”, amongst other content-related rules (Article 63(b)). Generally, Article 6 allows only those foreign publications to be imported “which would directly or indirectly have benefits to the welfare and development of the nation”.

Article 44 of the draft law gives the prosecutor the power, where he or she believes that a media outlet is about to disseminate information that is illegal and will cause serious damage, to impound the printed matter. According to the draft, impounding is synonymous with destruction. Article 44(4) provides for an expedited process before the courts where such an order has been made, whereby an appeal will be decided within 48 hours.

The draft proclamation (Part 6) provides for possible imprisonment for several breaches of the law, for terms of up to five years. These include breaches for even minor offences such as employing journalists who do not meet the conditions specified in the law, breach of the licensing rules for media outlets, failure to publish a reply or dissemination of banned foreign publications.

(In March 2005, the new Penal Code, which was due to come into effect in May 2006, was revealed to include some of its punitive provisions of the draft Press Law. There are 71 additional articles in the new Penal Code. These articles include both general provisions applicable to all offences, as well as specific ones applicable to particular media crimes. Among these are articles taken verbatim from the draft Press Law, referring to liability for offences committed by the press.)

2.1.4. Laws on ownership legislation (eg. limits on cross- or foreign ownership).

In terms of Article 19 of the Broadcasting Proclamation of 1999, broadcasting is a field of investment that is strictly reserved for Ethiopians (Maria and Genamow 2000).

2.1.5. Other media-relevant laws covering:

Access to information

Part 3 of the 1992 press law is titled “Right of Access to Information”. It states, in Article 8, that the press “have the right to seek, obtain and report news and information from any government source of news and information” and that they “have the right to disseminate news, information and other products of press in their possession”.

But this does not apply to:

- Information designated as secret by the Council of Representatives or the Council of Ministers;
- Information which is secret by virtue of other laws;
- Unless the court decides otherwise, information relating to any case heard by a court *in camera*;
- Information relating to a case pending before any court;
- Unless the person concerned consents, information which is private to a victim of a crime.

Part 3 of the draft Press Law ensures access of all citizens, not just journalists, to information held by public authorities. Article 12 sets out the basic right and Article 13 requires public bodies to publish key information. Article 14 describes the process for obtaining information. Article 14(6) lists circumstances in which the responsible public relations officer may reject requests, including that the request is too general or “would involve disproportionate diversion of human and material resources or would adversely interfere with the functioning of the authority”.

Articles 15 to 29 set out the exceptions to the right of access. Article 15(1) states that a public information officer will refuse a request for access or a request to ascertain the existence of a record if the information sought falls under a number of the categories of exceptions found in Articles 16 to 29. Article 15(2) provides that the access regime is subject to prohibitions contained in other laws.

Legal framework for state-subsidy of private media

None.

Defamation — including where it is a criminal matter

The 1992 press law prohibits “defamation or false accusation against any individual, nation/nationality, people or organization”. As stated above, the Broadcasting Proclamation of 1999 makes it an offence to “defame individuals, the nation, nationalities, people or organisations”.

Harmful content: hate speech, pornography

Again, the Broadcasting Proclamation prohibits programmes that violate “the rules of good behaviour”. It is also an offence to broadcast programmes before 11pm that “corrupt children”.

Security laws and official secrets

Article 27 of the Broadcasting Proclamation Commission prohibits programmes that “commit a criminal offence relating to State security or defence, or the constitutionally established government”.

2.1.6. Laws on reporting courts.

None, aside from *sub judice* and *in camera* provisions.

2.1.7. Laws and regulations on media and elections

The Election Code of Conduct prescribes detailed regulations for the media. Under point 5, the “Right of Using the Mass Media”, the following prevails:

- Political parties and independent candidates shall have access to the mass media; by way of freely obtaining: air time on the radio and television; and a column in the print media;
- The mode of utilisation shall be determined by the directives that the Ministry of Information and the Board is to issue in consultation with independent candidates; political parties; the mass media; and government organs;
- Officials at any level shall have the obligation to promote equal access to candidates in respect of such facilities as radio and television stations, assembly halls and newspapers under their respective authority.

The National Electoral Board of Ethiopia accredits journalists to cover elections and requires them to abide by the following principles:

- In the collection and dissemination of news on the election process, they shall strive for balance, accuracy and impartiality;
- They shall report only on credible and well-sourced facts;
- They shall not hide key information or falsify documents;
- They shall use only fair methods to obtain news, images and documents;
- They shall do the utmost to avoid facilitating discrimination based on race, sex, language, religion, political or other beliefs, national or social origins.

Accredited media representatives may:

- Be present in polling stations from opening to closing time (6am to 6pm) and observe the voting process, provided this does not violate the confidentiality of data and the secrecy of the vote or disrupt the polling process in any way;
- Visit as many polling stations as they wish and move around inside polling stations, as long as this does not disturb the flow of voters or the work of election officials;
- Interview voters, candidates’ representatives, observers or election officials, if the individuals consent and the activities of the stations permit this. These interviews must be conducted outside the polling stations;
- Observe the materials prepared before election day, follow vehicles carrying election materials to constituency electoral offices and observe the intake of materials;
- Observe the counting of ballots at polling stations and the posting of results.

Accredited media representatives may not:

- Interview voters, candidates’ representatives, observers or election officials inside stations during registration or polling;
- Film, photograph or interview any voters or election officials without their consent;
- Film or photograph the recording of registration details or voters marking their ballot papers; or acquire any pictures, film footage or audio commentary from behind the voting screens;

- Film, photograph or copy the Electors’ Registers, voters’ registration identity documents or any other documents which would infringe on the privacy of voters.

2.1.8. Ethics and the law:

Statutory mechanisms to police professional ethics

Article 38 of the draft Press Law provides for the establishment of a Press Council. The Council has a mandate to make recommendations regarding the press, as well as to prepare and entertain complaints regarding a Code of Ethics. The 29 members of the Council will be drawn from the federal government, associations of journalists, journalists, publishers and society at large. The extent of government control over this body is clear from the fact that the powers and responsibilities of the Council, the appointment of members and the working procedure will all be determined by the Council of Ministers.

Non-statutory mechanisms

The Ethiopian Free Press Journalists Association.

Right to reply provisions

Article 9 of the 1992 press law makes provision for right of reply in the following terms:

1. Where any information or matter concerning any person is reported in a press, such person shall have the right to reply in the press in which the report appeared;
2. The press in which such report appeared shall give to the person concerned the opportunity in due time to make a reply proportionate to the report and in such manner that those who knew about the original report can readily notice the reply;
3. The provisions of sub-articles 1 and 2 of this Article shall not affect the provisions of Article 2049 of the Civil Code.

Article 37 of the draft Press Law grants individuals “reported in a press” an expansive right of reply and correction. Article 37 fails to refer to Article 11, which empowers the editor-in-chief to refuse to publish anything against his will. According to that provision, “any practice or agreement that restricts this power shall be null and void”.

Confidentiality of sources

In terms of Article 8 of the 1992 press law:

The publisher or the editor of any press may not be compelled to disclose the source of any news or information which has been used in the preparation of his press.

However:

The court may order the publisher or editor of the press to disclose his source of information in the case of a crime committed against the safety of the state or of the administration established in accordance with the Charter or of the national defence force, constituting a clear and present

danger, or in the case of proceedings of a serious crime, where such source does not have any alternative and is decisive to the outcome of the case.

The 2004 draft Press Law repeats these stipulations which give qualified protection of confidential sources. Article 8 of the Broadcasting Proclamation provides that the press disclose its source in the case of crimes constituting clear and present danger.

2.1.9. Respect for freedom of expression and law by governments, media and others (including examples of whether the laws are enforced or not; if other laws — eg. citizenship — are used against media)

The International Press Institute's 2004 World Press Freedom Review expressed the opinion that "there are signs that the government is grudgingly accepting the fact that the independent media have a role to play in Ethiopian society", but also said that the perception that the independent media are little more than a barrier between government and the people continues to prevail in various quarters of the government. There was also concern that the government was merely paying lip service to press freedom in order to encourage a better relationship with the international donor community. "The discussion of the draft press law offered evidence that the Ethiopian government is willing to listen, but the latest version of the law shows that it is not necessarily so willing to accept advice." Reporters without Borders (RSF), in their 2004 annual report, also focussed on the draconian restrictions of the draft Press Law.

In January 2005 the International Press Institute and Reporters without Borders questioned the treatment of two Ethiopian journalists, Shiferraw Inermu and Dhabassa Wakjira, who work for the Oromo-language service of the state-owned Ethiopian Television. Both were accused of having links with an Oromo separatist group. The two were arrested at their homes in Addis Ababa in April 2004. Inermu has been released and re-arrested on a number of occasions with the state ignoring orders by the courts to release him on bail, while Wakjira was held in custody. According to RSF both remained in prison by November 2005. Since the start of 2004, 12 Oromo journalists are reported to have fled Ethiopia to the safety of neighbouring countries. Suspended by the authorities in 2004, and subsequently splintered by internal conflict, the Ethiopian Free Press Journalists Association (EFJA) won a High Court ruling on 24 December that the suspension of the officers and their replacement with a new leadership was illegal. On 3 March 2005 the Ministry of Justice lost its appeal on this issue, but there were indications that the ministry would appeal this decision. EFJA's success was an indication that the judiciary had a degree of independence. In November 2005, the International Press Institute (IPI)

Reporters without Borders and the Committee to Protect Journalists (CPJ) reported that Ethiopian authorities were hunting down journalists, including the leadership of the EFJA, in a bid to clamp down on government critics following public protests that left more than 40 dead at the hands of security forces.

The Ethiopian government issued a "wanted" list of 58 people, including 17 publishers and editors, who were to be prosecuted for attempting to "violently undermine the constitutional order in the country". State media disseminated photographs of many of the journalists and called on the public to inform police about their whereabouts. Ethiopian Prime Minister Meles Zenawi said the individuals on the list would be charged with treason, which carries the death penalty in Ethiopia. He accused some journalists of working hand-in-hand with opposition parties and promoting street protests in Addis Ababa. CPJ reported that eight journalists had been detained by November 2005.

Police searched the offices of *Netsanet*, *Ethiop* and *Abay*, and confiscated documents, computers, money, and other equipment and materials. The Ethiopian authorities are also accused of using state-owned media to

campaign against foreign broadcasters Voice of America (VOA) and Germany's DeutscheWelle. Both of these stations broadcast local-language news programmes into Ethiopia via shortwave, and were a popular source of information in the country which has no independent radio stations. The state-owned *Ethiopian Herald* published an article accusing VOA, Deutsche Welle Radio and the private press of "promoting the destructive missions of opposition parties".

In April 2007, eight editors and publishers of Amharic-language newspapers were acquitted in court although their publications remain banned, and some had spent 17 months in prison awaiting trial. Subsequently, in mid-2007, Ethiopia's High Court convicted four editors and three publishers of now-defunct weeklies of anti-state charges linked to their coverage of the government's handling of disputed parliamentary elections in 2005. The charges include "inciting the public through false rumours" and "genocide" (the government claimed the coverage harmed the Tigrayan ethnic group). Two of the editors were convicted of charges of "outrages against the constitutional order" with sentences carrying life imprisonment or death.

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2.2 GHANA

2.2.1. Relevant constitutional and broad provisions:

Freedom of expression

The Constitution of the Republic of Ghana (1992) says in Article 211(a) “all persons have the right to freedom of speech and expression, which includes freedom of the press and other media”.

Freedom of the media (mentioned as an institution)

Chapter Twelve of the Constitution is titled “Freedom and Independence of Media”. In the terms of Article 162:

- 1) Freedom and independence of the media are hereby guaranteed;
- And
- 4) Editors and publishers of newspapers and other institutions of the mass media shall not be subject to control or interference by Government, nor shall they be penalized or harassed for their editorial opinions and views, or the content of their publications.
 - 5) All agencies of the mass media shall, at all times, be free to uphold the principles, provisions and objectives of this Constitution, and shall uphold the responsibility and accountability of the Government to the people of Ghana.

Right of access to information

Article 21(1)(f) enshrines the right to information “subject to such qualifications and laws as are necessary in a democratic society”.

Whether limitations are “reasonable” in a democracy

Article 162(2) says: “Subject to this Constitution and any other law not inconsistent with this Constitution, there shall be no censorship in Ghana.”

Qualifications are spelled out. Article 164 says: “The provisions of articles 162 and 163 of this Constitution are subject to laws that are reasonably required in the interest of national security, public order, public morality and for the purpose of protecting the reputations, rights and freedoms of other persons.” But Article 165 adds, “For the avoidance of doubt, the provisions of this Chapter shall not be taken to limit the enjoyment of any of the fundamental human rights and freedoms guaranteed under Chapter 5 of this Constitution”.

Other institutions mentioned in constitution (eg. regulatory bodies)

Article 166 provides for institutional protection of media against governmental abuse and interference by creating the National Media Commission (NMC). This body has responsibility for media independence and must work to “insulate the state-owned media from governmental control”. It also mediates public complaints against media and has responsibility for ensuring “high journalistic standards”. However, the NMC has no powers in regard to content in media, private or state-owned. It can, however, propose legislation to Parliament on media.

In terms of Article 166, the National Media Commission consists of fifteen members as follows:

- a) one representative each nominated by:
 - i) the Ghana Bar Association;
 - ii) the Publishers and Owners of the Private Press;
 - iii) the Ghana Association of Writers and the Ghana Library Association;
 - iv) the Christian group (the National Catholic Secretariat, the Christian Council, and the Ghana Pentecostal Council);
 - v) the Federation of Muslim Councils and Ahmadiyya Mission;
 - vi) the training institutions of journalists and communicators;
 - vii) the Ghana Advertising Association and the Institute of Public Relations of Ghana;
 - viii) and the Ghana National Association of Teachers;
- b) two representatives nominated by the Ghana Journalists Association;
- c) two persons appointed by the Ghanaian President; and
- d) three persons nominated by the Ghanaian Parliament.

The Commission elects its own Chairperson. Article 167 spells out the functions of the National Media Commission as being to:

- a) promote and ensure the freedom and independence of the media for mass communication or information;
- b) take all appropriate measures to ensure the establishment and maintenance of the highest journalistic standards in the mass media, including the investigation, mediation and settlement of complaints made against or by the press or other mass media;
- c) insulate the state-owned media from governmental control;
- d) make regulations by constitutional instrument for the registration of newspapers and other publications, except that the regulations shall not provide for the exercise of any direction or control over the professional functions of a person engaged in the production of newspapers or other means of mass communication; and
- e) perform such other functions as may be prescribed by law not inconsistent with this Constitution.

From 1993 to 1996, tension arose between the government and the National Media Commission. The Supreme Court stepped in to interpret two disputed issues. The first was over the authority to appoint heads of the state-owned media. About five years after the case was lodged, the Supreme Court endorsed the NMC's right to appoint chief executives of the state-owned media. The second related to who had the power to allocate and manage the frequencies for radio and television broadcasting. The NMC and the government interpreted the constitutional provisions differently. The Supreme Court in effect disqualified the NMC from frequency management in a decision involving a private citizen's case.

Constitution takes cognisance of international law
International law is not mentioned.

Power of courts to assess constitutionality of media law

According to Article 2(1) of the Constitution, a person who alleges that:

- a) an enactment or anything contained in or done under the authority of that or any other enactment; or
 - b) any act or omission of any person;
- is inconsistent with, or is in contravention of a provision of the Constitution, may bring an action in the Supreme Court for a declaration to that effect.

Constitutional right to reply

In terms of Article 162(6):

Any medium for the dissemination of information to the public which publishes a statement about or against any person shall be obliged to publish a rejoinder, if any, from the person in respect of whom the publication was made.

Is there a national media policy?

Yes, the Ghana National Media Policy was released in 2000.

Accession to international agreements relevant to media

International Convention on Civil and Political Rights accession	2000
African Charter accession	1989

2.2.2. Laws relating to the status of journalists (do they need to be registered?).

No.

2.2.3 Laws and regulations on licensing media (print, broadcast):

Do print media need a licence?

Article 162(3) of the constitution, states:

There shall be no impediments to the establishment of private press or media; and in particular, there shall be no law requiring any person to obtain a licence as a prerequisite to the establishment or operation of a newspaper, journal or other media for mass communication or information.

The 2003 Newspaper/Publications Instrument, prepared by the National Media Commission and the government, and passed by parliament, requires registration of a paper within 30 days of its publication or import, but this is excluded from being a means of control and therefore amounts only to notification.

Is there an independent licensing body for broadcast?

The National Communications Authority Act, 1996, provides for the establishment of the Ghana National Communications Authority (GNCA) to regulate communications by wire, cable, radio, television, satellite and

similar means of technology for the orderly development and operation of efficient communication services in Ghana. The regulator reports to the Ministry of Transport and Communications. The GNCA is financed by license fees, spectrum fees and funds from parliament. The board is composed of a Chairperson and six others, appointed by the president. This reduces its independence, and some criticism has been made of the lack of transparency as to why some licenses are rejected while others granted.

The Act defines the responsibilities of the GNCA as:

- setting technical standards;
- licensing service providers;
- providing guidelines on tariffs chargeable for services;
- monitoring the quality of service providers and initiating corrective action where necessary;
- setting terms and guidelines for interconnections of the different networks;
- considering complaints from telecom users and taking corrective action where necessary;
- controlling the assignment and use of the radio frequency spectrum;
- resolving disputes between service providers and between service providers and customers;
- controlling the national numbering plan;
- controlling the importation and use of types of communication equipment;
- advising the Minister of Communications on policy formulation and development strategies of the communications industry.

Its responsibilities include licensing, establishing licensing fees together with the sector ministry, interconnection rates together with the sector ministry and the operator, technical standards, frequency allocation, type approval, and service quality monitoring.

Are three categories of broadcasting licensed (public, commercial, community)?

The Ghana National Media Policy endorses a three-tier system. The National Media Council work on broadcasting standards led to a draft bill in 2003 which elaborates on the rights and responsibilities of broadcasters. The bill has, however, not received further legislative attention, even although community radio stations do exist.

Are there limits on private broadcasting — eg. not in television, no national licenses offered?

National licences appear to be reserved for state-owned media.

Is the board of the state-owned media independent?

As specified constitutionally, the National Media Commission appoints the leadership of the state-owned media. Article 168 says that the Commission shall appoint the chairperson and other members of the governing bodies of public corporations managing the state-owned media in consultation with the President. According to Article 169, editors of the state-owned media shall be appointed by the governing bodies of the respective corporations in consultation with the Public Services Commission.

Are there public-service oriented statutes or licence conditions for the state-owned media?

Article 163 of the Constitution says: “All state-owned media shall afford fair opportunities and facilities for the presentation of divergent views and dissenting opinions.”

Chapter 7 of the 1992 Constitution provides in clause 11: “The state shall provide fair opportunity to all political parties to present their programmes to the public by ensuring equal access to the state-owned media.”

Are there licence conditions impacting on content — including local content?

The National Media Policy prescribes that the “power of the media shall be used proactively to encourage the promotion and growth of local culture”. A prescribed (but unspecified) proportion of media output should be allocated to local content. Local languages must be used prominently in all media.

2.2.4. Laws on ownership legislation (eg. limits on cross- or foreign ownership).

The state owns the *Daily Graphic*, a significant newspaper, and private citizens own other newspapers. In broadcasting, some 140 radio stations are reported to be in existence, of which only 11 are owned by the state (Kafewo, 2006).

Article 10 of the National Communications Authority Act says broadcast licenses can only be given to Ghanaian individuals or Ghanaian-registered companies. According to the National Media Policy, at least 51% of the shares in a commercial media company must be held by indigenous Ghanaian citizens representing themselves or wholly-owned Ghanaian enterprises. The National Media Policy also prescribes that ownership of commercial media companies be spread to discourage monopolies. Cross-media ownership must be restricted and only allowed if it is in the public interest. The National Media Policy proscribes broadcast enterprises from being owned or operated by a political party or religious organisation.

2.2.5. Other media-relevant laws covering:

Access to information

A Right to Information Bill was first proposed in 2003. In 2007, the President and the Attorney General reportedly said that the country was not ready for such a law because it did not have the infrastructure for implementation. The 2005 incarnation of the Bill says its function is to:

- provide for the right of access to information held by a government agency subject to the exemptions that are necessary and consistent with protection of the public interest and the operation of a democratic society;
- provide for the right of access by an individual to personal information held by a government agency which relates to that individual;
- protect from disclosure, personal information held by a government agency to the extent consistent with the preservation of personal privacy;
- provide for the internal review of decisions of government agencies by the sector Ministers and judicial review by the High Court of decisions of Ministers and private bodies;
- provide for right of appeal.

Article 1 provides for the right of access to official information. A person has the right of access to information in the custody or under the control of a government agency unless the information falls within any of the exemptions specified in Articles 3 to 17 of this Act. One is not obliged to give a reason for the application for access to information unless one has requested that the application be treated as urgent. When an agency receives an application for access to information, part of which is exempt, the information officer of the agency must disclose to the applicant as much of the information as can reasonably be separated without disclosing the exempt part.

In terms of Article 2 it is the responsibility of the government generally to provide information on governance without such information being requested.

Article 3 provides for exemptions relating to the President and Vice-President's Offices. In terms of clause 1, information is exempt if:

- a) it is information prepared for submission or which has been submitted to the President or Vice-President, or
- b) if it contains matters the disclosure of which would reveal information concerning opinion, advice, deliberation, recommendations, minutes or consultations made or given to the President or Vice-President.

Article 3 continues:

- 2) A certificate under the hand of the Secretary to the President or the Secretary to the Vice-President that information is exempt information establishes that the information is exempt subject to a ruling by the High Court;
- 3) Information is not exempt information if it contains factual or statistical data and does not disclose information concerning a deliberation or decision of office of the President or Vice President.

Article 4 establishes exemptions with regard to information relating to Cabinet in similar terms.

Article 5 establishes exemptions with regard to information relating to law enforcement, public safety and national security. It is exempt if it contains matter, the disclosure of which can reasonably be expected to:

- a) interfere with the prevention, detection or curtailment of a contravention or possible contravention of a law;
- b) prejudice the investigation of a contravention or possible contravention of a law;
- c) reveal investigation techniques and procedures in use or likely to be used in law enforcement;
- d) disclose the identity of a confidential source of information in respect of a law enforcement matter or disclose the information given by a confidential source;
- e) impede a prosecution of an offence;
- f) endanger the life or physical safety of a person;
- g) prejudice the fair trial of a person or the impartial adjudication of a case;
- h) reveal a record of information that has been confiscated from a person by a police officer or other authorised person;
- i) interfere with the maintenance or enforcement of a lawful method or procedure for protecting the safety of the public;
- j) endanger the security of a building, structure or means of transport or computer and communication system for which security is reasonably required;
- k) prejudice the security of a prison or place for lawful detention;
- l) facilitate the escape of a person from lawful custody;

- m) prejudice a system or procedure for witness protection or other procedure for protection of persons or property.

In terms of Article 5(2) information is not exempt if it:

- a) consists merely of a report on the extent of success achieved in a programme adopted by an agency to deal with a contravention or possible contravention of the law;
- b) contains a general outline of the structures of a programme adopted by an agency to deal with a contravention or possible contravention of an enactment;
- c) consists merely of a report on a law enforcement investigation that has already been disclosed to the person the subject of the investigation and disclosure of the information would be in the public interest.

In terms of Article 5(3) information is exempt if it relates to the security of the State and has been created by or is in the custody of the Armed Forces or the Security and Intelligence Agencies established under the Security and Intelligence Agencies Act, 1996.

In terms of Article 6 information affecting international relations is exempt if it can reasonably be expected to:

- a) damage or prejudice the relations between the Government and the government of any other country;
- b) reveal information communicated in confidence to a government agency by or on behalf of another government;
- c) reveal information communicated in confidence to an agency by an international organisation of states or a body of that organisation.

Article 7 provides that information that affects the defence of the country is exempt if it can reasonably be expected to:

- a) damage or prejudice the defence of the Republic or a foreign state allied to or friendly with the Republic;
- b) prejudice the detection, prevention or suppression of terrorism, sabotage or espionage.

Article 8 provides exemptions for information relating to economic and other interests. It is exempt prior to official publication if:

- a) it contains trade secrets or financial, commercial, scientific or technical information that belongs to the government and the information has monetary or potential monetary value;
- b) disclosure of the information can reasonably be expected to damage the financial interest of Government or the ability of the Government to manage the national economy;
- c) disclosure of the information can reasonably be expected to create undue disturbance in the ordinary course of business or trade in the country;

- d) disclosure of the information can unduly benefit or be injurious to a person because it provides advance information about future economic or financial measures to be introduced by Government;
- e) it contains criteria, procedures, positions or instructions that relate to negotiations carried on or on behalf of the Government;
- f) it contains questions to be used in an examination or test for educational purposes.

Article 9 exempts economic information of third parties if would reveal a trade secret, research or scientific, technical, commercial, financial or labour related information supplied in confidence.

Legal framework for state-subsidy of private media

The National Media Policy proposes incentives, concessions and a national fund to support the development of media.

Defamation — including where it is a criminal matter

Since 2001, Ghana no longer has criminal defamation. An Amendment Bill that year repealed the relevant section of Ghana Criminal Code of 1960. It also scrapped Section 184 dealing with presidential powers to ban organisations, as well as sections that deal with sedition, defamation of the president, and dissemination of false news that could damage the reputation of the country. However, the number of civil cases brought by against media outlets has reportedly escalated and severe damages awards imposed.

Harmful content: hate speech, pornography

The Cinematography Act protects children from exposure to unsuitable materials, especially through the state-owned mass media.

Security laws and official secrets

The State Secrets Act of 1962 imposes restrictions on public access to information held by public and civil service officials. Note that this would change with the passing of the Freedom of Information Bill.

In 2001, the Criminal Libel and Sedition laws were repealed.

2.2.6. Laws on reporting courts

None. In September 2004, a judge prevented journalists from both the state-owned and private media from covering a case in the Accra Circuit Court involving a member of the opposition National Democratic Congress (NDC) who was standing trial for alleged electoral malpractices. The judge claimed that “it was an offence for the journalists to sit in court and listen to proceedings to write a story without applying to the court registrar for authorization”. The Media Foundation for West Africa reports that she did not cite a specific legal provision for this argument.

2.2.7. Laws and regulations on media and elections.

The Public Elections Regulations, passed in 1996, have no reference to media.

2.2.8. Ethics and the law:

Statutory mechanisms to police professional ethics

The National Media Commission is supposed to settle complaints. The courts also rule on civil defamation.

Non-statutory mechanisms

The Ghana Journalism Association operates a Code of Ethics.

Right to reply provisions

Not elaborated in law beyond the Constitutional reference.

Confidentiality of sources

No protection exists for journalists to protect confidentiality of their sources.

2.2.9. Respect for freedom of expression and law by governments, media and others (including examples of whether the laws are enforced or not; if other laws — eg. citizenship — are used against media)

The International Press Institute's 2004 World Press Freedom Review says that while individual members of the media community operated with relatively little harassment, throughout the year there were indications that the desire to present a positive image of government was prioritised over the willingness to accept critical coverage. There were concerns about the independence of the Ghana Broadcasting Corporation (GBC) as its management decided to interdict the Director and four journalists with Ghana Television (GTV) over a story they had broadcast concerning state-owned Ghana Airways.

Reporters without Borders, in their 2004 annual report, said that "Ghana is one of the African countries that most respect press freedom". They did, however, also refer to isolated threats and harassment of journalists.

The Freedom House report on World Press Freedom for 2004 labels Ghana as "free". It notes that freedom of the press is guaranteed by law and is generally respected in practice. It referred to Ghana's diverse and growing media landscape and referred to the 2001 repeal of the Criminal Libel and Seditious Laws, which increased freedom of expression and said that open criticism of governmental policies and officials appears in both private and government-owned media reports although "authorities have reportedly pressured state-run media outlets to restrict opposition party coverage".

In May 2004, the President replaced the Minister of Communications with a new appointee as chair of the National Communications Authority, the body responsible for allocating media licenses, due to complaints that the original appointment represented a conflict of interest.

In November 2005, the *Ghana Palaver* newspaper, supporter of the National Democratic Congress (NDC), the main opposition party, launched an appeal for funds to pay damages of 1.9 billion cedis (approximately US \$220.000) ordered by a court. The damages arose out of legal suits filed against the newspaper by Works and Housing Minister Hackman Owusu Agyeman and George Kufuor, a businessman who is the brother of President John Agyekum Kufuor, in April 2004 and September 2005. The newspaper contended that without support it would go out of business.

There have not been major developments since 2005, apart from various civil society and media groups seeking to get government to adopt an overall broadcast law.

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2.3 KENYA

2.3.1 Relevant constitutional and broad provisions:

Freedom of expression

The Constitution of Kenya Act of 1963, in Chapter Five protects the fundamental rights and freedoms of the individual. Article 79(1) protects freedom of expression:

Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

Freedom of the media (mentioned as an institution)

Not mentioned.

Right of access to information

Mentioned in part — as “freedom to receive ideas and information without interference”.

Whether limitations are “reasonable” in a democracy

The Constitution states in Article 79(2):

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that the law in question makes provision —

- a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
- b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or
- c) that imposes restrictions upon public officers or upon persons in the service of a local government authority, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

Other institutions mentioned in constitution (eg. regulatory bodies)

Not mentioned.

Constitution takes cognisance of international law

Not mentioned.

Power of courts to assess constitutionality of media law

The courts can consider the constitutionality of media laws although anyone submitting the issue to the courts would have to establish their locus standi, i.e. demonstrate that they have a personal right or interest over and above those of other citizens and that this right or interest has been affected by such media laws.

Constitutional right to reply

No.

Is there a national media policy?

A draft Information and Communications Technology Policy was released for comment in 2005, and published in final form in March 2006. It was criticised by the Media Council of Kenya in 2005 for emphasising technology at the expense of aspects of media and communication, although the 2006 version of the policy does cover some issues such as community media and cross-ownership.

Accession to international agreements relevant to media

International Convention on Civil and Political Rights accession	1972
African Charter accession	1992

2.3.2. Laws relating to the status of journalists (do they need to be registered?).

None. However, civil society organisations, media houses and opposition politicians in 2007 were locked in a stand-off with the Kenyan government over the proposal of a statutory media council in Kenya, as it is suggested in the Bill (later renamed the Media Council of Kenya Bill).

The Bill, which was introduced in May 2007, would require journalists to seek licenses from a statutory Media Council. This body would be made up of 14 members, drawn from 28 nominations by various civil society bodies (media ones being in a minority). The total nominations would be reduced to half by a Media Advisory Board in turn consisting of at least one government representative as well as nominees by each of the following: Media Owners Association, Kenya Union of Journalists, Marketing Society of Kenya and the Central Organisation of Trade Unions, with a chairperson appointed by the Minister for Information and Communications. According to the Media Bill, the Minister would then be responsible for appointment of the Media Council members and its chair. In other words, government would not be directly involved in choosing who sits on the Media Council.

However, the proposed legislation basically imposes a compulsory licensing mechanism for journalists on the basis of educational qualifications and an annual prescribed fee. It would allow for de-accreditation and/or a fine against journalists found guilty of violating a code of conduct. Not only would this deter the free flow of information but it is also against international standards on free expression. Kenyan journalists expressed fear that current or future governments might use the proposed law to intimidate journalists or deny them freedom to operate. The Kenya Media Owners Association has called upon parliament to get rid of the Bill and allow the continuation of the existing, voluntary self-regulating principles of the existing Media Council. On its part, the government argues that the existing Council is toothless to rein the media when required.

However, in early June 2007, press reports indicated that the Kenyan government was willing to backtrack on some of the regressive elements of the Bill — with specific assurances in this regard coming in from President Mwai Kibaki himself. By mid-June 2007, the Bill was reported to have passed a second reading in parliament,

apparently still with the controversial provisions for registration and the statutory Media Council intact. It was unclear whether the Minister of Information and Communication also retained the power to appoint the chairperson of the Media Council as originally proposed.

2.3.3. Laws and regulations on licensing media (print, broadcast):

Do print media need a licence?

In terms of a 2002 amendment to the Books and Newspapers Act of 1905, newspaper publishers must register with the government and post a large libel insurance bond of one million shillings (about US \$13,900). They must also submit copies of every publication to the Registrar. This law provides government power to license and proscribe publications (Ngeëthe et al, 2000).

Is there an independent licensing body for broadcast?

The Kenya Communications Act of 1998 established the Communications Commission of Kenya (CCK), which deals with licensing, regulating and co-ordination of the telecommunication and radio communication frequencies and apparatus. However, the power of granting a license to set up a broadcasting station has remained vested with the Ministry of Information, Transport and Communication. The procedure is that once an organisation or individual has been authorised by the Ministry to set up a broadcast station, the licensee then has to apply to the Communication Commission of Kenya (CCK) for broadcasting frequency.

Of the members of the Board of Directors of the Communications Commission of Kenya, the Chairman is appointed by the President and the other members by the Minister. In March 2005, the Minister for Information and Communications, disbanded and reconstituted the CCK Board.

The 2007 Kenya Communications (Amendment) Bill which had its second reading in parliament in July, deals with more provisions about the CCK. (If passed, the Bill will rename the 1998 Kenya Communications Act, the “Information and Communications Act”). This Bill says that the CCK is required to exercise its functions independently, but it also provides that the CCK board (expanded to eight members) continue to be appointed by the Minister, with, it would appear, the Chair still being appointed by the President. The CCK is subject to general policy guidelines from the Minister, which guidelines do, however, require stakeholder consultation before being issued. Significantly, according to the bill, the CCK will henceforth issue broadcast licenses (for three tiers of broadcasting services). Persons refused licences may appeal to a Tribunal, which is appointed by the Minister and consists of a judicial officer (retired or still working) and four non-government employees. Broadcasting without a licence, according to the Bill, can attract a fine and/or imprisonment up to five years. A seven-person Content Advisory Council is also provided for in the Bill, which is appointed by the Minister in consultation with the CCK. It may have powers delegated to it to ensure monitoring and compliance with licence conditions, and to deal with complaints. As such errant licensees could be fined or have their permits revoked.

Are three categories of broadcasting licensed (public, commercial, community)?

Not yet. However, the Broadcasting Bill of 2004 provided for a broadcasting authority to facilitate and regulate all matters related to broadcasting. In the bill, categories for broadcasting include public, commercial and community. (However, it also provides for the disruption of broadcasting for reasons of public security.) The 2006 National Information and Communication Policy document provides for the three tiers, but implies that only the private and community will be subject to CCK authority. The 2007 Kenya Communications (Amendment) Bill, however, appears to possibly supersede the Broadcasting Bill. It elaborates on the three categories of licence,

including subscription broadcast services as a fourth category, and locates them all under the CCK. It does not elaborate much on public broadcasting, however, defining this form of service as equivalent to the Kenya Broadcasting Corporation (KBC).

Are there limits on private broadcasting — eg. not in television, no national licenses offered?

Private broadcasters appear to not be given access to national frequencies. Signal distribution has also in the past been limited to state-owned KBC. This institution had the power “to establish and operate radio communication services to regulate and control radio communication, and to provide, install and maintain the necessary equipment for any other person authorised to operate radio communication”. The 2007 Communications (Amendment) Bill, however, provides for licensing of other signal providers, and by implication implies that the KBC would have to also apply for such a licence. KBC has also had to date the power to control receiving sets for radio and television broadcasts and to license of dealers in the repair of such sets, but the Communications (Amendment) Bill of 2007 also proposes to end this. All this means that a degree of “monopoly status” for the KBC now seems likely to come to an end. Also in the 2007 Bill is a provision for “Fair Competition and Equal Treatment” which appears, in principle, to apply to KBC as well as any other licensed broadcaster.

The 2006 National Information and Communications Technology Policy says that no private or community broadcast licence may be given to a political party or affiliated group. The same is provided for in the 2007 Kenya Communications (Amendment) Bill.

Is the board of the state-owned media independent?

The Kenya Broadcasting Corporation (KBC) Act of 1989 established the Kenya Broadcasting Corporation (KBC) to assume government functions of producing and broadcasting programmes or parts of the programmes by sound or television. The KBC as such is accordingly controlled by the state. The government’s 2006 National Information and Communications Technology Policy says that the KBC legislation will be changed “to reflect the nature, structure, mandate and funding of the corporation as a public broadcaster”, but does not elaborate on what that means.

Are there public-service oriented statutes or licence conditions for the state-owned media?

None at the time of writing this report. Change, however, was suggested in the government’s 2006 National Information and Communications Technology Policy, which says *inter alia* that KBC should provide Universal Service. The 2007 Kenya Communications (Amendment) Bill says that a licence granted to a public broadcaster “may” include an obligation to universal service as well as requirements to:

- operate in the public interest and conduct broadcasting services with impartial attention to the interests and susceptibilities of different communities of Kenya;
- respond to the aspirations of the entire Kenya population in terms of age, race, gender, interests and backgrounds;
- promote, the cultural, moral, social and economic values of Kenya;
- promote the use of local and national languages;
- provide programming that promotes Kenyan identity and programmes; and
- provide any other broadcasting services and in a manner as the Commission may, in writing, require.

Are there licence conditions impacting on content — including local content?

The National Information and Communications Technology Policy of 2006 says the CCK should ensure increased local content in broadcasting, but gives no targets. The 2007 Kenya Communications (Amendment) Bill says private free-to-air television may be required to provide drama, documentaries and children's programming that reflect Kenyan themes. In the Bill, all broadcasters are required to:

- provide responsible and responsive programming that caters for the varied needs and susceptibilities of different sections of the Kenyan Community;
- ensure that Kenyan identity is developed and maintained in programmes;
- observe standards of good taste and decency;
- gather and present news and information accurately and impartially;
- when controversial or contentious issues of public interests are discussed, make reasonable efforts to present alternative points of view, either in the same programme or in other programmes within the period of current interest;
- respect the right to privacy of individuals;

The Minister may also make regulations, without prejudice to “generality”, on local content, and a Universal Service Fund to be created under the Bill includes among its aims the development of local content.

2.3.4. Laws on ownership legislation (eg. limits on cross- or foreign ownership).

None. (The consequence of this is the growth of cross-media holdings by both the Nation and the Standard groups). The 2004 Broadcast Bill had included outlawing cross-media ownership, but the provision was dropped after opposition. The 2006 National Information and Communications Technology Policy says limits to cross-ownership will be set through competition laws. The 2007 Kenya Communications (Amendment) Bill excludes licensees across tiers of broadcast, from holding shares in another licensee, and from controlling a newspaper.

2.3.5. Other media-relevant laws covering:

Access to information

The Civil Service Act of 1989 requires that any government employee receive direct approval from the permanent secretary of the relevant department before releasing any information. The 1968 Official Secrets Act section 187 is said by the Kenya Union of Journalists to declare all official information a state secret (see below). A 2005 survey by the Kenya Human Rights Commission (KHRC) criticised the Kenyan government, and particularly the Office of the President and the Ministry of Justice and Constitutional Affairs, for denying citizens access to public information. The KHRC report said that, for Kenyans, getting information from government agencies was like “squeezing water out of a rock”. The report was based on a survey where 140 requests for information were submitted to 18 different government agencies. After four months, there had been no response to 60 percent of the requests and only 7.1 percent received positive responses.

Against this highly restrictive background, a draft policy has been circulated which, according to a statement by ARTICLE 19 in early 2007, veers away from the goal of a definite Freedom of Information law. However, in 2005 the Ministry of Information announced its completion of a draft Freedom of Information Act. But since then, a Bill has not even been formally introduced in parliament. Transparency International in Kenya (TI-Kenya) has also questioned whether the government actually intends to pass such a law. Several other organisa-

tions, including the International Committee of Jurists-Kenya and Commonwealth Human Rights Initiative, have challenged the overly legalistic and technical nature of the draft law. Another failing in the draft is that it fails to provide comprehensive penalty provisions to aid enforcement of the right to information. This is in a state where the bureaucracy is known to be slow and plagued by rampant corruption. TI-Kenya has recognised several other weaknesses that it believes need to be amended in order for the draft law to be implemented and function effectively:

- The Bill includes no right of access to information held by private bodies undertaking public functions;
- The Bill provides the right to information only to Kenyan citizens, rather than to all persons, although many poor people living in Kenya may be unable to provide documentation of their citizenship;
- The Bill does not obligate the government to reform its system of records management, which the critique describes as currently “chaotic and unreliable”;
- The scope of the Bill is limited only to documents that are created after the law comes into force, which greatly reduces the amount of information available to the public;
- The Bill should provide oral or other means of access to information, as many Kenyan information seekers may be illiterate or otherwise disabled;
- The Bill provides for publication of certain information in the government *gazette*, but instead should require that information be available for public inspection at agency offices;
- There is no clearly-delineated chain of authority for who is responsible for implementation of the Freedom of Information Act within each agency;
- Exemptions in the Bill grant broad discretionary powers of withholding to the Minister and are not strictly defined, particularly with regard to documents affecting national security, defence, or international relations;
- Several other exemptions are also overly expansive and/or unwarranted, including: documents related to research; electoral rolls; and documents concerning agency operations.

However, TI-Kenya praised the draft law wholeheartedly for the inclusion of Article 45, which repeals the Official Secrets Act.

Legal framework for state-subsidy of private media

None. On the contrary, Reporters without Borders reported in 2007 that the government had decreed a state advertising boycott against The Standard newspaper and Kenya Television Network. (Senior editorial and business staffers at the company have also endured a seven-hour interrogation about an article impugning a government minister).

Defamation — including where it is a criminal matter

The Defamation Act of 1992 has resulted in significant libel costs for journalists and media organisations. There are also sections of the Penal Code (cap 63) that restrict publication in similar respects (Ngeëthe et al, 2000, Kenya Union of Journalists).

Insult laws

None. However, the Defamation Act has been used in the 1990s for prosecuting journalists who report police violence and allegations of torture and corruption (Ngeëthe et al, 2000).

Harmful content: hate speech, pornography

Article 181 of the Penal Code (1930) relates to the production, distribution, and exhibition of obscene materials. The definition of obscenity is vague.

Security laws and official secrets

The Preservation of Public Security Act of 1960 provides for restriction of movement, including imposition of curfew, and prohibition of information. Under this Act, any person can be arrested indefinitely in the interest of defence, public safety, public order, public health and public morality, whenever decided at the discretion of the president.

The Official Secrets Act of 1968 criminalises disclosure of information by public officials, and so runs counter to any guarantee of the right to information. It establishes the general presumption that any official public information is secret unless a government agency has specific authorisation to release it, and it imposes severe criminal penalties for government officials who violate this provision. The National Security Act of 1970 further makes it illegal to publish any official information that is classified secret.

Articles 52 and 57(1) of the Penal Code also limit freedom of expression. The Public Order Act, Chiefs' Authority Act and the Armed Forces Act are also said by journalists to limit media freedom in Kenya.

2.3.6. Laws on reporting courts

In Kenya, the *sub judice* rule applies. The Contempt of Court Act has been used in prosecutions against journalists for criticising the judiciary (Nge'ethe et al, 2000). The Kenya Union of Journalists says the law makes court reporting very difficult.

2.3.7. Laws and regulations on media and elections

None. However the non-statutory Media Council has issued a code for election coverage.

2.3.8. Ethics and the law

Statutory mechanisms to police professional ethics

None. However, the government released a "Code of Conduct for Broadcasters" for discussion and finalisation in 2006. Further, and more seriously, the 2007 Media Bill includes a "Code of Conduct for the Practice of Journalism". It covers accuracy and fairness, including a provision (twice), that "provocative and alarming headlines should be avoided". In addition, the code states: "News, views or comments on ethnic, religious or sectarian disputes should be published or broadcast after proper verification of the facts and presented with due caution and restraint in a manner which is conducive to the creation of an atmosphere congenial to national harmony, amity and peace." It further says that journalists should defend their independence from those seeking influence and control of news content.

Non-statutory mechanisms

The Media Council of Kenya was set up in 2002, and involves the Media Owners Association (that in turn includes KBC as a member), as well as the Kenya Union of Journalists. However, much news in Kenya comes from freelancers who are not represented by these parties. The Media Council has issued a code of conduct for journalism.

Right to reply provisions

None in law, but there is a “Code of Conduct for Journalists and the Mass Media” which provides for the right to reply. The 2006 National Information and Communications Technology Policy proposes a Content Advisory Council to work with the CCK on dealing with complaints, and this is echoed in the 2006 Kenya Information and Communications Bill, and this envisaged body may become relevant to this issue in the future. Meanwhile, the Code of Conduct in the 2007 Media Bill says that apologies must be published as per instruction by the proposed statutory Media Council, and also that fair opportunity should be given to replies where reasonable.

Confidentiality of sources

None in law, but a code of conduct formulated by the Kenyan Union of Journalists states that “(i)n general, journalists have a professional obligation to protect confidential sources of information”. The Media Bill of 2007 provides a qualified defence in law for journalists to protect the anonymity of their sources.

2.3.9. Respect for freedom of expression and law by governments, media and others (including examples of whether the laws are enforced or not; if other laws — eg. citizenship — are used against media)

In 2002, Njehu Gatabaki, publisher of the monthly magazine *Finance*, was convicted of publishing an “alarming report” and sentenced to six months in jail. The case stemmed from a December 1997 report in the magazine alleging that president Daniel arap Moi was responsible for ethnic clashes that had plagued parts of Rift Valley Province in the early 1990s. Gatabaki was later pardoned and released by presidential decree.

The International Press Institute’s 2004 World Press Freedom Review argued that there were signs that the Kenyan government’s commitment to press freedom was waning, given a number of journalists arrested and the continued existence of repressive media laws. Police raids of news-stands had also resulted in confiscation of newspapers published by the so-called “alternative press”. The IPI said:

One of the biggest problems is that, while the administration vocally espouses a commitment to democracy and human rights, it is often extremely sensitive to stories concerning government corruption. For this reason, there is a need for the government to overcome this knee-jerk reaction to unflattering stories and to appreciate the important role played by the media in this fight.

The organisation Reporters without Borders, in its 2004 annual report, is more positive and suggest that there is increasing freedom of expression in Kenya. But in a 2005 news bulletin, it expresses astonishment at the arrest of David Ochami, of the opposition daily *Kenya Times*, on the charge of “incitement” for writing a column criticising the country’s president.

On 16 November 2005, the Kenyan government ordered radio station Kiss FM to cease broadcasting for seven days after airing a programme that the authorities described as “incitement to violence”. This happened after fierce debate between two political groups for and against a new draft constitution which was put to vote later that month. Several people died in violent confrontation with the police during the campaign. Observers, especially those opposed to the new Constitution, asserted that the closure was political and was aimed at giving proponents of the change a head start in the run up to the November 21st poll.

Three journalists from the *East African Standard* were harassed in 2005 after the paper published leaked excerpts of confessions to the police by a suspected murderer. The article reported that some of the suspects had pointed to a prominent politician in the ruling National Rainbow Coalition (NARC) party as having masterminded the murder. After failing to get the journalists to reveal their sources, authorities pursued charges in court against one of them, with theft of a copy of a videotape and handling stolen property. He was acquitted.

In 2006, two journalists from *The Standard* newspaper were detained for writing “false” news about the president, and *The Standard’s* premises were also raided by hooded state security officers. Six journalists were reported to have charged with publishing rumours likely to cause harm.

In March 2007, the editor of a sensationalist tabloid was found guilty of defaming a government minister and sentenced to a large fine alternatively to a year imprisonment.

The head of the Kenya Public Service was quoted in July 2007 in regard to the controversial Media Bill that “the law which the Government would like to see eventually is one that conforms to international best practice”.

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2.4. MALI

2.4.1. Relevant constitutional and broad provisions:

Freedom of expression

Freedom of expression is guaranteed under Title 1 of the Constitution which covers rights and duties of human dignity. Article 4 of the Constitution states that:

“e)very person has the right to freedom of thought, conscience, religion, worship, opinion, expression, and creation in respect to the law”.

Freedom of the media (mentioned as an institution)

Article 7 of the Constitution recognises and guarantees the freedom of the media, “Freedom of press is recognised and guaranteed”.

Right of access to information

Not mentioned in the Constitution

Whether limitations are “reasonable” in a democracy

Press freedom is subjected to conditions defined by law, meaning that it is unclear as to the supremacy of the Constitution in this regard.

Other institutions mentioned in the Constitution (eg. regulatory bodies)

The Constitution guarantees equal access for all to state-owned media, specifying that it will be subjected to conditions determined by an independent body.

Constitution takes cognisance of international law

Article 116 says that once treaties and accords are ratified, they have superior authority over laws of the State.

Power of courts to assess constitutionality of media law

Yes.

Constitutional right to reply

No.

Is there a national media policy?

Yes.

Accession to international agreements relevant to media

International Convention on Civil and Political Rights accession	1974
African Charter accession	1981

2.4.2 Laws relating to the status of journalists

The current media law is Law 00-046/AN-RM of 7 July 2000 Regulating the Press and Violations of Laws concerning the Press. It regulates the press and deals with violations of the laws governing the press. The law was promulgated in June 2000.¹

The practice of journalism is limited to anyone in possession of a diploma or degree in journalism with at least a year's professional experience in newsgathering and dissemination within a public or private media organisation (Article 4). Editors must be over 21, have at least three years working experience and be resident in Mali.

Decree No. 892-191/P-RM establishing a Press Card Commission, institutes the press card as the identification card for journalists. According to this law, the possession of a press card, "is a binding declaration to comply with the rights and duties of the journalist" (Article 13). The commission responsible for issuing press cards is composed (Article 3) of:

- A representative of the Minister of Communication;
- Two representatives of newspaper editors nominated by their peers;
- Four representatives of journalists nominated by their professional organisation.

Only newspaper editors and journalists with at least two years of professional experience qualify to be appointed to the Commission (Article 6). The Commission oversees the approval, renewal or withdrawal of press cards. Decisions are taken by majority vote of members present.

According to Article 9 the press card can be withdrawn under two conditions:

- when a journalist is convicted on defamation ;
- when a journalist violates the codes of ethics of the profession.

Although the press card is co-signed by the president of the Commission and the Minister of Communication (Article 13), only the Press Card Commission is entitled to withdraw the press card of a journalist (Article 10). In such an instance, the journalist will be notified in writing. A journalist can appeal the decision through the judiciary (Article 11). Obtaining a national press card fraudulently or by providing inaccurate information is punishable by conditions stipulated in existing laws.

2.4.3. Laws and regulations on licensing media:

Do print media need a licence?

Articles 7 to 9 of the 2000 press law require new newspapers or other periodicals to be registered with the Court of First Instance. This is a routine measure. However, the 2000 law governing the operations of the press and journalists generally gives a great deal of scope for administrative sanctions against journalists and the media. Specifically, the Ministry of Territorial Administration (MINAT) is granted powers to ban foreign publications deemed to endanger national unity. The criteria for banning these publications are broadly defined in Article 19 as "publications that undermine national integrity and unity". This applies to foreign-owned newspapers published within or outside Mali. Prohibited newspapers that resume publication under a different title are doubly sanctioned and subject to seizure by administrative authorities (Article 19). The law also requires publishers of national newspapers published in the capital, Bamako, to deposit two copies or dummies of the paper at the

¹ Available at www.malimedia.org

MINAT on the date of publication (Article 17). In the case of newspapers published outside the capital, copies must be deposited at the offices of the various divisional administrators (the High Commissioner's Post, the Court of First Instance, and the divisional services of MINAT). Failure to do so could result in the newspaper's director of publication being fined.

Is there an independent licensing body for broadcast?

In terms of Decree No. 92-022 of January 18, 1992, determining the conditions for obtaining and suspending private audiovisual licenses, the Ministers of Communication and the Interior are jointly responsible for granting authorisation for broadcast licenses (Article 5). Such a decision is to be made within 15 days of the application being lodged with the respective ministries. Failure to respond to an application within 15 days equates to an approval of the license which is renewable after three years (Article 7).

Article 5 of law No. 92-038 creates the Higher Communication Council and grants it the authority to monitor both private and public broadcasters to ensure they meet the conditions of their licences. Thus, the Higher Communication Council serves as a consultative body on issues relating to the production, programming and distribution of broadcast content. It monitors the attribution and suspension of frequencies to radio and television broadcasting stations.

Are three categories of broadcasting licensed (public, commercial, community)?

Ordinance No. 92-337/P-CTSP refers to private broadcasting in general. Decree No. 92-022 determines the conditions for obtaining and suspending private radio licenses. It does not distinguish between commercial and community categories.

Are there limits on private broadcasting — e.g. not in television, no national licenses offered?

Ordinance 92-337/P-CTSP authorises the creation of private broadcasters, but conditions for licensing pertain to private radio, and private TV is not contemplated in this law.

Is the board of the state-owned media independent?

In accordance with the Constitution's prescriptions, the *Comité National de l'Égal Accès aux Médias d'État*, (National Committee for Equal Access to State Media) was created by Law No. 93-001. It ensures equal access to the state media for all. The seven member committee also ensures balance and pluralism on state media. However, its independence is thrown into question because the composition of the board is dominated by state representatives. The President, the Prime Minister, the President of the National Assembly, the First President of the Supreme Court, the President of the Constitutional Court, the President of the High Council of Local Authorities, and the President of the Economic and Social Council each appoint one member of the committee.

Article 3 of the Law says the committee must develop laws and regulations to ensure:

- equilibrium and plurality of information by taking into account
- different political, economic, social and cultural feelings of the country; and
- an equitable management of time and the editorial space dedicated to candidates and to political trade union groups during election campaigns.

In terms of Article 4, the Committee can rule on violations of the legislative and statutory propositions governing equal access to the state media. According to Article 5, it can inflict following sanctions:

- a warning;
- formal notification;
- rectification of all or part of a programme;
- suspension of all or part of a programme.

Article 6 says that media organisations can appeal to a judge against the above sanctions.

Are there public-service oriented statutes or licence conditions for the state-owned media?

Unknown

Are there licence conditions impacting on content — including local content?

Yes.

2.4.4. Laws on ownership legislation (e.g. limits on cross- or foreign ownership)

It was reconfirmed in 2000 that media ownership is restricted to Malian citizens (Article 11 of Law N°00-046/AN-RM of July 7th, 2000). The provisions of Articles 18 and 19 of this law which also deal with foreign publications, define foreign publications as all newspapers and periodicals published outside Mali. Implicitly Malian proprietorship of publications published outside Mali is classified as foreign. Circumvention of this law is punishable by a jail sentence of up to three years or a fine. According to an earlier law, Article 3 of Decree N°92-022 of January 18, 1992, only Malian citizens can be granted licenses to operate private radio and television stations.

2.4.5 Other media-relevant laws covering:

Access to information

Article 32 of the 2000 law regulating the press, obliges the state to assist the media by providing access to information. The article stipulates that conditions and circumstances under which such assistance will be provided will be determined by decree. Article 32 of the 1992 law also provides for access to information. There is also a law (98-012) that includes measures to promote transparency in government, but it has apparently never been implemented.

Legal framework for state-subsidy of private media

Article 32 of the 1992 law states that government has a duty to assist media organisations that contribute to the implementation of the right to information. According to the IFJ-Afrique, the state has made 200 million francs (approximately US \$100.000) annually available to the media.

Defamation — including where it is a criminal matter

Chapter 6 (Articles 33 to 51) of the law broadly covers crimes committed through the press or other forms of publication. Defamation is defined as allegations that compromise the dignity or integrity of a person (Article 38). These are considered and punished as constituting crimes committed in public meetings (e.g. assault and

threats). Direct publication or reproduction of a defamation is punishable even if done ambiguously or without naming the concerned individual. Severe punishment exists, and the accused are guilty until they prove their innocence.

Insult laws

Particular protection against defamation, libel and slander is accorded to the army, the head of state, members of parliament, other holders of public office, and civil servants. Infringement of these through incitement to violence or libel is punishable by imprisonment or fines. The penalty for defamation against the courts, the armed forces, and public administrators is a jail sentence or fines (Article 39). Defamatory cases are prosecuted at the request of the individual concerned. In the case of defamation pertaining to a religious group or race, the Ministry of Public Affairs can initiate prosecution.

The publication of articles that insult the person of the Head of State is punishable by three months imprisonment or a fine of between 50 000 and 600 000 francs (approximately US \$2,500 and \$30,000) (Article 36). A similar offence against the head of a foreign government is equally punishable: defamation of the Head of State or a diplomatic representative can be prosecuted following a written request from the affected party to the Ministry of Justice or the Ministry of Foreign Affairs.

Harmful content: hate speech, pornography

Articles 33 to 35 of the 2000 law cover incitement to violence and hate speech. Media articles that directly or indirectly incite violence or threaten national security are punishable by imprisonment or a fine. The vagueness of these provisions potentially sanctions government intervention in the media. Violation of this law is punishable by fine or imprisonment.

Security laws and official secrets

Article 59 of the law states that a magistrate can order the seizure of a publication that has been indicted on criminal charges. However, in the case of incitement to violence or a criminal act (as per the stipulations of Articles 33 and 34 (subparagraphs 1, 2, 3), and 35 and 37) the seizure of the newspaper and associated printed material (posters) will be done in accordance with provisions of the Penal Code.

Law 00-046/AN-RM of 7 July 2000 grants the Ministry of Territorial Administration (MINAT) powers to ban foreign publications “that undermine national integrity and unity” (Article 19). Under Article 74 the Minister can order the seizure of newspapers that publish defamatory content (as stipulated in Articles 33, 34, 35 and 37) which could “likely harm national security”.

2.4.6. Laws on reporting courts

Articles 48 to 50 make it unlawful to report court procedures and indictments prior to their being read in court. Exceptions to this require the written authorisation of a judge. Courts and tribunals can also ban the reporting of civil cases brought before the court. Articles 48 to 50 (of Law No 00-046/AN-RM of 7 July 2000) make it unlawful to report court procedures and indictments prior to their being read in court. Exceptions to this require the written authorisation of a judge. Courts and tribunals can also ban reporting on civil cases brought before the court. Defamation against the courts, tribunals, armed forces or public administrators is punishable by imprisonment of 11 days to 6 months or a fine ranging from 50,000 to 150,000 francs (approximately US \$250 to \$750) (Article 39).

Article 51, which regulates reporting of the national assembly, prohibits the reproduction of parliamentary debates, speeches and printed material.

2.4.7. Laws and regulations on media and elections

This is part of the remit of the National Committee in charge of Equal Access to the State Media.

2.4.8. Ethics and the law:

Statutory mechanisms to police professional ethics

Licensing and other laws, including the press card system.

Non-statutory mechanisms

The national press ethics observatory (ODEP) oversees standards in journalistic practice.

Right to reply provisions

Yes, under Chapter 4, of the 2000 law specifically in Articles 30 to 31.

Confidentiality of sources

The voluntary code of practice adopted by the Association of Journalists in 1991 protects confidential sources, but it does not have legal force.

2.4.9. Respect for freedom of expression and law by governments, media and others (including examples of whether the laws are enforced or not; if other laws — e.g. citizenship - are used against media)

According to one source, in October 2003 three journalists from a private radio station Kayira were arrested and jailed for inciting violence. The journalists were detained after broadcasting a programme that condemned the seizure and sale of villagers' livestock by several village officials and bailiffs. The officials, who were named in the report, requested the seizure of the station's equipment and the journalists charged with insult, incitement to violence and slander. The journalists were released on bail three weeks later.

However, according to the version of the Committee to Protect Journalists, the incident was slightly different from a legal point of view. In this version the station aired interviews with angry villagers, who criticised debt-collectors for confiscating livestock. Several debt-collectors entered the radio station and confiscated equipment. With the help of Moussa Kéita, the president of Mali's High Council on Communications, the equipment was returned but the debt-collectors then accused the journalists of criminal defamation, leading to their subsequent arrest.

The journalists were released after a judicial hearing. A lawyer representing the journalists said they would likely face trial. The journalists were accused of "opposing legitimate authorities," "insulting police agents," "broadcasting false news" and defamation.

According to the 2003 World Press Review of the International Press Institute (IPI):

Mali has an open free climate for the media. Freedom of speech and the press is guaranteed in the Constitution and is by and large respected. There are, however, a number of laws that allow for harsh penalties, including imprisonment, for libel and public injury — but these laws have not been used to prosecute journalists. Even though the government controls the only television

station, and a number of radio stations, they all provide balanced coverage, including criticism of the government.

The 2004 report of Reporters without Borders says: “Mali rarely gives press freedom organisations cause for concern. Its news media are free, and press independence is a reality.”

In 2001 a defamation complaint against Sidiki Konaté, director-general of the Office of Radio and Television in Mali (ORTM), was withdrawn. In May Konaté was convicted of criminal defamation following a television broadcast in which the mayor of Bamako accused Malian magistrates of being corrupt and inefficient. Reporters without Borders reported that a few days after Konaté was sentenced to one month in prison, the National Union of the Magistracy withdrew its complaint against him.

However, in June 2007, the International Federation of Journalists (IFJ) reported jail sentences on five Malian journalists and a teacher over charges of insult or complicity in insulting the head of state after several newspapers published a story about a school assignment on a sex scandal involving a fictional president. A criminal court in Bamako convicted Seydina Oumar Diarra, the journalist who wrote the article, and sentenced him to 13 days in prison. Diarra’s editor Sambi Touré was given an 8-month suspended jail sentence. Three other editors were convicted and were given four-month suspended jail sentences for having republished the article. The teacher who gave the assignment to his class was given a two-month prison sentence and banned from teaching for two months.

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2.5 MOZAMBIQUE

2.5.1 Relevant constitutional and broad provisions:

Freedom of expression

The Mozambican Constitution provides the rights of expression, information and the press to all citizens. This dates back to the 1990 Constitution, but was expanded in the 2004 amended Constitution. According to the Mozambican Constitution (Chapter 2, Article 48), there is also support of journalists' activities, and of their right to keep professional secrets. The actual wording of Article 48 is as follows:

1. All citizens shall have the right to freedom of expression and to freedom of the press, as well as the right to information;
2. The exercise of freedom of expression, which consists of the ability to impart one's opinions by all lawful means, and the exercise of the right to information shall not be restricted by censorship;
3. Freedom of the press shall include, in particular, the freedom of journalistic expression and creativity, access to sources of information, protection of independence and professional secrecy, and the right to establish newspapers, publications and other means of dissemination; and
- ...
6. The exercise of the rights and freedoms provided for in this article shall be governed by law on the basis of the imperative respect for the Constitution and for the dignity of the human person.

Freedom of the media (mentioned as an institution)

See above.

Right of access to information

See above.

Whether limitations are "reasonable" in a democracy

Article 56, clause 2, of the 2004 Constitution specifies that the exercise of rights and freedoms may be restricted for the purposes of safeguarding other rights and interests that are protected by the same document. This is somewhat different from the 1990 Constitution, where the exercise of rights and freedoms could be limited when they threatened public order and individual rights, or when they involved the use of violence, or when there was a state of war, state of siege or state of emergency (Articles 96 and 106).

Article 5 of the 1991 Press Law states that the only permissible limitations upon the freedom of press relate to obligations to respect the Constitution, the dignity of the human person and the imperatives of foreign policy and national defence.

Other institutions mentioned in constitution (eg. regulatory bodies)

Article 50 of the Constitution refers to a Superior Council for the Media (*Conselho Superior da Comunicação Social*) (CSCS). It spells this out as follows:

1. The CSCS shall guarantee the right to information, to freedom of the press and to independence of the media, as well as the exercise of broadcasting rights and the right of reply;
2. The CSCS shall be an independent body composed of eleven members appointed as follows:
 - a) two members appointed by the President of the Republic, of whom one shall be the President;
 - b) five members elected by the Assembly of the Republic, according to the degree of parliamentary representation;
 - c) three representatives of journalists, elected by their respective professional organisations;
 - d) one representative of journalist businesses or institutions;
3. The CSCS Media shall issue opinions prior to Government decisions on the licensing of private television and radio stations;
4. The CSCS shall participate in the appointment and discharge of directors-general of public sector media organisations, in the terms of the law;
5. The law shall regulate the organisation, functioning and other powers of the CSCS.

The role of the CSCS is:

- ensuring the independence of media, the freedom of press as well as the right of response;
- advising about the licensing of new private and state owned broadcasters;
- advising the government in case of appointing or dismissing the Chief Executive Officer (in Portuguese, the *Presidente do Conselho de Administração*) public radio and also of public television. According to the Press Law, the CSCS should also be consulted when preparing laws to regulate media;
- ensuring the promotion of culture, national identity and national personalities.

Articles 35 to 40 of the Press Law set out in detail the role and functions of the CSCS created in the 1990 Constitution. Here, the CSCS is defined as “the body through which the state guarantees the independence of the mass media, the freedom of the press and the right to information, as well as the exercise of the right to broadcasting time, and the right to reply”.

However, CSCS is limited in that its powers are limited to advising government and mere “participation” in the appointment and dismissal of the leadership of the state media. It is therefore not a regulatory body, but rather a moral force (of uncertain actual influence).

Constitution takes cognisance of international law

Article 18 (International Law) states the following:

1. Validly approved and ratified international treaties and agreements shall enter into force in the Mozambican legal order once they have been officially published and while they are internationally binding on the Mozambican State;
2. Norms of international law shall have the same force in the Mozambican legal order as have infra-constitutional legislative acts of the Assembly of the Republic and the Government, according to the respective manner in which they are received.

Power of courts to assess constitutionality of media law

Article 2 reads that “Constitutional rules shall prevail over all other rules of the legal order.” Further elaboration is in Article 214 on unconstitutionality, which says that in matters brought before them for decision, the courts shall not apply laws or principles that are contrary to the Constitution.

Mozambique further has a Constitutional Council, in terms of Article 244, with the power to:

- a) evaluate and declare the unconstitutionality of laws and the illegality of normative acts of State offices;
- b) settle conflicts of jurisdiction between the sovereign public offices.

Constitutional right to reply

None.

Is there a national media policy?

Yes.

Accession to international agreements relevant to media

International Convention on Civil and Political Rights accession	1993
African Charter accession	1989

2.5.2 Laws relating to the status of journalists

According to the Press Law (Chapter 4, Article 26), a journalist is a person who dedicates himself to the research, selection and presentation of public events activities in the form of news, information or opinion through any media company. These activities should be considered as a permanent and payable job.

Correspondents and freelancers are accredited by the company for whom they are writing or filing stories. In the case of foreign journalists wanting to report local events, they should have accreditation issued by the Government’s Information Bureau (GABINFO).

Article 27 deals with the rights of journalists and provides protection against arbitrary interference in editorial decisions, as well as against intimidation and detention of journalists in the course of their duties. It gives journalists the right not to comply with editorial instructions which do not originate from the competent authority in his or her company. The Press Law also sets out the duties of journalists, such as providing complete and accurate information, and rectifying mistakes that are published. Another duty is to abstain from “the use of the moral prestige of the profession for personal gain”. Potentially more controversial, is an obligation to respect “the imperatives of foreign policy and national defence” (Article 5).

2.5.3. Laws and regulations on licensing media (print, broadcast)

Do print media need a licence?

GABINFO, the Government Information Bureau, is the body that handles administrative registration of all media — print and broadcast. The Bureau replaced the former Information Ministry which was abolished after the first Mozambican elections in 1994. Licenses are issued by GABINFO after the application request document is approved. Licensing is only refused if the applicant does not submit all the information demanded by Press Law (see below). In this case, the Information Bureau must explain, in writing, the reasons for the decision. Applications should state:

- the objectives of the applicant with a description of the activities the applicant proposes to develop (print or broadcasting media);
- the areas the proposed media will cover, shown in map form;
- the languages to be used by the applicant;
- editorial statutes of the applicant;
- detailed identification of the applicant's owner and editor.

In case of print media, the application should also show:

- the periodicity of publication (weekly, daily or monthly);
- the number of copies to be issued (either weekly, daily or monthly);
- the size and price of the newspaper;
- detailed information of the printer and supplier company.

The application request document should be accompanied by information about the source of funding (companies, banks, individuals, donors, etc) as well as the financial means need for its management.

Licenses are issued in 30 days and are automatically renewed every two years. The license can be cancelled if the applicant does not start its activity within a year after it has been licensed.

Is there an independent licensing body for broadcast?

See above. The Prime Minister appoints the Director of GABINFO after nomination by the Council of Ministers, meaning that licensing for both print and broadcast is not independent.

Also, licences for the use of a frequency are issued by the INCM (*Instituto Nacional das Comunicações de Moçambique*), a technical body under the Ministry of Transport and Communications. So far, there are no known cases of refusal.

Are three categories of broadcasting licensed (public, commercial, community)?

Although the National Media Policy is said to recognise three tiers of broadcasting, there is no community broadcasting category of licensing in practice. The Press Law allows for the establishment of private broadcasting but does not set out a licensing framework. It simply calls for specific legislation governing the conditions under which the “cooperative, mixed or private sectors” may participate in broadcasting. GABINFO has been working on regulations for community broadcasting, but is also working in a document about a special law for broadcasting specially focusing on public broadcasting. The document is still in the process of research and consultation. Meanwhile, it is said that GABINFO is also working on a new media law that distinguishes the three tiers. The government has created the National Institute of Communication under GABINFO to promote the development of community radio stations.

Are there limits on private broadcasting — eg. not in television, no national licenses offered?

It does not appear that national licences are available to anyone but the state-sector broadcasters. There is private TV in the capital.

Is the board of the state-owned media independent?

No. In 1994, the state-owned broadcasting companies — Rádio Moçambique and Televisão de Moçambique — be-

came public companies. Government appoints the board directors, chairpersons and CEOs. The chairpersons of the public broadcasters (just like the chairperson of any other public company in Mozambique) is nominated by the Council of Ministers and appointed by the Prime Minister. Further, the Press Law stipulates that the directors of all public sector media shall be appointed by government. The chairperson of the broadcasting corporation board is appointed by the Council of Ministers and the other members are appointed by government ministries. One board member is elected by secret ballot of the employees. The chairpersons of the public broadcaster propose possible board members who are appointed after consideration by GABINFO. There is no public participation in the appointments.

The state-owned Mozambique News Agency (AIM) was set up by the government in 1975 and was supposed to receive elaborated legal status after the Press Law of 1991. However, in 2006, the agency was defined as falling under GABINFO. The CSCS, as noted earlier, has a role in the appointment of CEOs, but this does not include board members.

Article 6 of the Press Law permits the state to acquire holdings in the mass media beyond those defined as being in the public sector. Thus the government continues to control former state-owned publications such as *Notícias* and *Domingo*, despite their semi-privatisation. The newspapers are currently owned by a private company called Notícias, s.r.l., whose main shareholders are the national bank (Banco de Moçambique) and the national insurance company (Emose).

Are there public-service oriented statutes or licence conditions for the state-owned media?

According to the Constitution, Article 48:

4. In the public sector media, the expression and confrontation of ideas from all currents of opinion shall be guaranteed;
5. The State shall guarantee the impartiality of the public sector media, as well as the independence of journalists from the Government, the Administration and other political powers.

Editorial independence of media workers is also protected under Article 114) of the Press Law, which states that media in the public sector shall carry out their duties free from interference by any outside interest or influence that may compromise their independence.

Under Article 12 of the Press Law, political parties with representation in parliament have the right to air-time on public radio and television. The opposition has the right to reply to government statements on public radio and television.

The Constitution itself lays down in Article 49, provisions concerning broadcasting rights, right of reply and of political response. It also states the following:

1. Political parties shall, according to their degree of representation and to criteria prescribed by law, have the right to broadcasting time on public radio and television services;
2. Political parties that have seats in the Assembly of the Republic but are not members of Government shall, in terms of the law and according to their degree of representation, have the right to broadcasting time on public radio and television services in order to exercise their right of reply and the right to respond to the political statements of the Government;

3. Trade unions, professional organisations and organisations representing social and economic activities shall also be guaranteed broadcasting rights, according to criteria prescribed by law;
4. During election periods, contestants shall have the right to regular and equitable broadcasting time on public radio and television stations of national or local range, within the terms of the law.

Article 2 of the Press Law guarantees freedom of expression and information, as well as journalistic independence and protection of sources. It also spells out the functions of the public media — which include the state radio and television service and the national news-agency — and guarantees their “impartial, objective and balanced coverage”. The Decree 31/2000 also sets out public service objectives for the state-owned television service programming while granting the broadcaster autonomy to decide on the specifics.

Are there licence conditions impacting on content — including local content?

The law does not specify any extra conditions like local content, or need to include news bulletins. Article 8 of the Press Law says that each medium defines its orientation and objectives according to ethical principles of mass communication. However, when it comes to the public broadcaster, Article 11 says that public media must create programmes considering the different public interests, promoting the development of the country, promoting national culture, national identity and national languages. It must also ensure impartial, objective and balanced news coverage.

2.5.4 Laws on ownership legislation (eg. limits on cross- or foreign ownership).

Article 65) of the Press Law states: “Only Mozambican institutions and associations, as well as Mozambican citizens who are resident in the country and fully enjoy their civil and political rights can be owners of information organs and journalistic enterprises.” Thus, Mozambican legislation allows only nationals to own a media institution. However, if an institution includes international share-holding, the foreign investment can be up to 20 per cent. Directors and editors must have Mozambican nationality and residence.

2.5.5. Other media-relevant laws covering:

Access to information

The 1991 Press Law (Article 3) defines the right to information as “the faculty of each citizen to inform him/herself and be informed about relevant facts and opinions, at the national and international level, as well as the right of every citizen to disseminate information, opinions and ideas through the press”. The Law states in Article 4 that access to information must not be limited by censorship and that information must be provided to all citizens.

The right to access information established by the law does not refer to facts and documents that are state secrets or considered by the state or official Sources to be part of confidential judicial processes. Nor does it apply to information involving a citizen’s private life.

GABINFO, as well as non-governmental organisations such as the Media Institute of Southern Africa (MISA), have been pushing for a law on the Right to Information/Access to Information. MISA, for example, has organised workshops in order to incorporate contributions coming from various stakeholders. A final draft proposal has been submitted to parliament by MISA.

In 2005 the government introduced a draft law on Access to Official Sources of Information. The media advocacy organisation ARTICLE 19 says the draft elaborates on the constitutional guarantee of freedom of information, extends its scope to privately held information of general public interest, and establishes an access procedure as well as an appeals mechanism. However, the Bill is criticised for not providing for an independent body to supervise implementation and nor does it protect whistleblowers. It also lacks provisions to combat the culture of secrecy within the government. By mid-2007, there seemed to be no further movement on the draft law.

Legal framework for state-subsidy of private media

None, although the National Institute of Communication has been created to help community radio stations.

Defamation — including where it is a criminal matter

Articles 41 to 49 of the Press Law deal with offences of “abuse of press freedom” including defamation. Article 47 states that the crime of defamation is punishable with a prison sentence of up to four months and a fine. The law also, in Article 47, provides protection against the publication of offensive facts about an individual’s private or family life. The penalties prescribed can include suspension of publications (Article 48). Journalists taken to court for allegedly defaming private citizens may use recorded or printed material to prove their innocence. In case they are found guilty, they can be condemned to two years jail and an amount as compensation to the person offended with a minimum of 100.000 meticaís (almost US \$3.900).

ARTICLE 19 argues that suspension of publications and onerous fines, because of their chilling effect on media freedom, are disproportionate punishments for defamation.

Insult laws

The President of the Republic or a foreign head of state can be defamed even if the stated facts are true, according to Article 47 of the Press Law.

Also, under the Penal Code of 1886, defamation or threats against the president, government members, parliament members and other authorities are considered as offences and the authors can be prosecuted. These provisions could allow officials to prosecute journalists. Nevertheless, the government is generally tolerant of criticism. In case of defamation against a foreign head of State or his representative in the country, the penalty applied is the same as used in case of defamation against the president — and no evidence in support of the journalist publishing the truth is acceptable in court.

Harmful content: hate speech, pornography

Article 483 of the Portuguese Penal Code, is still in force and makes provision against public incitement to crime. Article 174 4) of the same Code defines as a crime any incitement to political struggle through violence or hatred. In terms of the Penal Code and the 1991 law, the publication of material containing pornography, hate speech, racial discourses or other things that violate the right of citizens, perturbs the civil order or encourages criminal acts is not permitted by the law. It can result in the banning of media that perpetuate such actions. The court decides the duration of suspension of the media activity.

Security laws and official secrets

Unknown

2.5.6 Laws on reporting courts

Court cases are opened to public including journalists, but the judges have the right to announce “closed sessions” to protect witnesses, court secrets and the presumption of innocence (see however 2.5.9 below). Although the law allows journalist to cover court cases, there is not much coverage of these.

During the 2003 judgment of the case of the Carlos Cardoso assassination, Judge Augusto Paulino accepted a petition from media law experts arguing that the session should be broadcast live. In another case that same year, however, involving the same witnesses from the case above, the judge declared the sessions closed to public broadcasting under provisions for protection of witnesses, court secrets and presumption of innocence. In March 2005, the Maputo City Court barred media from covering a libel case involving one of six men sentenced to long imprisonment for the murder of journalist Carlos Cardoso. None of the court officials approached by journalists could explain the legal basis for the secrecy of the trial.

In principle, other trials have been public matters in Mozambique, even though judges can close courts to the public in sensitive cases, such as those involving rape, in order to protect the victim. However, in mid-2007, MISA reported that all of the main Mozambican journalists’ associations had urged President Armando Guebuza not to promulgate a bill passed by the country’s parliament, the Assembly of the Republic, in June 2007 which will ban any broadcasting of trials (see MISA 2007; Pambazuka News 2007). Although the bulk of the bill deals with the organisation of the country’s courts, and is for the most part uncontroversial, Article 12 of the bill puts limitations on media/press coverage of the courts. For instance, the second clause of the article is a directive that confers a blanket ban on “the production and public transmission of images and sound from trials” on the basis of “safeguarding the material truth and the legally protected interests and rights of those involved in the cases”. This means that there is no room for cameras, microphones and dicta-phones in courtrooms. Not only is this in contradiction with Article 65 of the Constitution which refers to criminal trials as being public except in a few very specific cases, it is also in opposition to Article 48 of the Constitution which states that all citizens have the right to information. Excluding radio and television equipment from the courts denies citizens that right. In their letter to Guebuza, the journalists’ organisations argued that Article 12 of the law on the courts “puts serious obstacles in the way of the media’s job of explaining matters to public opinion, as a fundamental condition for the existence of an open and democratic society” (MISA 2007). The President could return the bill to the Assembly, and the judges of the Constitutional Council [the body that has taken over the functions that the Supreme Court used to have in this area] can decide whether the offending article violates the Constitution.

2.5.7. Laws and regulations on media and elections

According to Article 12(2) of the Press Law, during election periods all contending parties are entitled to equitable broadcasting time. Article 86 of the 1993 Electoral Law, enacted ahead of Mozambique’s first multi-party elections, stated that “(c)andidates, political parties or political coalitions ... have the right to equal treatment from public or private entities, in order to carry out their electoral campaign freely and in the best conditions.”

The duties of the public sector print media are cited in the electoral law as follows:

1. The public sector print media should include electoral material in their publications;
2. Whenever the print media referred to in the previous point include in their publications information related to the electoral process, these should be rigorous and exempt from any bias and shall avoid tampering with issues to be published and any discrimination against different candidates;

3. Graphic publications which belong to the state or are controlled by the state are required to include material related to the electoral acts in all the publications issued during the electoral propaganda period, in line with the principles referred to in the previous points of the present article.

Article 33 says that candidates may agree among themselves to share or alternate use of the airtime or publication space attributed to them.

(Act n. 7/ 2004 <http://www.idea.int/africa/upload/Moz%20Electoral%20Law%207%202004.pdf>)

2.5.8. Ethics and the law

Statutory mechanisms to police professional ethics

None.

Non-statutory mechanisms

The Mozambican Journalists Association plays a role here.

Right to reply provisions

As established by Article 33 of the Press Law, the right of reply is defined extremely broadly to apply to “all individual or collective persons or public bodies who feel injured by the publication or radio or television broadcast of untrue or erroneous references that may affect the reputation and good name of such citizens or institutions”. The CSCS also decides about public complaints concerning the performance of Mozambican media and it can require media to grant a right of reply.

Confidentiality of sources

As indicated above, the Constitution recognises the right to protection of professional independence and confidentiality (*sigilo professional*). Article 30 gives more detail in guaranteeing the right of journalists to protect the confidentiality of their sources of information without punishment. Section 28 of the Press Law provides that journalists (and their directors) enjoy the right to professional secrecy in relation to the source of the information published or broadcast, and their silence should not lead to any kind of punishment.

2.5.9. Respect for freedom of expression and law by governments, media and others (including examples of whether the laws are enforced or not; if other laws — eg. citizenship — are used against media)

In 1991 when the law was approved, the public media (Radio Mozambique, Television of Mozambique and Notícias Society — the mainly state-owned newspaper company) enjoyed a monopoly. Over the past 20 years there has been a strong increase in the numbers of newspapers, private radio and TV stations. However, many cases of violations of media law by officials are reported every year in Mozambique, although only a small number of them are published. Generally though, freedom of the press and access to information is respected. In many cases where freedom of press is violated, it is due to a lack of understanding of media law from the side of local leaders or because of reluctance of others in accepting the changes that the country has faced.

Below are some examples of when the law was respected and when not:

In May 2004, the Administrator of Mocuba in the central Zambezia Province came into conflict with a local community radio reporter over a story on road degradation and the transportation of coffins on stretchers in that town. The journalist was suspended. The same year, a journalist from the weekly newspaper *Demos*, Fabio Mondlane Junior, was jailed at the Niassa capital of Lichinga following a story in which he accused the attorney-general in Niassa of corruption. The attorney general considered the story as defamatory and succeeding in criminal charges against the journalist. The journalist was released after paying a fine. Another journalist from from the newspaper *Imparcial* was condemned to 18 months in prison and a payment of compensation to the national Attorney General. He had accused the authorities of releasing Naite Chissano (the son of former president Joaquim Chissano) from jail. (Naite Chissano had been jailed after he had threatened a journalist.)

A number of journalists interviewed in 2005 felt that there is still more to be done in order to ensure that the law protects the Mozambican media sector and guarantees access to information to all. Manuel Zimba, a journalist for the past 15 years, said: “Journalists fear to express their views. The law does protect them, but there are some external factors — influential people who feel threatened — that insist in impeding the work of the journalist”. Lionel Matias, a journalist since 1976, said: “There are still some points to improve on the media law, mainly in respect to the access of information. The law protects state secrets and officials quote this when it comes to not giving out information — thereby making the job of the journalist difficult”.

Salimo Abdul has worked as journalist for more than 14 years. According to him, there is a need to improve the articles on regulation of the media. He said:

The law is not adapted to actual situations. When it was approved the scenario was totally different. The number of media companies was not as big as it is now. The law does promote the spread of media but does not regulate how these media are performing. For example, in our days, anyone can open a radio station or newspaper because there are not strong media regulations defined. We have examples of channels that are opening to broadcast 24 hours and they only play music.

In May 2006, three journalists were detained for a week on criminal libel charges, with MISA-Mozambique saying that this measure was illegal in relation to the specific charges. Near the end of 2006, GABINFO announced draft amendments to the 1991 Press Law. In response, Paul Fauvet, the head of the English-language service of the Mozambican state-owned news-agency AIM, criticised what he said was a proposal to license Mozambican journalists. By June 2007, it was not clear what the status of the proposed amendments was.

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2.6 NIGERIA

2.6.1 Relevant constitutional and broad provisions:

Freedom of expression

On 29 May, 1999, a democratically-elected civil government and a new constitution were inaugurated in Nigeria. The country was previously under 16 years of military government, which ruled by decrees, with the country's earlier constitution suspended for much of this period.

The 1999 Constitution is essentially the same as that of 1979, which was in operation for only four years (1979 to 1983) before it was repealed by the military government. Its main features include the separation of powers, federalism, a bill of rights, a party system, and secularism. The Constitution provides for a Bill of Rights which guarantees a set of civil and political liberties including the right to freedom of expression and the press. In terms of Article 39(1):

Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

Freedom of the media (mentioned as an institution)

Article 22 of the Constitution states:

The press, radio, television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in this Chapter and uphold the responsibility and accountability of the Government to the people.

Right of access to information

Beyond the entitlement to receive information in 39(1), there are no categorical guarantees in the Constitution for right of access to government or other public agency information.

Whether limitations are "reasonable" in a democracy

Article 39 specifies:

- 2) Without prejudice to the generality of sub article (1) of this article, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions:
Provided that no person, other than the Government of the Federation or of a State or any other person or body authorised by the President on the fulfilment of conditions laid down by an Act of the National Assembly, shall own, establish or operate a television or wireless broadcasting station for, any purpose whatsoever;
- 3) Nothing in this Article shall invalidate any law that is reasonably justifiable in a democratic society:
 - a) for the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of courts or regulating telephony, wireless broadcasting, television or the exhibition of cinematograph films;

- b) imposing restrictions upon persons holding office under the Government of the Federation or of a State, members of the armed forces of the Federation or members of the Nigeria Police Force or other Government security services or agencies established by law.

The latter clause is rather vague as to what such restrictions might be and how these would affect media rights.

Other institutions mentioned in constitution (eg. regulatory bodies)
None.

Constitution takes cognisance of international law
No.

Power of courts to assess constitutionality of media law
Not specified in the Constitution as such.

Constitutional right to reply
None.

Is there a national media policy?

In 2004, the Government set up a commission to review the existing National Mass Communication Policy which was set up in 1990 during the military dictatorship. It is not clear if this resulted in a new policy document.

Accession to international agreements relevant to media

International Convention on Civil and Political Rights accession	1993
African Charter accession	1983

2.6.2 Laws relating to the status of journalists (do they need to be registered?).

Decree No. 60, 1999 created a government-appointed Press Council and mandates the state accreditation of journalists. According to Article 17:

- 1) Subject to rules made under this Decree, a person shall be entitled to be fully registered under this Decree if:
 - a) He has attended a course of training recognised by the Nigeria Union of Journalists so acquired with the cognate experience recognised by the Nigeria Union of Journalists; or
 - b) The course was conducted at an institution so approved, or partly at one such institution and partly at another or others; or
 - c) He holds a qualification as approved; or
 - d) He holds a certificate of experience issued in pursuance of article 22 of this Decree.
- 2) Subject as aforesaid, a person shall be entitled to be registered as a journalist if he satisfies the Council that immediately before the commencement of the Decree he had not less than five years experience as a journalist.

- 3) An applicant for registration shall, in addition to evidence of qualifications, satisfy the Council that;
 - a) He is of good character;
 - b) He has attained the age of 18 years;
 - c) He has not been convicted in Nigeria or elsewhere of an offence involving fraud or dishonesty;
 - d) He has been trained at an approved mass media institution;
 - e) He has a general professional orientation which covers the basic requirement of information leading to a qualification not less than a diploma; and
 - f) He has good knowledge of the politics and socio-economic affairs of his society acquired from an approved institution.

Article 22 specifies certification of experience:

- 1) A person who, after obtaining an approved qualification, satisfies the conditions specified in clause 2) of this article shall be entitled to receive free of charge a certificate of experience in the prescribed form from the person in charge of the institution.
- 2) The conditions referred to in clause 1) of this article are that
 - a) he shall have served his time for employment, the prescribed period in Nigeria with a view to obtaining a certificate of experience; or
 - b) he shall have acquired, during his employment practical experience under the personal supervision and guidance of one or more registered journalists for such periods as may be prescribed;
 - c) the manner in which he carried out the duties of this employment and his conduct during the period of his employment shall have been satisfactory.
- 3) It shall be the duty of the employer, being a registered journalist supervising the training of the person employed with a view to obtaining a certificate of experience, to ensure that the person is afforded proper opportunities of acquiring the practical experience required for the purposes of paragraph b) of the clause 2) of this article,
- 4) Where after having served his time as referred to in paragraph a) of clause 2) of this article, a person is refused a certificate of experience, shall be entitled:
 - a) to receive from his employer particulars in writing of the grounds of the refusal; and
 - b) to appeal from the refusal to a committee of the Council in accordance with rules made by the Council in that behalf (including rules as to the time within appeals are to be brought) and on any such appeal the committee of the Council shall have power to either dismiss the appeal or itself issue the certificate of experience in question or give such other direction on the matter as it considers just.
- 5) The Minister may make for the issuance of certificate of experience in respect of employment and institutions outside Nigeria.

Nigeria also requires individual accreditation of journalists who report on executive government. According to non-governmental media organisations, only the state media and private journalists who are considered sympathetic towards the government may be guaranteed access to important news conferences and meetings.

2.6.3. Laws and regulations on licensing media (print, broadcast):

Do print media need a licence?

Decree 60 of 1999 also requires that publications be registered by the (government-appointed) Press Council through a system entitled “Documentation of Newspapers.” In applying for registration, publishers must submit their mission statements and objectives and could in theory be denied registration if their objectives fail to satisfy the Council.

Is there an independent licensing body for broadcast?

The Nigeria Broadcasting Commission Decree of 1992 establishes the Nigerian Broadcasting Commission (NBC) as the regulatory authority for broadcast. This decree was ordered under the military dictatorship. There is a 1999 Amendment which does not substantially change the legislation. In terms of Article 2, the Commission is responsible for:

- a) advising the Federal Military Government generally on the implementation of the National Mass Communication Policy with particular reference to broadcasting (The Amendment of 1999 removes reference to the military government);
- b) receiving, processing and considering applications for the ownership of radio and television stations including cable television services direct satellite broadcast and any other medium of broadcasting;
- c) recommending applications through the Minister to the President, Commander in Chief of the Armed Forces, for the grant of radio and television licences;
- d) regulating and controlling the broadcast industry;
- e) undertaking research and development in the broadcast industry;
- f) receiving, considering and investigating complaints from individuals and bodies corporate or incorporate regarding the contents of a broadcast and the conduct of a broadcasting station;
- g) upholding the principles of equity and fairness in broadcasting;
- h) establishing and disseminating a national broadcasting code and setting standards with regard to the contents and quality of materials for broadcast;
- i) promoting Nigerian indigenous cultures, moral and community life through broadcasting;
- j) promoting authenticated radio and television audience measurements and penetration;
- k) initiating and harmonising Government policies on trans-border direct transmission and reception in Nigeria;
- l) regulating ethical standards and technical excellence in public, private and commercial broadcast stations in Nigeria;
- m) monitoring broadcasting for harmful emission, interference and illegal broadcasting;
- n) determining and applying sanctions including revocation of licences of defaulting stations which do not operate in accordance with the broadcast code and in the public interest;

- o) approving the transmitter power, the location of stations, areas of coverage as well as regulate types of broadcast equipment to be used; and
- p) carrying out such other activities as are necessary or expedient for the full discharge of all or any of the functions conferred on it under of pursuant to this Decree.

The 1999 amendment re-numbers p) as u) and adds the following before it:

- p) ensuring qualitative manpower development in the broadcasting industry by accrediting curricula and programmes for all tertiary training institutions that offer Mass Communication in relation to broadcasting;
- q) intervening and arbitrating in conflicts in the broadcast industry;
- r) ensuring strict adherence to the national laws, rules and regulations relating to the participation of foreign capital in relation to local capital in broadcasting;
- s) serving as national consultants on any legislative or regulatory issues on the broadcasting industry;
- t) guaranteeing and ensuring the liberty and protection of the broadcasting industry with due respect to the law.

The website of the NBC (www.nbc-nig.org) repeats the legislation's requirements and describes how an application is processed by the Commission and recommended to its board for onward transmission, through the Minister of Information and National Orientation, to the president, who gives the final approval for Radio and Television Broadcasting Licences". In practice, this is interpreted as the president having to personally sign every licence issued.

The composition and appointment of the Nigeria Broadcasting Commission indicate that it is not an independent body. The 1999 law says the Commission shall consist of people recommended by the minister and appointed by the president, and include the following:

- a) a chairman;
- b) ten other members as may be approved to represent the following interests, that is:
 - i) law,
 - ii) business,
 - iii) culture,
 - iv) education,
 - v) social science,
 - vi) broadcasting,
 - vii) public affairs,
 - viii) engineering,
 - ix) State Security Service,
 - x) the Federal Ministry of Information and Culture; and
- c) the Director-General of the Commission.

Article 3(2) of the National Broadcasting Decree of 1992 says that:

The Chairman and other members of the commission shall be persons of proven integrity, experience and specialised knowledge in the broadcasting industry or who by reason of their professional or business attainment are in the opinion of the Minister capable of making useful contribution to the work of the Commission.

In terms of Article 3(3) “(t)he Chairman and other members of the Commission shall be appointed by the President, commander in Chief of the Armed Forces on the recommendation of the Minister.”

The Media Rights Agenda organisation ran a campaign that eventually culminated in 2000 with the Federal Government appointing boards to the Nigeria Communication Commission, the Nigerian Television Authority and the Nigeria Broadcasting Commission. Prior to this, these institutions were run by single individuals reporting direct to government. Even with the constituted boards, however, it needs to be pointed out that these are appointed by government (as with any government parastatal), and without public participation.

It would thus appear that the Nigerian regulatory bodies are not independent. Indeed the suspension of a private station, Freedom FM, in March 2006 has been interpreted as governmental interference in response to programming criticising the President. In 2005, the Nigeria Broadcasting Commission closed down African Independent Television and RayPower FM for several hours following a report on an airline crash (see further discussion below).

Are three categories of broadcasting licensed (public, commercial, community)?

No. The NBC distinguishes between private, public, state-owned and satellite stations. It is estimated that there were just 14 private free-to-air television stations in 2005, compared to 32 run by state governments, and 97 local affiliates of the national channel. In addition, 80 of some 100 radio stations on air in 2005 were owned by government at state or federal level (see Okwori and Adeyanju, 2006). Community radio seems to be resisted by government for fear that it could fuel local political, regional, ethnic or religious tensions. Only one experimental license has been given to a non-profit station at the University of Lagos. After extensive lobbying by civil society, government commissioned a Community Radio Policy Drafting Committee which submitted a report in December 2006.

Are there limits on private broadcasting — eg. not in television, no national licenses offered?

Only the federal government owned television station, the Nigerian Television Authority (NTA) and the federal government owned radio station, the Federal Radio Corporation of Nigeria (or Radio Nigeria, for short) are licensed to broadcast nationally. Private broadcasters who have tried to combine their regional stations into simultaneously broadcasting networks have been threatened with having their licences revoked by the National Broadcasting Commission.

Is the board of the state-owned media independent?

No, the Nigerian Television Authority and the Federal Radio Corporation of Nigeria are run by the state. As with the regulatory bodies, the Federal Government also for a long time (up till 2000) did not even appoint boards, despite legislation to this end, preferring to run these institutions through a sole appointee, according to Media Rights Agenda.

Are there public-service oriented statutes or licence conditions for the state-owned media?

State-owned media have some public service obligations on the stations. However, many of the conditions which could help bring them closer to public service media are missing in the enabling statutes, and government is legally empowered to interfere in their editorial and operational processes.

Are there licence conditions impacting on content — including local content?

Article 9 of the Nigeria Broadcasting Commission Decree of 1992 states that in order for a licensing application to be considered, the Commission must be satisfied that the applicant “can give an undertaking that the licensed station shall be used to promote national interest, unity and cohesion and that it shall not be used to offend the religious sensibilities or promote ethnicity, sectionalism, hatred and disaffection among the peoples of Nigeria”.

Licenses can be revoked where “in the opinion of the Commission the station has been used in a manner detrimental to national interest or where a complaint from the public has been upheld after a public hearing instituted by the Commission and whose decision is upheld by a majority of members of the Commission”. The Commission may also impose a lesser sanction such as a warning or the suspension of a licence.

The Nigeria Broadcasting Commission website says that when an application is made for renewal of a licence, a report is required:²

- Emphasising national cohesion, national security, respect for human dignity and family values.
- Compelling Accuracy, objectivity and fairness. Right of Reply, integrity. Authenticity, Good taste and Decency, presentation of womanhood with respect and dignity, legal, decent and Truthful advertisement, protection of children from X-rated programmes and harmful or deceitful adverts.
 - Forbidding inciting broadcasts, advertisement of magical cures, exploitation of children, sponsorship of Newscast and monetization of political coverage etc. (The reference to “incitement’ is not clear).

In 2004, the NBC initiated a standing ban on live broadcast of foreign news and programmes. Local programme content is a minimum of 60% for open television and 80% for radio. The cable/satellite re-transmission stations are required to reflect a minimum of 40% local content in their programming.

2.6.4. Laws on ownership (eg. limits on cross- or foreign ownership).

In terms of Article 9 the Commission must consider, when determining a licence the:

- a) structure of share holding in the broadcasting organization;
- b) number of share holding in other media establishments;
- c) distribution of those stations and establishments as between urban, rural, commercial or other categorisation.

It is illegal for any person to have controlling shares in more than two television stations. In terms of Article 10, the Commission will not grant a licence to a religious organisation or a political party.

² Note: the unusual capitalisation that follows is that of the original text.

2.6.5. Other media-relevant laws covering:

Access to information

There still exists legislation that contributes to making access to information held by public organisations extremely difficult. This includes the criminal provisions of the Criminal Code Act of 1990, the Evidence Act of 1990, the Public Complaints Commission Act of 1975, and the Statistics Act of 1987.

Civil society and media rights advocacy organisations, principally the Media Rights Agenda, have since 1993 led a campaign for the passing of a freedom of information law. In June 2005 the Nigerian Senate President stated that he was committed to ensuring to a law that would “actualise the right of Nigerian citizens to know and sustain efforts to develop a prosperous and stable nation”. In November 2006, the Nigerian Senate passed the Freedom of Information Bill, meaning that all that was required was for the National Assembly to send it for assent to the outgoing leader of the country President Olusegun Obasanjo. However, having been through a gestation period of six years, with drafts being revised and amended from one level of government to another, the process was aborted. In March 2007, President Obasanjo refused to sign the Bill into law. He told a meeting with civil society leaders in April 2007 that he rejected the requirement of judicial review of any refusal to grant access. This was a major setback in the sense that the legislation may have to start almost from scratch with the new National Assembly and new president who took up office in May 2007.

Legal framework for state-subsidy of private media

None. However, the 2003 Nigerian Communications Act authorised a Universal Access Fund with the aim of promoting telecommunications access to under-served areas.

Defamation — including where it is a criminal matter

Chapter 7 of the Criminal Code of 1990 includes stipulations regarding defamation. There is also power held by the National Broadcasting Commission and the National Press Council to investigate and impose penalties for defamation.

Harmful content: hate speech, pornography

Chapter 21A of the Criminal Code of 1990 deals with “obscene publications”. In terms of Article 233C1), an article is obscene if its effect is “such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it”. It is an offence punishable by fine or imprisonment or both to distribute or project any article deemed to be obscene. The law states that it does not apply to television or sound broadcasting (which activities are regulated by licence conditions).

Security laws and official secrets

A number of decrees that are contrary to the 1999 Constitution have been repealed, including the Official Secrets Act and the Defamatory and Offensive Publications Decree of 1999. There are still, however, a number of repressive laws introduced during the military dictatorships prior to the return to constitutional democracy in 1999, such as the Offensive Publications Decree of 1993, the Obscene Publications Act of 1990, and the Printing Press Regulation Act of 1990.

The Criminal Code Act, 1990, Chapter 7 relates to Sedition and the Importation of Seditious or Undesirable Publications. In effect including an ‘Insult Law’ provision, Article 502) defines a “seditious intention” as an intention to:

- a) bring into hatred or contempt or excite disaffection against the person of the President or of the Governor of a State or the Government of the Federation;
- b) excite the citizens or other inhabitants of Nigeria to attempt to procure the alteration, other than by lawful means, any matter established by Nigerian law;
- c) raise discontent or disaffection amongst the citizens or other inhabitants of Nigeria;
- d) promote feelings of ill-will and hostility between different classes of the population of Nigeria.

But an act, speech or publication is not seditious if it intends:

- to show that the president or the governor of a State has been misled or mistaken in any measure;
- to point out errors or defects in the government or Constitution of Nigeria or any of its State thereof in terms of established or in the administration of justice with a view to the remedying of such errors or defects;
- to persuade the citizens or other inhabitants of Nigeria to attempt to procure by lawful means the alteration of any matter in Nigeria;
- to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of Nigeria.

In terms of Article 51, it is an offence for anyone who:

- prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; and/or
- imports any seditious publication, unless he has no reason to believe that it is seditious,

Conviction for a first offence can incur imprisonment for two years or to a fine or to both, and a subsequent offence may result in imprisonment for three years. Possession of a seditious publication is an offence punishable by one year jail or a fine or both.

In terms of Article 58, the appropriate Minister can ban the importation of any publication. Anyone who then “imports, possesses, publishes, sells, offers for sale, distributes or reproduces” such is guilty of an offence and liable, on conviction, to a fine or imprisonment or both.

In terms of Article 88A it is an offence to:

- in any manner or form publish or display or offer to the public the pictorial representation of any person living or dead in a manner likely to provoke any section of the community;
- publish or circulate publications either in the form of newspapers, or leaflets, periodicals, pamphlets or posters, if such publications are likely to provoke or bring into disaffection any section of the community;
- sing songs, play any instrument or record sounds, or sell, lend, or let on hire any record of sounds, the words of which are likely to provoke any section of the community.

It is a defence if a person charged under this Article can show that he/she made reasonable inquiry and was unaware of the possibility that it might be used for purposes mentioned above.

It is clear that many of the above are extremely broadly defined offences, and with extremely harsh penalties.

2.6.6. Laws on reporting courts

The 1990 Criminal Code also has restrictions on “Contempt of Court”, “Perverting Justice” and other provisions that limit media coverage. Where operational, Sharia Penal Law could also have adverse implications for coverage.

2.6.7. Laws and regulations on media and elections

The Electoral Act of 2002 spells out details. According to Article 29:

- 1) A candidate and his party shall campaign for the elections in accordance with such rules and regulations as may be determined by the Commission;
- 2) State apparatus including the media shall not be employed to the advantage or disadvantage of any political party or candidate at any election;
- 3) Media time shall be allocated equally among the political parties at similar hours of the day;
- 4) At any public electronic media, equal airtime shall be allotted to all political parties during prime times at similar hours each day, subject to the payment of appropriate fees;
- 5) At any public print media, equal coverage and conspicuity shall be allotted to all political parties;
- 6) Any public media that contravenes subsections 3 & 4 of this article shall be guilty of an offence and on conviction be liable to a fine of 500.000 naira [approximately US \$5.000] in the first instance and to a fine of double that for subsequent conviction.

According to Article 94:

- 1) A government owned print or electronic medium shall give equal access on daily basis to all registered political parties and/or candidates of such political parties;
- 2) A denial of such access and equal time constitutes an offence punishable in the first time with a fine of N500.000 and the withdrawal of the licence of the offending electronic media house by the National Broadcasting Commission for a period of 12 months on any subsequent violation;
- 3) A person other than a political party or a candidate who procures any material for publication for the purposes of promoting or opposing a particular political party or the election of a particular candidate over the radio, television, newspaper, magazine, handbills or any print or electronic media whatsoever called during twenty four hours immediately preceding or on polling day is guilty of an offence and liable on conviction to a fine of N50,000 [US \$500] or imprisonment for six (6) months or to both.

In terms of Article 95:

- 1) A person, print or electronic medium who broadcasts, publishes, advertises or circulates any material for the purpose of promoting or opposing a particular political party or the election of a particular candidate over the radio, television, newspaper, magazine, handbills, or any print or electronic media whatsoever called during twenty four hours immediately preceding or on polling day is guilty of an offence under this Act;
- 2) Where an offence under subsection 1) of this article is committed by a body corporate every principal officer of that body is equally guilty of an offence under this Act;
- 3) Where any person is convicted of an offence under this article he shall be liable: a) in the case of a body corporate to a fine of N500.000 and; b) in the case of an individual to a fine of N100.000 or to imprisonment for 12 months.

Article 29 states that a person who:

by preventing any political aspirants from free use of the media, designated vehicles, mobilization of political support and campaign at an election commits the offence of undue influence and liable on conviction to a fine of N100.000 or imprisonment for twelve months, and shall in addition be guilty of corrupt practice under Article 121 of this Act and the incumbent be disqualified as a candidate in the election.

2.6.8. Ethics and the law:

Statutory mechanisms to police professional ethics

The (government-appointed) Nigerian Press Council (created in terms of Decree 60, 1999).

Non-statutory mechanisms

The Nigeria Union of Journalists.

Right to reply provisions

None.

Confidentiality of sources

The Code of Ethics of the Nigeria Union of Journalists states that a journalist should “observe the universally accepted principle of confidentiality and should not disclose the source of information obtained in confidence”.

2.6.9. Respect for freedom of expression and law by governments, media and others (including examples of whether the laws are enforced or not; if other laws — eg. citizenship — are used against media)

In April 2004 the Lagos Magistrate Court struck out the case of conspiracy, sedition, and criminal defamation brought against three editors of Insider Weekly Magazine by the Lagos State Commissioner of Police for lack of diligent prosecution. The editors “and others at large” were accused of publication of a seditious matter against the Vice President Atiku Abubakar and the National Security Adviser, General Aliyu Muhammed Gusua, Rtd., and thereby committing an offence punishable under Article 516) of the Criminal Code.

The International Press Institute's 2004 World Press Freedom Review reported violations against press freedom that accompanied violence in parts of the country as journalists were suspended, assaulted, threatened, arrested and deported by aggressive police and security forces. The escalation of politically motivated violence against journalists, according to this report, was representative of the instability that spread throughout the country. The IPI expressed the view that progress in the area of press freedom was stagnant in Nigeria.

Reporters without Borders, in their 2004 annual report on Nigeria, also lamented police violence against and harassment of journalists. In October 2005 they reported that *Weekly Star* publisher, Owei Kobina Sikpi had been arrested on a charge of publishing false information. They said: "Protesting against a journalist's illegal detention could be quite pointless in Nigeria under President Olusegun Obasanjo, given how much everyone seems to accept the impunity enjoyed by the security forces, but you do not need to be a lawyer to see that Sikpi's arrest and imprisonment for the past ten days violates at least two articles of the constitution."

The 2004 Freedom House world report on press freedom labels Nigeria as "partly free" (Karlekar 2004):

Although Nigeria possesses a vibrant and often critical media sector, journalists continue to face restrictive laws, physical threats, and economic pressures that sometimes curtail their ability to cover sensitive issues. Criminal defamation laws remain in place under which several journalists were detained, arrested, or sued during the year in connection with stories on state-level government officials.

The report describes how "criticism from media and civil society organizations caused the national assembly to withdraw a new code of conduct that required journalists to confirm all sensitive information from the assembly prior to publication and warned of punitive action in response to 'speculative journalism'". The same report also says that no new private radio stations were licensed in 2004. It says that both state and private media owners were reported to proscribe coverage of certain issues.

As indicated above, in 2005 the Nigerian Broadcasting Commission temporarily shut down Africa Independent Television (AIT) and RayPower FM Stations, over alleged unprofessional coverage of an airliner crash in which 117 passengers and crew members died. The company said that the stations were being punished for challenging the official version put out by the state-owned Nigerian Television Authority (NTA) and instead criticised aviation authorities for negligence. It is not clear what procedure the NBC followed in deciding to shut down the radio and television station. The sanctions procedure in the Commission's guidelines for the Nigeria Broadcasting Code, requires that a station should first be served with a notice and given a hearing before the application of sanctions. Paragraph 10.7.1 of the Code provides that: "The Commission shall serve an erring station an order to show cause why a revocation or a 'cease and desist' injunction should not be issued." A public hearing should then follow the issuance of such a notice. These procedures were not followed.

Continued harassment of journalists was being reported by Media Rights Agenda in 2007. These included raids on premises, assaults on cameramen, arrests and detentions, and confiscations of notes and publications. In addition, there were charges of journalists under sedition legislation, criminal defamation based on "false news" and the Official Secrets Act.

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2.7. SENEGAL

2.7.1. Relevant constitutional and broad provisions

Freedom of expression

Senegal's current constitution was adopted in 2001. Chapter 2 of the Constitution outlines provisions on civil liberties as well as on individual, social and economic rights. Article 8 guarantees "freedom of opinion, freedom of expression, and freedom of the press" among other freedoms. It also guarantees the "right to plural information".

Freedom of the media (mentioned as an institution)

The Constitution also specifies, in Article 11, that "(t)he creation of a press organ for political, economic, cultural, sports, social, entertaining or scientific information is free and subject to no prior approval". On other communications, Article 13 states that the secrecy of correspondence by mail, telegraph, telephone and other electronic communications is inviolable. Restrictions on this inviolability can be ordered only in accordance with law.

Right of access to information

Access to information is covered in Chapter 3 (Articles 26 to 30) of the law. This also deals with the rights of journalists and media technicians concerning the practice of their profession.

Whether limitations are "reasonable" in a democracy

According to Article 10, each individual has the right to freely express and broadcast opinion verbally or in written form provided the exercise of this right undermines neither the honour of individuals nor public order. According to Jacques Habib Sy (nd), stipulations on undermining honour and public order are open to interpretations that can lead to various repressions of the press. He further notes that this potential has in fact been used in the past to stifle private media organisations. The Constitution also states that the freedoms conferred are subject to conditions defined by law. Criteria for general limitations of rights are vague and open to infringement.

Other institutions mentioned in constitution (eg. regulatory bodies)

None

Constitution takes cognisance of international law

International law is specified as applicable once it has been ratified by Senegal (Article 98).

Power of courts to assess constitutionality of media law

Unknown

Constitutional right to reply

None

Is there a national media policy?

Yes.

International Convention on Civil and Political Rights accession	1978
African Charter accession	1982

2.7.2. Laws relating to the status of journalists

The law of February 2nd, 1996, relating to organs of social communication and the profession of journalists and technicians makes the following provisions:

Article 23 defines a journalist as any graduate of a school of journalism who is practising journalism within any area of communication. It also includes any person whose regular work is in the domain of communication (for instance at a school of journalism, a company or other press service).

Article 24 defines a technician as any graduate of a school of engineering or person who works as a technician within the communication industry. It also includes any person practising this trade, as defined in the *Convention Collective des Journalistes et Techniciens de la Communication Sociale* (Collective Convention of Journalists and Technicians in Social Communication).

Article 25 states that journalists and technicians employed within the civil service and other public-owned establishments are governed by the employment code and the provisions of the collective agreement applicable to their respective professions.

Article 40 says that journalists and technicians can apply for a national press card. In terms of Article 41 the commission responsible for issuing press cards is composed of six members: a representative of the national assembly, a magistrate appointed by the minister of justice, a representative of the minister of communication, a representative of the most representative trade union of communication professionals, a representative of the press and the private broadcasters, and a representative of state communication organs. Obtaining a national press card fraudulently or by providing inaccurate information is punishable by imprisonment of between six months and three years and/or a fine of 20.000 — 500.000 francs (approximately US \$100 - \$2.500) (Articles 52 and 73). Once issued, press cards are valid for three years for professional journalists and one year for interns (Article 55). National press cards are renewable, but can be withdrawn by the commission in instances where the holder violates the provisions of the law (Article 56). Such a withdrawal can be provisional or permanent. The law does not specify conditions under which a suspended press card can be reinstated.

Rights of journalists

Article 27 gives a journalist the right to refuse any instruction that contravenes the practice of their work. This is reinforced in Article 28 whereby a journalist cannot be forced to undertake a professional act or to express an opinion that is contrary to their conviction. Where such a circumstance should arise, a journalist can invoke the “clause of conscience” to support their position. In terms of Article 29, the editorial board of any press organ is obliged to disclose any information that is likely to affect the life of the organisation.

Responsibilities of journalists

Chapter 2 of the law covers the responsibilities expected of journalists and media technicians, such as respect for facts (Article 31), respect for different religious, political or philosophical convictions of the public, as well as non-discrimination based on race, ethnicity, sex or nationality (Article 33).

In addition, Article 32 stipulates that in the practice of their profession, journalists and technicians must be prepared to:

- defend the freedom of information, commentary and criticism;
- publish only information which has been verified, or, in case of the contrary, state the necessary reservations;
- not retain information, or leave undisclosed texts and the documents used in the presentation of facts or comment on them;
- rectify any published information which is inaccurate;
- not use unfair or reprehensible methods to obtain or disseminate information, photographs and documents.

Article 34: Journalists or technicians must respect the private life of the people, particularly in instances where an individual holds a public office and their private life does not interfere with the duties of that office.

Article 36 prohibits plagiarism, slander, defamation and charges which have no basis. In addition, “journalists cannot receive any advantage as a result of the publication or the suppression of information”.

Article 37: The practice of journalism should not be confused with that of advertising or propaganda. Journalists cannot accept direct or indirect instructions from advertisers.

Article 38: Besides editorial directives from someone responsible for editorial decisions, a journalist or technician must resist any pressure.

2.7.3. Laws and regulations on licensing media (print, broadcast):

Do print media need a license?

In terms of Article 15, preliminary authorisation is not needed in order to start publishing a newspaper or periodical in Senegal. Instead a statement or declaration of publication to a Public Prosecutor is required (Article 16). Such a declaration, which is not followed by any subsequent authorisation or refusal to proceed, should include the name of the newspaper, its mode and place of publication, details of the owner and editor respectively, and the criminal record of the editor. Failure to compile a proper declaration of publication is punishable by a fine of between 60 000 and 600 000 francs against the editor or the publisher (approximately US \$300 to \$1,200). In such instances, the newspaper will temporarily suspend publication until the provisions of Articles 16 to 18 are fulfilled (Article 66).

Each edition of a newspaper publication must state the name of the editor, if necessary, the names of the owners), as well as the names and addresses of its publishers, and the print run of the last edition (Article 14). Failure to comply with the provisions of Article 14 is punishable by a fine of between 20 000 and 100 000 francs (approximately US \$200 - \$5,000) (Article 64).

Article 18: Prior to the distribution of any edition of a newspaper, the director of publication or the publisher shall deposit signed copies with the Ministry of Communication, the Ministry of Justice, the First Court of Appeal, the Public Prosecutor, the Ministry of the Interior (for publications in Dakar) and the National Archives. In the case of newspapers published outside Dakar, copies will be deposited only with the governor or prefect and the state prosecutor. Copies to be deposited with the other ministries can be sent by post after the newspaper has been distributed.

Foreign media

This is defined as media whose “statement of publication” is made outside Senegal (Article 19). Foreign publications must deposit two copies of the publication to the Ministry of Justice, the Ministry of Interior and the Ministry of Communication at least four hours prior to their distribution in Senegal (Article 20).

Article 21: The distribution and sale of foreign newspapers and periodicals can be prohibited by the joint decision of the Ministry of the Interior and the Ministry of Communication. The law does not specify conditions or circumstances under which foreign publications can be banned. Nevertheless, violating such a ban or resuming publication under a different title is punishable by a jail sentence of between two months and a year and a fine of 50 000 francs (approximately US \$250) or one of the two (Article 69).

Article 22: The working conditions of a Senegalese journalist recruited by a foreign media organisation in Senegal should be similar to those laid down by the employment code of Senegal and the Collective Convention of Journalists and Technicians in Social Communication.

Article 68: Anyone who distributes foreign newspapers in Senegal without following the provisions of Article 18 is liable to a fine of between 60 000 and 600 000 francs (approx US \$300 to \$2,000).

Is there an independent licensing body for broadcast?

The High Audiovisual Council (HCA or *Haut Conseil de l’Audiovisuel*) has had powers to oversee all audiovisual media in the country (Law 89-09 of February 11, 1998). The council is supposed to ensure objectivity and pluralism of information, and free and healthy competition between broadcasting media.

The President of the Republic has appointed the president and members of the High Audiovisual Council as follows:

- An individual chosen by the President of the Republic;
- A member of parliament chosen by the president of the national assembly;
- A magistrate chosen by the President of the Republic from a list of three names submitted by the president of the Constitutional Council. This individual will serve as president of the HCA;
- An eminent journalist or technician chosen by the President of the Republic from a list of three names submitted by the trade union most representative of communication professionals;
- A representative of women’s organisation chosen by the President of the Republic from a list of three names presented by the Federation of Women’s Organisations in Senegal;
- An individual qualified in arts, culture and letters chosen by the President of the Republic from a list of three names submitted by the Minister for Culture;
- A person chosen by the President of the Republic from a list of three names submitted by Senegal’s Human Rights Committee;
- An eminent lawyer chosen by the President of the Republic from a list of three names submitted to him by the Faculty of Legal and Political Studies at Cheikh Anta Diop University, Dakar.

It is unclear if this is retained in law 33 of 2005 that transformed the HCA into a National Council for the Regulation of Broadcasting (CNRA). It is apparent, however, that the members are still nominated and appointed by the President, even though they are required to reflect a diversity of civil society and media sectors. The new

body has additional guarantees of independence compared to the HCA, and has an entrenched mandate. But in 2007, ARTICLE 19 said that most of the new radio licences had been awarded to relatives or members of the ruling party. The CNRA can function as a tribunal able to hear complaints in addition to being able to impose punishments ranging from temporary closure to stiff fines (up to US \$20 000). In this way, it effectively marginalises the journalists' self-regulatory body (CRED)³. However, the CNRA does not appear to have sanction powers over the state broadcaster.

Notwithstanding the CNRA, government retains significant power of suspension and sanctions over broadcasters. In terms of Article 29 of the conditions of contract applicable to private commercial radio stations, in the case of breach of any of its obligations as stipulated under the terms of its licence, the Minister of Communication can suspend the operations of a private commercial radio or aspects of its programming. The suspension of a license cannot exceed one month. Article 30 gives the suspended media organisation one week to respond to the Minister's suspension. The Minister has up to three weeks to make a final decision (Article 31).

The Minister of Communication can also withdraw the licence of a private commercial broadcaster when it is deemed that the institution has not respected clauses outlined in Articles 1 to 5 of the conditions of licence contract. These specific articles broadly define the various obligations of commercial radio stations — such as announcing the name of the radio station at least twice every hour, respecting its frequency, archiving broadcasts for at least a month, and submitting annual financial statements to the Minister of Communication and the Minister of Finance.

According to Article 19 of the statutes applicable to community radio, the Minister of Communication can suspend a radio station or parts of a programme when the station fails to comply with one or more of its obligations or conditions of authorisation. The duration of the suspension cannot exceed one month. Article 20 says that the suspended radio station has a week to respond to the Minister's suspension. The Minister then has up to three weeks to make a definite decision on the suspension (Article 21).

According to Article 22, the Minister of Communication can withdraw the authorisation of a station that fails to comply with the obligations as stipulated in Article 5 of the contract of operation. The Minister of Communication can suspend the station or parts of its operations for a month if the station fails to comply with any other obligations stipulated in the contract.

Are three categories of broadcasting licensed (public, commercial, community)?

The system exists, but there is not licensing required for public stations.

A statutory document, the “Conditions of Contract Applicable to Commercial Private Radio Stations”, outlines conditions related to the operation of commercial private radios. Commercial radio stations are defined as those with a profit rather than public service objective (Article 1). Under the provisions of the document, the Minister of Communication is responsible for issuing licences for private commercial radio stations. A licence is valid for three years, after which it can be renewed or terminated. Radio stations that wish to shut down are required to submit a six-month notice to the Minister of Communication.

The Community (“Associative”) Radio Stations regulations set out the statutes for this category of broadcasters. These are defined as private not-for-profit radio stations (Article 1). Advertising is prohibited (Article 16). However, public service announcements by public organisations who identify with the station's social goals, are allowed (Article 17).

3 CRED is discussed in more detail later in this chapter.

Article 4 grants officials of the Ministry of Communication free access to the station's equipment to "carry out checks relating to the respect of technical conditions". This provision is vague and is potentially open to interpretations that could lead to infringements on the freedom of the media.

Are there limits on private broadcasting— e.g. not in television, no national licenses given?

Law 92-02 (1991) gives state-owned broadcasting monopoly rights to ensure its signals can reach the entire country (Article 2). Private broadcasting is allowed for localised footprints.

Is the board of the state-owned media independent?

Article 2 of Law 92-02 of 16 December 1991, creating the *Radio et Television Senegalaise* (RTS), says that state broadcasting is funded by the state (Article 6) with its board of directors appointed mainly by different government ministries (Article 13). Also relevant here are the statutes of RTS of 1992, whereby the board consists of:

- A representative of the presidency;
- A representative of the prime minister's office;
- A representative of the Ministry of Finance;
- A representative of the Ministry of Communication;
- A representative of the Ministry of Industry;
- A representative of the Ministry of Local Authorities;
- A deputy designated by the National Assembly;
- A representative of the staff of the organisation;
- Two members chosen by the Minister of Communication based on their professional competence.

The Chair of the board is nominated by the President of the Republic and elected by members of the board.

Ordinance 59-054 created the Senegalese Press Agency (*Agence de Presse S n galaise* — APS) in 1959. Its administrative council is composed as follows:

- A president named through a prime ministerial decree;
- A representative of the Presidency of the Republic;
- A representative of each of the following ministries:
 - Information
 - Finance
 - Foreign Affairs
 - Interior;
- A representative of the National Assembly;
- A director of Posts and Telecommunication;
- A director of national radio;
- A representative of the print media, chosen by the Minister of Information;
- A representative of APS staff elected by secret ballot.

It is clear from this list that neither RTS nor APS can be considered independent public media.

Are there public-service oriented statutes or licence conditions for the state-owned media?

Law 92-02 (Article 2) defines state-owned broadcasting as having the mandate of public broadcaster, serving the information, culture, education and entertainment needs of the population as well as contributing to the reinforcement of national unity. The article requires pluralistic coverage — including of labour groups, business, women's advocacy groups, human rights bodies and consumer groups.

Law number 92-57 of September 3rd, 1992, relating to pluralism on state radio and television, grants all legal political parties equal access to these media. This includes coverage of public demonstrations, broadcasting of press releases, broadcasts of parliamentary debates as well as invitations to participate in roundtable debates. The regulator is charged with administering these provisions such that there should be balanced treatment of all in public media. This includes the activities of political parties and strict respect for pluralism and objectivity in accordance with the rules of ethics applicable to the occupation of journalists.

In terms of Article 5, legally constituted political parties have equal time on state radio and television as part of the weekly programmes which are reserved for them to introduce their viewpoints and read out press releases. Coverage of their public demonstrations, broadcast of their press releases and the broadcast of parliamentary debates is supposed to be in accordance with journalism ethics. In addition, legally constituted political parties are invited to participate in political, economic, cultural, social and sports programmes in the form of debates or “round tables”.

In terms of Article 13, the HCA (now CNRA) can oppose the dissemination of content which violates Articles 2 and 4 of the Constitution and Articles 248 and 266 of the Penal Code. The political party concerned must be notified of this without delay. The party can appeal the decision (on grounds of excessive power). In case of a successful appeal the party's insert will be broadcast during the next available programme for political parties.

Article 16 says that, in accordance with its general mission of ensuring plurality of information, state radio and television should cover political and union activities and debates of ideas by observing the ethical codes applicable to journalism.

Are there licence conditions impacting on content — including local content?

Private broadcasting responsibilities regarding content are such that at least 20% of all content broadcast by private commercial radio stations must be African programmes with at least 10% of these dedicated to Senegalese productions (Article 13).

In addition, broadcasting content that compromises public decency, security or the dignity of the individual is prohibited (Article 14). The law does not define such material, although Article 15 stipulates that broadcasts should not contravene the country's Constitution especially Articles 2 and 4 and Articles 248 to 266 of the Penal Code. Articles 2 and 4 of the Constitution deal with state sovereignty.

Community radio stations may not participate in political debate. Obligations concerning programme content are covered by Article 11, in terms of which responsibility for the content of programmes broadcast by the station rests with the authority which approves content. All community radio stations must have at least one communication professional responsible for programme planning. Article 12 provides that broadcasting content that compromises public decency, public security or the dignity of an individual is prohibited. The content of programmes must be free from discrimination based on race, religion, philosophy or sexuality.

Article 13 states that broadcasts cannot contravene Articles 2 and 4 of the country's Constitution and Articles 248 to 266 of the Penal Code. Article 14 provides that in the event of broadcasting content which will offend the sensitivity of the audience, particularly children and teenagers, listeners must be informed beforehand.

2.7.4. Laws on ownership (eg. Limits on cross- or foreign-ownership).

The state is owner of *Le Soleil*, one of the major newspapers in the country. Private ownership of newspapers is allowed. Article 3 of the law of February 2nd, 1996, relating to organs of social communication and the profession of journalists states that any individual can establish a media organisation provided the majority of journalists and technicians working in the organisation are of Senegalese nationality. Any violation of this provision is punishable by imprisonment of between two and six months or a fine ranging from 100 000 to 1 million francs (US \$5,000 to \$50,000) or both (Article 62).

Article 4 prohibits Senegalese nationals from holding majority shares in more than three media organisations. Foreign nationals can hold majority shares in only one media organisation. Any violation of this provision is punishable by imprisonment of between 2 and 6 months and a fine of 20 000 to 100 000 francs (approximately US \$1,000 to \$5,000), or one of the two (Article 63). Notwithstanding this, the Walf Fadjri and Sud groups each own a portfolio of print and radio assets.

Article 5 specifies that any individual who enjoys parliamentary immunity cannot be the editor of a media organisation.

Foreign nationals cannot hold more than 50% of voting rights in a community radio station (Article 10 of Conditions of Contract for Associative Radio).

2.7.5. Other media-relevant laws covering:

Access to information

None, aside from the constitutional reference. However, Article 30 of Chapter 3 of the law of February 2nd, 1996, states that in undertaking their duties, journalists have the right to use as sources of information anyone deemed qualified to comment on an event. Article 26 says that journalists and media technicians have free access to all non-confidential sources of information. They also have the right to freely enquire about issues that affect public life.

Legal framework for the state-subsidy of private media

In terms of Article 59 of the 1996 law, the state can financially assist media organisations that meet the following criteria:

Newspapers must:

- have a print run of at least 2000 and employ at least five full time journalists;
- devote at least 75 % of their coverage to political, economic, social, cultural or sports information;
- derive at least a third of their income from sales and subscriptions. These provisions do not apply to the local press (i.e. regional or divisional).

Audio-visual media must:

- broadcast to at least one administrative area;
- employ at least five full time journalists or technicians;
- respect the provisions of their licence.

Article 61 specifies that the Minister of Communication annually publish information on the distribution of the funds to media organs, including the names of editors of publications as well as the composition of each organisation's editorial team. Various media persons say that the assistance does not compromise their autonomy, but that the funds are too low. A controversy in 2006 revolved around whether government support should be financial or structural, and over the specific requirement that only entities with a minimum of five professional journalists could qualify. In the end, and controversially, approximately US \$600 000 was distributed to more than 100 media companies including some that did not meet the literal conditions of the law. ARTICLE 19 reports that certain experts believe that indirect and structural support would be less politicised.

Defamation — including where it is a criminal matter

The 1977 Penal Code (Articles 258 and 261) criminalises defamation with a maximum sentence of up to two years imprisonment, and a fine. Defamation is broadly defined in the code as an “allegation or imputation of a fact that undermines the dignity or esteem of the individual or body against whom the fact is imputed” (Article 255).

Insult laws

The publication of articles that insult the person of the Head of State — and even foreign Heads of State — is severely punished under provisions of the Penal Code, Articles 254 and 265. Article 258 says that even “if it is expressed as a question” such an action is an offence. Article 260 makes it illegal to defame cabinet ministers, MPs and civil servants.

Harmful content: hate speech, pornography

The 1997 Penal Code makes it an offence to publish content that has the “goal of inciting hatred” (Article 262).

Security laws and official secrets

The Penal Code further criminalises “false news” and “fabricated articles” with a penalty of up to three years imprisonment.

Article 80 of the Penal Code provides for three to five year prison terms for persons convicted of compromising public security or causing serious public disturbance. This legislation is interpreted by government as allowing it to close down media operations if they constitute a perceived threat to state security and public order. This was used against Madiambal Diagne of *Le Quotidien* in 2004 (see below).

2.7.6. Laws on reporting courts

According to the International Federation of Journalists, there are some decisions that may not be published.

2.7.7. Laws and regulations on media and elections

This is part of the remit of the HCA (now CNRA), and is also covered in Chapter 4 of the Electoral Code.

2.7.8. Ethics and the law:

Statutory mechanisms to police professional ethics

Broadcast licenses.

Non-statutory mechanisms

Senegal has a self-regulatory body called the Council for Respect of Professional Ethics (CRED), created in 1999, which operates as a peer mechanism for ensuring high ethical standards. It is composed of 13 members, including 4 journalists appointed by journalists' union SYNPICS, 3 from editors of the public and private media, one from government and the remainder from civil society groups and universities. ARTICLE 19 said in 2007, however, that ethics were not being respected in the country's media.

Right to reply provisions

Readers' right to reply is guaranteed under Chapter 3 of the media law of February 1996 (law relating to organs of social communication and the profession of journalists and technicians), and specifically Article 11. The right of reply is guaranteed in instances of inaccuracy (Article 10) or the reporting of assertions that injure the honour of a person (Article 11). Corrections have to be made under the same conditions of publication or broadcast as the original message.

Right of reply is also specified in Article 28: where a private station broadcasts an imputation that is likely to undermine the reputation or dignity of the individual, the person affected has the right of reply. Article 18 says that any individual or entity has a right of correction or answer in the case of broadcasts by community radio likely to injure the honour or reputation of the concerned person or entity.

Confidentiality of sources

Article 35 of Chapter 3 of the law of February 2nd, 1996, states that journalists or technicians are bound to professional secrecy as envisaged under Article 363 of the Penal Code. They should not reveal the sources of information obtained confidentially. Sources can be revealed to a senior ranking person within the media organisation only if this person is equally bound by professional secrecy. However, a journalist or technician could be asked to reveal their source if it is clearly proven that the source made an error.

2.7.9. Respect for freedom of expression and law by governments, media and others (including examples of whether the laws are enforced or not; if other laws — eg. citizenship — are used against media)

It is not clear that media law is always respected. Government is accused of not implementing the law as regards public service media, while it itself uses the law to act against journalists it believes are breaking the law.

According to the International Press Institute's 2004 World Press Freedom Review, Senegal has a number of laws that infringe on press freedom. The report refers to the legislation that prohibits "discrediting the state" and disseminating "false news" but suggests that these have not deterred the independent media. There are several newspapers and a dozen private radio stations that remain highly critical of the government and other political parties. Local television, however, is controlled by the state and provides coverage biased towards the ruling party. The report records that authorities have harassed journalists who have tried to report on more sensitive issues, and in the past there have been several reports of journalists being assaulted by police as they attempted to cover the news.

The Committee to Protect Journalists (CPJ) has reported, as noted above, that in July 2004, Madiambal Diagne, managing editor of the privately-owned newspaper *Le Quotidien*, was arrested and subsequently jailed. This repression was for "publishing confidential documents, disseminating false news and initiating actions [likely to] compromise public security". An outcry led to President Abdoulaye Wade pardoning him after four months, and saying that the specific article 80 of the Penal Code would be repealed. The journalists' union SYN-

PICS then submitted proposals to also repeal provisions that criminalise insulting the president and publishing false news. However, subsequently, the government elaborated a distinction between “press offences” and general offences (such as defamation) that can be committed irrespective of the media, saying that the latter will not be changed. However, there has been no movement since.

The Reporters without Borders 2004 report classified Senegal as having “noticeable problems” with regard to press freedom:

Press freedom is no longer assured in Senegal. Traditionally cited as an example of respect for the right to free expression, the country took a disturbing turn in 2003. Several journalists were physically attacked, others were threatened and a foreign correspondent was expelled.

The Freedom House 2005 report describes how, in July 2004 the HCA criticised the government-run television for not reflecting diverse viewpoints and not allowing equal coverage of opposition members and religious groups.

According to Freedom House, in January 2005, French journalist Christian Costeaux, who ran a website about tourism in Senegal, was sentenced in absentia to one year’s imprisonment and a fine of 600 million francs (approximately US \$3 million) for libelling a mayor and two local hotel owners, in an article alleging there was organised crime in their city.

In October 2005, the privately-owned newspaper daily *Sud Quotidien* and its radio stations Sud FM were closed and staff arrested for “endangering state security”. The arrest followed the station’s broadcast of an interview with a representative of an armed separatist movement in the south. The interview was broadcast simultaneously by all the radio stations in Sud FM’s network in Senegal. The government shut down five of these stations located in different parts of the country for relaying the broadcast, and banned the distribution of the paper which published the text of the interview. In raids conducted on the home of the station manager, authorities seized a video camera and videocassette of the interview. The following day 19 staff members arrested in Dakar, as well as the station manager of Sud FM’s Ziguinchor station, were released with the authorities saying charges were likely. Also in 2005, the Court of Dakar ordered the editor of the *Observer* to pay US \$80,000 for slander — a fine that ARTICLE 19 pointed out is very heavy in regard to the financial capacity of papers like this and which violates the African Declaration on free expression principles (DPFEA) which states that sanctions should never be so severe as to block the exercise of the right to free expression.

In January 2007, an ARTICLE 19 report on the state of freedom of expression in Senegal called for the reform of the legal, political and institutional frameworks for freedom of expression. The report highlighted the arrests, attacks and harassments of journalists, political opponents and human rights defenders in the lead up to elections. It also highlighted the excessive government control over the national television and the lack of independence of the broadcasting and telecommunication regulatory bodies in Senegal. In its recommendations, ARTICLE 19 urged the government to adopt a new law on freedom of information in accordance with international standards, and in consultation with national stakeholders. In addition, the report also called upon the media to reinforce respect for ethical standards and take into account public interest in the delivery of information.

Senegal again came to the attention of media watchers in April 2007 with reports of a ruling party official and his supporters threatening staff at a radio station east of Dakar following criticism from a caller to a phone in programme. A few days before this, a Dakar court was reported to have issued a prison sentence and damages against a journalist concerning an article about possible irregularities in the freeing of a former prime minister

who had been serving time for corruption. A journalist on a pro-government daily *Il Est Midi* was also convicted in April on criminal defamation charges. He was sentenced to six months imprisonment and a large fine, and barred from working as a journalist for three months. His paper was also banned for three months. Two other journalists were sentenced to suspended terms in jail in March 2007 on criminal defamation charges.

ARTICLE 19 reported in 2007 that, in a context of harassment and death threats, there had been “advanced discussions” between media and government about scrapping repressive media legislation. However, the authorities were said to remain hesitant about the range and date of any reform.

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2.8 SOUTH AFRICA

2.8.1 Relevant constitutional and broad provisions:

Freedom of expression

The Constitution of the Republic of South Africa of 1996 is the supreme law of the Republic. A central feature of the Constitution is the Bill of Rights, which entrenches a range of fundamental rights to which every citizen is entitled. Article 16 of the Bill of Rights explicitly recognises freedom of expression and media freedom as fundamental rights:

- 1) Everyone has the right to freedom of expression, which includes
 - a) freedom of the press and other media;
 - b) freedom to receive or impart information or ideas;
 - c) freedom of artistic creativity; and
 - d) academic freedom and freedom of scientific research.

Freedom of the media (mentioned as an institution)

See 1)a) above.

Right of access to information

Article 32 of the Constitution provides that everyone has the right of access to

- any information held by the state; and
- any information that is held by another person and that is required for the exercise or protection of any rights.

Clause 2 places an obligation on Parliament to pass national legislation to give effect to the right of access to information.

Whether limitations are “reasonable” in a democracy

- 2) The right in subsection 1) does not extend to
 - a) propaganda for war;
 - b) incitement of imminent violence; or
 - c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Fundamental rights and freedoms enshrined in the Bill of Rights are not absolute. The right to freedom of expression can only be exercised, understood and interpreted in the context of other potentially competing rights, such as the rights to privacy, dignity, and equality, or complementary rights such as the rights to freedom of assembly, belief, religion, association and access to information (Burns 2001). The right to freedom of expression may therefore be limited or restricted in terms of the specific exceptions cited in Article 16, as well as the general limitations clause, Article 36, which states:

The rights in the Bill of Rights may be limited only in terms of law of general application 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

- a) the nature of the right;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the relation between the limitation and its purpose; and
- e) less restrictive means to achieve the purpose.

Other institutions mentioned in constitution (eg. regulatory bodies)

Article 92 appears in Chapter 9 of the Constitution, which is headed “State Institutions Supporting Constitutional Democracy”. According to this article: “National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.”

Constitution takes cognisance of international law

Yes.

Power of courts to assess constitutionality of media law

The boundaries of the right to freedom of expression are set by the rights of others, and by the legitimate needs of society. In any particular set of circumstances there are competing interests at play, and in considering which right should prevail, the courts have to weigh up those competing interests and decide which carry more weight in a particular set of circumstances. South Africa has a specialised Constitutional Court to rule on such cases. The High Court may also hear such cases.

Constitutional right to reply

No.

Is there a national media policy?

No.

Accession to international agreements relevant to media

International Convention on Civil and Political Rights accession	1998
African Charter accession	1996

2.8.2. Laws relating to the status of journalists (do they need to be registered?)

None.

2.8.3. Laws and regulations on licensing media

Do print media need a licence?

The Imprint Act 43 of 1993 repealed the Newspaper Registration Act 63 of 1971, which required the registration

of all publications with at least a monthly frequency. The Imprint Act requires only that the name and address of the printer appear on any printed matter intended for public sale or distribution, which includes newspapers and magazines.

Is there an independent licensing body for broadcast?

The Independent Broadcasting Authority Act 153 of 1993 established an independent broadcasting regulator, the Independent Broadcasting Authority (IBA), before South Africa's first all-race elections in 1994, to ensure that the public broadcaster fulfilled its function in the public interest. In 2000, the IBA was incorporated into the Independent Communications Authority of South Africa (Icasa — see below). The provisions of the IBA Act establishing the regulatory framework for broadcasting in South Africa have largely been taken over into new legislation passed in 2005 (see below), and the Act itself has now been repealed.

The original IBA Act set out the need and procedures for broadcast licences, as well as identifying the need for a Code of Conduct for Broadcasting Services. The code has been administered by the Broadcasting Monitoring and Complaints Committee (BMCC), but the name of this body has changed, and its power been increased, under the 2005 legislation (see below). Broadcasters in South Africa are also given the option of self-regulation through a voluntary industry body and subscribe to its code of conduct which is approved by the regulator. The code of this body, the Broadcasting Complaints Commission of South Africa (BCCSA), is virtually identical to Icasa's own code. Members of the National Association of Broadcasters adhere to the BCCSA code, which has left Icasa's relevant committee (see below) to adjudicate mainly those disputes involving broadcasters who are not members of the NAB (mostly community broadcasters), or deal with matters of non-compliance with licence conditions. The original act also required broadcasters to adhere to the Code of Advertising Practice administered and enforced by the Advertising Standards Authority, and this provision is continued in the 2005 legislation.

The Broadcasting Act of 1999 was intended to provide a regulatory framework for the public broadcaster, the South African Broadcasting Corporation. Read together with the Independent Broadcasting Authority Act, it also dealt with the licensing of broadcast services. Chapter 2 of the Act, most of which remains in force notwithstanding amendments in the 2005 legislation, sets out general policy guidelines for South Africa's broadcasting system. The broadcasting system must, *inter alia*,

- safeguard, enrich and strengthen the cultural, political, social and economic fabric of South Africa;
- operate in the public interest and strengthen the spiritual and moral fibre of society;
- be controlled by persons or groups of persons from a diverse range of communities in South Africa and promote ownership, control and management of broadcasting services by persons from historically disadvantaged groups;
- encourage fair competition in the provision of programmes and services.

The Minister of Communications is empowered to develop broad policy for broadcasters in accordance with those values. The legislation also states that programming must be provided in all 11 official languages “as circumstances permit”.

The Independent Communications Authority of South Africa Act 13 of 2000 established a single regulator for the broadcast and telecommunications industries, which previously had separate regulators (the Independent Broadcasting Authority and the South African Telecommunications Regulatory Authority). The resulting body, Icasa, has jurisdiction over both the broadcasting and telecommunications sectors. Article 3 of the Act,

following the Constitution, enshrined the independence of Icasa from commercial or political interference. However, up until the end of 2005, a dual system operated so that government authority was direct in terms of telecommunications, and limited to broad policy terms as regards broadcast licensing. This reflected the constitutional protection of broadcast regulation as distinct from telecommunications. The Electronic Communications Act of 2005, in the spirit of convergence, removed the dualism in Icasa between Ministerial powers dealing with telecommunications and broadcasting. For all matters now, the Minister's role is policy formulation rather than involvement in decisions about licensing. However, Ministerial initiation is needed for Icasa to call for, or consider, applications for infrastructural licenses (described as "Electronic Communications Network Services"). This serves to protect legacy investments by the state-owned and partially state-owned companies providing signal distribution and telecommunications.

Article 5 of the 2000 Act dealt with the appointment of seven councillors of Icasa by the State President on the recommendation of the National Assembly, following public hearings with the candidates. This has changed under the Icasa Amendment Act of 2006. Parliament now appoints an independent selection panel, which recommends names to the Minister of Communications who chooses from amongst these and then presents the selection to parliament for approval or veto. The law also beefs up the functions of the former BMCC by replacing this committee of Icasa with a new "Complaints and Compliance Committee" which is backed up by a Compliance Inspectorate with strong powers to ascertain whether licence conditions are being adhered to.

Are three categories of broadcasting licensed (public, commercial, community)?

Chapter 3 of the IBA Act created a three-tier broadcasting system and provided for licensing of different broadcasters for these three sectors:

- a public broadcasting service;
- a commercial broadcasting service;
- a community broadcasting service.

A "public broadcasting service" was defined as any broadcasting service provided by the South African Broadcasting Corporation, any other statutory body or any entity that receives revenue from television or radio licences. The definition includes commercial services operated by the SABC. A "commercial broadcasting service" means a broadcasting service operating for profit or as part of a profit entity, but excluding any broadcasting service provided by a public broadcasting licensee. A "community broadcasting service" is fully controlled by a non-profit entity and carried on for non-profitable purposes, serves a particular community, and encourages members of that community to participate in programming. It may be funded by donations, grants, sponsorships or advertising or membership fees, or a combination of those sources. These provisions are taken up in the Electronic Communications Act of 2005.

Licence classes were originally subdivided into the following categories:

- free-to-air radio service;
- free-to-air television service;
- satellite-free-to-air radio service;
- satellite-free-to-air television service;
- satellite-subscription television service;
- terrestrial-subscription television service;
- direct-to-home delivery service, including multi-channel satellite distribution;

- local delivery service;
- cable television subscription service;
- low power radio service;
- any other class of licence as determined from time to time.

However, these classes are now partly superseded by the 2005 Electronic Communications Act. This law recognises traditional (what it calls “unidirectional”) broadcasting categories of public, commercial and community stations, which will require a relevant license — as well as, now, a frequency spectrum licence. It also introduces two other categories of licence which have a bearing on audio, or audio-video, content: Electronic Communications Network Services (such as signal distribution) and Electronic Communications Services (such as telephony or Internet Service Provision). Through such licences, convergent industries such as Internet service providers or telecommunications operators will be able to disseminate the kind of content previously distributed exclusively by conventional broadcasters. The legislation gives Icasa a degree of discretion about whether licences should be issued on a class or individual basis, and indeed about what services do not need licences (such as low-powered broadcasting). The effect here will be to enable increased competition in electronic media services.

Are there limits on private broadcasting — eg. not in television, no national licenses offered?

Icasa practice has been to grant a national licence to private television, but not to private radio stations. It also in 2005 granted two regional television licences to SABC, as well as two temporary community television licences for city-wide broadcasting. In 2007, it was due to grant licenses for privately-owned pay-TV.

Is the board of the state-owned media independent?

Articles 12 to 17 of the 1999 Broadcasting Act deal with the composition and appointment of the SABC Board. Article 13 empowers the State President to appoint 12 non-executive board members on the advice of the National Assembly, and after a nomination process that includes public participation.

Are there public-service oriented statutes or licence conditions for the state-owned media?

Chapter 4 of the Broadcasting Act, which continues unamended, deals with the SABC. In terms of Article 6, the SABC is governed by a Charter, which is set out in Sections 7 to 28. The Act empowers Icasa to monitor and enforce compliance with the Charter. Article 6 also entrenches the SABC’s right to “freedom of expression and journalistic, creative and programming independence”. Article 9 deals with the corporation’s organisational structure, and provides for two operational divisions: a public service division and a commercial service division, which have to be administered separately.

Article 10 sets out the SABC’s public broadcasting obligations, which include:

- broadcasting to South Africans in all the official languages;
- reflect the diverse cultural and multilingual nature of South Africa;
- providing news and public affairs programming which meets the highest standards of journalism, as well as fair and unbiased coverage, impartiality, balance and independence from government, commercial and other interests;
- including significant amounts of educational programming;
- supporting traditional and contemporary arts;

- broadcasting programs made by the Corporation as well as those commissioned from the independent production sector
- broadcasting national sports programming as well as developmental and minority sports.

The public broadcasting division may draw revenues from advertising and sponsorships, grants and donations, as well as television licence fees, and may receive grants from the State. Article 1 provides that the SABC's commercial broadcasting division be governed by the same policies and regulations that apply to private commercial broadcasters. However, the commercial division also has to comply with the values of the public broadcasting service in the provision of programmes and service, commission a significant amount of programming from independent producers, and subsidise the public services to an extent recommended by the SABC Board.

Are there licence conditions impacting on content — including local content?

In terms of the Electronic Communications Act, Icasa may prescribe local content regulations. The result is minimum quantified content for music and for film. Different quotas apply to different categories of broadcaster (public, commercial, community, radio, television).

2.8.4. Laws on ownership legislation (eg. limits on cross- or foreign ownership)

The Electronic Communications Act of 2005 defines “significant market power” as a factor to be considered in regulatory decisions. It further continues the pre-established controls of earlier legislation. These include:

- limitations on cross-media control of commercial broadcasting services;
- limitations on control of commercial broadcasting services;
- limitations on foreign control of commercial broadcasting services.

In summary, the 2005 law states there may not be foreign persons (non-South African citizens, or a company controlled by non-South African citizens) exercising control over a private broadcasting licence. Non-South Africans are also prohibited from holding a financial interest of more than 20 percent in a private broadcaster, or having voting interests of more than 20 percent in such a broadcaster. The law also stipulates that not more than 20 percent of the directors of a private broadcasting service may be non-South African citizens.

The law also takes over the IBA Act's Article 49 dealing with concentration of ownership and control of commercial broadcasters. This prohibits any one entity from controlling more than one commercial television broadcasting service, or more than two commercial FM and AM radio broadcasting services. It also prohibits anyone from controlling two commercial FM stations or two commercial AM stations in the same or overlapping broadcast areas.

As per the IBA Act, there is also a limit on cross-ownership of broadcasting services. Thus the legislation prohibits control of both radio and television licences by anyone who controls a newspaper. No person who controls a newspaper which has 20 percent or more of the newspaper circulation in a specific area, according to the Audit Bureau of Circulations, may control a radio station in the same or a substantially overlapping area. A 20 percent shareholding in a radio or television station is deemed to be control.

However, as regards each of these restrictions, the regulator is authorised by the law to exempt license applicants if it is deemed to be in the interests of the objects of the legislation.

Unlike the old IBA Act which prohibited granting a broadcasting licence to any “party-political entity”, the new legislation specifies no such restriction.

2.8.5. Other media-relevant laws covering:

Access to information

The Promotion of Access to Information Act 2 of 2002 was passed to give effect to the constitutional right of access to information.⁴ The Act does not apply to the media specifically, but has implications for the ability of journalists to gather information. The Act places an obligation on public and private bodies to give members of the public access to records on request, and without them having to supply reasons for wanting the information. The term “public body” is widely defined and includes government departments, local authorities, statutory bodies and parastatals. Records of Cabinet, members of Parliament and provincial legislatures are exempt from the application of the Act.

The Act also includes a provision (as required in the Constitution) that allows individuals and government bodies to access records held by private bodies when it is necessary to enforce people’s rights. Bodies must respond within 30 days. The Act excludes from its jurisdiction: records of the Cabinet and its committees, judicial functions of courts and tribunals, and individual members of Parliament and provincial legislatures. There are some mandatory and discretionary exemptions for records for both public and private bodies. Most of these require some demonstration that release of the information would be harmful. The exemptions cover: personal privacy, commercial information, confidential information, safety of persons and property, law-enforcement proceedings, legal privilege, defence, security and international relations, economic interests, and the internal operations of public bodies.

Private bodies may also refuse to disclose information about commercial activities. Grounds for any refusal, however, may be overridden by a legitimate public interest, defined in the Act as instances where the record would reveal either a substantial contravention of the law or an imminent and serious public safety or environmental risk.

Legal framework for state-subsidy of private media

The Media Development and Diversity Agency Act of 2002 was passed in order to create an environment for media development and diversity, to be fostered by the Media Development and Diversity Agency. The Act applies to print, broadcast and new electronic media. In terms of Article 3 of the Act, a key function of the MDDA is to encourage ownership and control of media by historically disadvantaged communities, language and cultural groups.

Article 17 empowers the MDDA to support media organisations through:

- financial support, in the form of cash subsidies or emergency bridging finance aimed at strengthening or ensuring the survival of media organisations;
- training opportunities and capacity development in the areas of media production and distribution;
- negotiating indirect support from state utilities or financial organisations, such as preferential pricing or discounted tariffs.

Broadcast licensees that contribute to the MDDA may have this offset against their statutory obligations to contribute a percentage of turnover to the Universal Service Agency, now named the Universal Service and Access Agency according to the 2005 Electronic Communications Act.

⁴ Summary below draws from Mochaba et al (2003).

Defamation — including where it is a criminal matter

In South Africa, even under apartheid, defamation has largely been a civil law matter, designed to protect a person's right to an untarnished reputation. It seeks to protect the legitimate interest that individuals have in a good reputation. Within the constitutional context, it supports the fundamental right to human dignity enshrined in the Bill of Rights. The most commonly raised defences used against a defamation suit are:

- that the publication was true and in the public interest;
- that the publication constituted fair comment;
- that the publication was made on a privileged occasion, such as court or Parliamentary proceedings.

In *National Media Ltd. & Others vs Bogoshi 1998 (4) SA 1196 (SCA)*, the Supreme Court of Appeal developed the common law to include a fourth defence: that the publication of the statement, although false, was reasonable. The ruling was confirmed four years later by the Constitutional Court in *Khumalo & Others vs Holomisa 2002 (5) SA 401 (CC)*. As a result, it is now possible for media organisations or journalists to escape liability even if a report was false, as long as the authors can show that publication was reasonable in the circumstances. To determine whether publication was reasonable, the court will take into account:

- the nature and tone of the report (greater latitude is allowed in political discussion);
- the nature of the information on which the allegations were based (including the reliability of the sources);
- steps taken to verify the information;
- steps taken to obtain the affected party's response;
- publishing that response;
- the need to publish.

Privacy is protected by Article 14 of the Constitution. Invasion of privacy can take two forms: disclosure of private information, and intrusion into the private sphere of another. The disclosure or intrusion has to be intentional, and without lawful justification. The disclosure may be justified and lawful if it concerns a public figure or is in the public interest; if it is made during a privileged occasion; or if the subject of the disclosure had given consent.

In *MEC for Health, Mpumalanga v M-Net & Another 2002 (6) SA 714 (t)*, the High Court held that even where material had been obtained by means of an illegal invasion of privacy, it may be justifiably broadcast if the public interest warrants it. In this case, the applicant sought to interdict the broadcasting of a programme about malpractices at a mental hospital by arguing that journalists had entered the hospital without permission, obtained material by using a hidden camera, and filmed hospital patients without their permission. The court dismissed the application on the basis that the right of the public to be informed about the malpractices outweighed concerns about privacy.

South Africa also has a common law crime termed “*crimen injuria*” used mainly for slander in verbal terms such as an insult that affects personal dignity rather than reputation. In 2007 charges were laid under this provision after a website alleged that various named men had used the services of a male prostitute.

Insult laws

None.

Harmful content: hate speech, pornography

The Film and Publications Act (1996) classifies certain kinds of content with age-related and distribution-related restrictions. Such control was initially post-publication, but in 1999 it was extended to cover pre-publication (i.e. production *per se* of offensive content became an offence).

The law covers child pornography, but also hate speech in a broad sense, including sexual and “religious hatred” content, except in cases deemed to be *bona fide* artistic, scientific or discussion-oriented purposes. These constraints accord with the “human dignity” provision in the constitution. Three agencies are responsible for carrying out the objects of the Act: the Film and Publication Board, the Film and Publication Review Board and the Board’s classification committees. The Board is required to review publications only when complaints from the public are received (and members of the Newspaper Press Union are exempted from authority of the Board).

Any person who intends distributing a film or computer game must apply to the Board to have the product classified. However, licensed broadcasters are exempt, on the basis that the IBA Act (and now the Electronic Communications Act of 2005) provides sufficient regulation as well as complaint procedures. However, such outlets could still possibly be liable if they broadcast films classified XX, or any film “which, judged within context, amounts to propaganda for war, incites imminent violence, or advocates hatred that is based on race, ethnicity, gender or religion and which constitutes incitement to cause harm”.

In 2006, a Films and Publications Amendment Bill was tabled before parliament. It sought to make further provision regarding the classification of films and publications; to provide for the registration of internet service providers; to provide for an obligation to report offences involving child pornography; and to increase penalties for offences involving child pornography.

During May 2007 hearings on the Bill, it was criticised by civil society organisations, media practitioners and media owners on the grounds that it could be used to curtail media freedoms. One of the key issues that came up for criticism included a proposed requirement for media to submit their content pre-publication to the Film and Publications Board for classification. The amendment was subsequently changed to reinstate the news media’s exemptions with regard to the Board.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 is intended to promote equality and eliminate unfair discrimination. To these ends, it includes articles prohibiting hate speech. Article 10 of the Act bars anyone from “publishing anything that could reasonably be construed to demonstrate a clear intention to be hurtful, cause harm or promote hatred on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, culture, language or birth”. This provision is wider than the limitation of freedom of expression in the Bill of Rights, which refers only to hate speech based on race, ethnicity, gender or religion. Article 12 prohibits the dissemination or broadcasting of information — including the display of advertisements or notices — that could reasonably be construed to unfairly discriminate against any person. There are some exceptions to this rule, including *bona fide* artistic creativity, academic or scientific inquiry and fair and accurate reporting in the public interest.

The Act not only criminalises hate speech and discriminatory speech, but also empowers equality courts to issue interdicts against publication and to award damages.

Security laws and official secrets

The Defence Act 42 of 2002 replaced the Defence Act of 1957, which in effect had imposed a blanket ban on the reporting of military matters unless the information emanated from official sources (Burns 2001). The 2002 Act

repealed the offensive sections of the 1957 statute, replacing them with provisions giving the State President the power to make regulations restricting freedom of the media in certain, well-defined circumstances and in accordance with the Constitution.

Article 104 7) provides that, subject to the Promotion of Access to Information Act, anyone who, without authority, discloses or publishes classified information “whether by print, the electronic media, verbally or by gesture”, is guilty of an offence. The penalty is a fine or imprisonment for up to five years. Classified status may be assigned to any information by the Minister of Defence.

The Protection of Information Act 84 of 1982 replaced the Official Secrets Act 16 of 1956, and is intended to protect secret state information against disclosure. It has a number of articles that restrict media freedom. Article 2 makes it an offence to enter or inspect prohibited areas, which include military areas and places where ammunition is kept. The Act gives the State President the power to declare any area a “prohibited area”. Places that may be declared “prohibited areas” include factories, dockyards and telecommunications facilities (Burns 2001). This article prevents journalists from entering restricted areas to gather information.

Article 4 prohibits the disclosure or receipt of official state secret information such as secret codes or passwords or confidential documents. This provision may prevent journalists from receiving some forms of “leaked” official information (Louw, 2004).

2.8.6. Laws on reporting courts

The Constitution explicitly provides for open courts in the Bill of Rights. Clause 34 states that “(e)veryone has the right to have any dispute ... decided in a fair public hearing...”. Meanwhile, Clause 35 provides that every accused has “a right to a fair trial, which includes the right ... to a public trial...”.

The Criminal Procedure Act 51 of 1977, Article 153, empowers a presiding officer in a criminal trial to hold the proceedings behind closed doors if that is held to be in the interests of justice, good order or public morals. Where a court has excluded the public from criminal proceedings, it may order that no information about the proceedings be published. The provision gives presiding officers broad powers to bar media from reporting criminal proceedings (Louw 2004). However, it is a general principle that all court proceedings in South Africa should be conducted in public. It follows that any member of the public, including journalists, should be able to attend court proceedings, subject to certain exceptions.

As a general rule, the open court principle also extends to court records or court documents. Journalists may publish anything said in open court without fear of being sued for defamation or invasion of privacy, as long as the statement reported is the report is accurate, fair and balanced and relevant to the proceedings (although this excludes statements ruled inadmissible by the presiding officer).

In certain circumstances, a presiding officer of a court may order that proceedings be held *in camera*, i.e. members of the public, including journalists, are excluded from the proceedings. Generally, judges exclude television cameras from court proceedings, but there have been exceptions.

No information may be published that may reveal the identity of an accused or a witness under the age of 18 in a criminal trial, or any party or witness under the age of 18 to a civil trial. The Child Care Act places a total ban on the presence of strangers, including journalists, in the children’s court and the publication of matter that may reveal the identity of a child involved in the proceedings.

South African courts have not prosecuted anyone for breaching the *sub judice* rule since 1994, and are likely to follow a less strict interpretation of the law if a prosecution should ensue (Penfold 2004). In what was regarded as a set-back to transparency, in 2007 the Constitutional Court dismissed an appeal by the national

public broadcaster (SABC) of a decision by the Supreme Court of Appeal which denied the corporation the opportunity to make recordings and to broadcast proceedings of a high profile five-day criminal appeal.

2.8.7. Laws and regulations on media and elections

The Electronic Communications Act of 2005 takes over the 1993 IBA Act provisions on coverage of elections by broadcasters. The stipulations cover a prohibition on broadcasting of party election broadcasts and political advertisements except in certain circumstances. For example, a party election broadcast and a political advertisement must not be broadcast on any broadcasting service except during an election period and then only to the extent authorised by the provisions of Articles 57 and 58.

There are also provisions about the broadcasting of party election broadcasts on public broadcasting services, and carrying political advertising on any broadcasting service. An example is that while a broadcaster is not required to broadcast a political advertisement, if this is done voluntarily, all other political parties should have the same opportunity if they request it. The law specifies equitable treatment of political parties by broadcasting service licensees during an election period. Icasa has set out a complex formula that interprets “equitable” in terms of time allocations.

2.8.8. Ethics and the law

Statutory mechanisms to police professional ethics

The BCCSA is a statutorily recognised industry body for broadcast self-regulation.

Non-statutory mechanisms

The Newspaper Press Union has operated a Press Ombudsman, chosen by professional organisations and media owners, which in 2007 was expanded to include a Press Council that includes members of the public as well as the media.

Right to reply provisions

These appear in the codes of conduct of the two structures above.

Confidentiality of sources

Article 205 of the Criminal Procedure Act 51 of 1977 empowers the courts at the request of the National Director of Public Prosecutions to summon anyone who may have information about an alleged offence to be examined. The Article has been used to compel journalists to reveal the identity of confidential sources. A person subpoenaed under Article 205 may, in terms of Article 189, cite “just cause” for a refusal to give evidence. The South African National Editors Forum has negotiated a Record of Understanding with the prosecuting authorities in terms of which certain procedures will be followed and negotiations undertaken before a subpoena is issued under Article 205 (Louw 2004).

2.8.9. Respect for freedom of expression and law by governments, media and others (including examples of whether the laws are enforced or not; if other laws — eg. citizenship — are used against media)

South African media operate with substantial impunity in a free environment. For example, there was widespread compromising of the sub judice law by media in 2004 without legal consequences — although many media people also believe the law to be unconstitutional.

However, there is a certain amount of harassment. This entails pre-publication gag orders obtained by parties, including government, seeking to suppress information publication, and also actions including civil cases or state subpoenas to compel journalists to reveal their confidential sources. Between May 2005 and June 2007, six attempts were made at interdicting the *Mail & Guardian (M&G)* (Delaney, 2007). In two of these, an interim order was granted, but without the courts taking cognisance of the extraordinary nature of prior restriction.

A Muslim group successfully won a court interdict against several newspapers publishing the controversial Danish cartoons (even though there was no clear evidence that the publications even intended to do so). But in two other (separate) cases in 2006 and 2007 respectively, the SABC and the Ministry of Transport both lost out on attempts to interdict the publication of information they viewed as problematic. In 2007, the Supreme Court of Appeal in a case known as *Midi-TV*, reinforced a presumption against prior restraint for allegedly defamatory articles, highlighting the alternative that plaintiffs can always seek redress through subsequent damages claims. In terms of the judgement, “gagging orders” will henceforth have to meet a threefold test. First, the information concerned must relate to the administration of justice (rather than a personal reputation). Second, demonstrable harm or prejudice must be shown to result if publication were to proceed. Third, an applicant would need to show that a ban is a necessary and appropriate remedy. This last test requires the court to assess the harm caused by a gag not only to those with a direct interest in publishing, but to the interests of the public in having access to the information (Danay and Foster, 2007).

In 2005, the State issued a subpoena in terms of Article 205 of the Criminal Procedures Act to the *M&G* Online’s host, M-Web. The subpoena required the company to hand over records relating to the online publication of an excerpt of an Imvume Management bank statement, as part of the controversial “Oilgate” story. The “Oilgate” story involves a series of investigative reports alleging that the oil company Imvume Management was used to channel R15 million from the state to the ruling African National Congress (ANC) to assist it in running its election campaign in April 2004. The subpoena said the charge being investigated was contempt of court, apparently because the statement excerpt remained on the website after a separate gag order obtained earlier by Imvume against the *M&G*’s printed copy publication of the “Oilgate” story.

The power of the Constitutional Court was underlined in 2005 when it found against two lower courts in a case of *South African Breweries vs “Laugh it off promotions”*. The court found that a satirical t-shirt that parodied the breweries did not constitute a trademark violation. Former deputy president Jacob Zuma included a cartoonist in a suite of civil defamation cases he brought against the media in 2006.

There have been problems in the implementation of the Promotion of Access to Information Act and its use has been limited. A survey conducted by the Open Democracy Advice Centre in 2002 found that: “On the whole, POATIA has not been properly or consistently implemented, not only because of the newness of the act, but because of low levels of awareness and information of the requirements set out in the act. Where implementation has taken place it has been partial and inconsistent.” Almost half of public employees had not heard of the law. A larger problem pointed out by the Centre for the Study of Violence and Reconciliation is the poor records management of most government departments.

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2.9 TANZANIA

The United Republic of Tanzania was established in 1964 with the political union of the former colonies of Tanganyika and Zanzibar. The government of the islands of Zanzibar retains considerable local autonomy including in regard to media law and regulation.⁵

2.9.1 Relevant constitutional and broad provisions:

Freedom of expression

The Bill of Rights, introduced into the Constitution in 1984, included the right to freedom of expression. Article 18 reads as follows:

Without jeopardising the laws of the country, everyone is free to express any opinion, to offer his views, and to search for, to receive and to give information and any ideas through any medium without consideration to country boundaries and is also free to engage in personal communication without interference.

As it stood, this provision clearly elevated law over freedom of expression, but the offending initial clause was removed by amendment to the Constitution in 2005.

Freedom of the media (mentioned as an institution)

None. However, a proposed Constitutional Amendment Act published in 2007 includes reference to “freedom of the press and all other media”.

Right of access to information

Article 18 of the Bill of Rights says in clause (2): “Every citizen has the right to be informed at all times about different events taking place within the country and around the world, events that are important to his life and to the livelihood of the people and also about important social issues.” The 2007 proposed amendment to the Constitution says everyone has the right of access to: “a) any information held by the state; and b) any information that is held by another person and that is required for the protection or exercise of any rights.” It says legislation must be enacted to give effect to this right.

Whether limitations are “reasonable” in a democracy

There is no provision in the 1984 Constitution that declares it the supreme law of the land. Also, the Constitution has a general limitations clause on all rights and freedoms guaranteed under the Bill of Rights. Article 30(1), the general limitations clause, states that human rights and freedom may not be used by one person in a way that interferes with or curtails the rights and freedom of others or interests of the public. Article 30(2) states that the provisions for human rights, freedom and responsibilities do not “illegalise” in any way the established law or prevent any new legislation or any lawful act which is aimed at:

- a) ensuring that justice and freedom of others or interests of the public are not violated by misuse of freedom and individual rights;

⁵ Much of this chapter is drawn from Louw (2004) and White and Bujita (2005), but also updated in several important areas.

- b) ensuring the security, safety of the society, peace of the community, community health, rural or urban development programmes, production and utilisation of minerals, or development and promotion of resources or any other interests aimed at developing the well-being of the public;
- c) ensuring the implementation of judicial decisions or court orders reached on any civil or criminal matter;
- d) maintaining the reputation, justice and freedom of the majority of the people or the privacy of people involved in court decisions, prevent the disclosure of secret information, and maintaining the respect, authority and freedom of the court;
- e) imposing restrictions, administering and guarding against the establishment, operation and matters of unions and private organisations in the country; or
- f) allowing any other activity to take place that will help develop and preserve the interests of the nation.

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The 2007 draft amendments say: “The rights in the Bill of Rights may be limited only by laws of general application and to the extent necessary in an open and democratic society for the purposes of ensuring: a) national security; b) public order and the prevention of crime; c) public safety, health and morals; d) the rights of reputations of others; or e) the authority of the courts.”

Other media-related institutions mentioned in constitution (eg. regulatory bodies)

None. However, the 2007 proposed amendment says: “An independent body will be established by law to regulate broadcasting... in the public interest in a manner which ensures fairness and a diversity of views in the broadcasting, which are broadly representative of Tanzanian society.” It adds that “in the distribution of broadcast frequencies, regard should be had to the public interest in receiving information from a plurality of sources at the local as well as the national level”.

Constitution takes cognisance of international law

No.

Power of courts to assess constitutionality of media law

Article 30(5) of the Constitution allows for this. The proposed amendment to the Constitution refers to courts developing rules of common law to give effect to, or to limit, the rights in the Constitution. It also states that the High Court shall have original jurisdiction in terms of the legality of proclamations.

Constitutional right to reply

None.

Is there a national media policy?

The Media Law Policy was published in November 2003. It perpetuates the prior system of registration requirements for newspapers, and it also contains broad content restrictions. It proposes to bring internet services under the same law and regulations governing broadcast. It was reported in 2005 that the Zanzibar government was in talks over a new media policy, but no further information could be obtained in this regard.

International Convention on Civil and Political Rights accession	1976
African Charter accession	1984

2.9.2. Laws relating to the status of journalists (do they need to be registered?)

The Tanzania government website lists minimum qualifications for editors and journalists to be “accredited”, which appears to be a form of compulsory registration. In March 2007, the government published the draft Media Services Bill whereby all journalists should hold a recognised professional or academic qualification and be licensed by a central body, the Media Standards Board that is appointed by government. The Bill says: “No person shall practise journalism in Tanzania unless he/she holds academic and professional qualifications recognised by the Board.” These are defined as a university degree, a postgraduate diploma in journalism or mass communications, or other qualification to be approved by the Board. It is an offence to hire a non-qualified person to practise journalism, in terms of the Bill.

2.9.3. Laws and regulations on licensing media (print, broadcast):

Do print media need a licence?

The Newspapers Act, 1976, provides for the registration and regulation of newspapers in the country. In terms of Article 6, a newspaper may not be published or printed before the publisher, editor and proprietor have sworn an affidavit containing the name of the newspaper, a description of the building where it will be printed, and the places of residence of the publisher, editor and proprietor. In terms of Article 51) the Act does not apply to government newspapers. Article 9 stipulates that copies of the newspaper must be sent to the Registrar by registered post.

The Act imposes a fine and a jail sentence of up to four years on any person who prints or publishes a newspaper without registering it with the Registrar of Newspapers or furnishes the Registrar with false information regarding the paper’s particulars. The Registrar is appointed by the Minister and has full discretionary power with regard to the registration process. The Registrar can refuse to register (or can cancel an existing registration) if it appears to him/her that the paper in question may be used for any purpose prejudicial to, or incompatible with, the maintenance of peace, order and good government.

These amounts to licensing powers, and indeed the Act also gives the Minister wide discretionary powers to ban or close down newspapers. The Minister may prohibit publication of any newspaper “in the public interest” or “in the interest of peace and good order”. He or she may also prohibit the importation of a publication if he/she believes it is contrary to public interest. If an order to cease publication is disobeyed, the offending person can face a fine or a maximum prison sentence of four years, or both.

The Act allows the Minister to require a publisher of a newspaper to deposit a bond of an unrestricted sum against any possible monetary penalties or damages, which the newspaper may incur. Where the minister requires such a bond, non-payment can result in a fine or term of imprisonment of up to two years, or both.

The Registration of News-Agents, Newspapers and Books Act of 1988 provides for the registration, deposit and printing of newspapers and books in Zanzibar. Its stipulations are similar to those that apply to the mainland summarised above. The February 2007 Media Services Bill proposes to repeal the 1976 Newspapers Act, but maintains a system for registering newspapers. According to the Bill, only companies with at least 51% of shares held by citizens can apply to register a news-agency or newspaper (which is very broadly defined). Any-

one publishing a “newspaper” without registration would be liable to a large fine and up to four years in jail. Further, the Bill provides for the Minister to direct the Registrar to initiate a court case to ban a paper if it is found to have breached “national security or public safety or public order, or public morals, peace and good order”. For defying a ban, the penalty can be a jail sentence of up to five years, and a distributor of a banned publication can face two years in prison. The Registrar of newspapers and news-agencies has the power to refuse registration after considering the resources and training plans of the applicant. All registered operators must comply with a “Code of Standards and Ethical Practice” to be drawn up by the envisaged Media Standards Board.

According to ARTICLE 19, the need for the proposed registration for the media should be reconsidered, particularly in light of the fact that most if not all mass media are already registered under Tanzanian company law. If a registration regime is nevertheless found to be necessary, it should apply to true mass media outlets only, be of a minimal nature and be administered by an independent body.

Is there an independent licensing body for broadcast?

The Tanzania Communications Regulatory Authority Act, 2003, Article 4(1) establishes the Tanzania Communication Regulatory Authority (TCRA) to regulate telecommunications, broadcasting and the postal services. It merged the Tanzania Communications Commission and the Tanzania Broadcasting Commission.

Article 7 establishes the Board of Directors as the governing body of TCRA. It is made up of seven members: a Chairman and Vice-Chairman who are non-executive, four non-executive members, and the Director General who is appointed by the Minister responsible for Communications. The Chairman and Vice-Chairman are appointed by the President (one is from mainland Tanzania and one from Zanzibar). The Minister appoints the four non-executive members after consultation with the sector Minister (responsible for a regulated sector). In January 2006, the government announced the creation of a Ministry of Information, Culture and Sports.

Article 8 establishes a Nomination Committee that invites and shortlists applications for appointment to the Board and as Director-General of the TCRA. In terms of Article 12, the President may, acting upon the advice of the Minister after consultation with the relevant sector Minister, remove a member of the Board from office if the member is declared bankrupt, is convicted of a criminal offence, has a conflict of interest, is incapable of carrying out his duties or fails to attend at least two-thirds of all meetings of TCRA within a 12-month period.

Article 15 confers upon TCRA such powers to act as are conferred upon it by any legislation related to the regulated sector. The regulated sector is defined as including broadcasting, the allocation and management of radio spectrum and converging electronic technologies. This means, as White and Bujito (2005) point out, that to ascertain the powers of the TCRA, one has to have reference to the sector legislation, such as the Broadcasting Services Act (see below).

Article 47 empowers the TCRA, in consultation with the Minister, to make rules with respect to a code of conduct, records to be kept and information supplied to it. The Minister must be consulted by the TCRA prior to the regulator making any declaration. In addition, the Minister is empowered to make such regulations and rules as he/she considers necessary or desirable to give effect to the provisions of the Act. In the light of all this, including the composition of the authority and its appointment process, it cannot be said that Tanzania has an independent regulator.

White and Bujito (2005: 69) also point out that the regulation of broadcasting in Tanzania is not carried out by the TCRA alone and that the Act provides for the appointment of a number of related bodies each with specific functions. These include the Content Committee, the Internal Review Committee, and the TCRA Consumer Consultative Council.

The functions of the Content Committee, in terms of Article 27, include:

- advising the Sector Minister on broadcasting policy;
- monitoring and regulating broadcast content;
- handling complaints from operators and consumers;
- monitoring broadcasting ethics compliance;
- exercising the powers and carrying out the functions that TCRA may determine, including:
 - a) matters that concern the content of any broadcast;
 - b) the promoting of public awareness of broadcasting matters; and
 - c) making the TCRA aware of different regional interests that need to be taken into account by the Authority when carrying out its functions.

In terms of Article 26, the Content Minister (not the Minister of Communications) establishes the Content Committee which is made up of no more than five members, including:

- the Vice-Chairman of TCRA who is the Chairman of the Content Committee;
- four members appointed by the Content Minister after consultation with the Chairman of TCRA, who are appointed on the basis of their education, experience, skills and expertise and who do not have a conflict of interest; and
- an expert or any other person co-opted by the Content Committee as it deems necessary.

The Broadcasting Services Act, 1993

The Broadcasting Services Act regulates broadcasting in mainland Tanzania. This is the sector legislation for broadcasting referred to above. Article 4 of the Act provides for the establishment of the Tanzania Broadcasting Commission. Its main responsibilities are to issue licences to private broadcasters and generally to supervise them in terms of programme content and compliance with licensing conditions.

The TBC consists of a chairperson appointed by the Tanzanian Union president and not less than six or more than eight members appointed by the Union minister in charge of information. The Act does not guarantee the independence of the TBC's governing body nor freedom from government interference in editorial policy or decision-making.

In awarding licences, Article 11(3) (d) allows the TBC to specify the geographical coverage of a broadcasting licensee. The TBC has until now used this power to allow only government-owned radio and television stations to broadcast on a national basis.

Article 25 of the Act relates to national security and obliges any licence holder to broadcast any announcement "which the minister deems to be in the public interest". Additionally, if the Minister believes that broadcasting of any particular material would be contrary to national security or public interest, he/she may, by written notice, "prohibit the license holder from broadcasting such matter — and the licence holder shall comply with any such notice so delivered". "National security" and "public interest" are not defined.

Article 13(3) provides what is in effect a code of conduct for broadcasters. Licensees are required to:

- present news and current affairs factually, accurately and impartially;
- present a wide range of programming to reflect Tanzanian and Africa expression;
- serve the needs of and reflect Tanzanian society;

- make maximum use of Tanzanian resources in the creation of programming;
- limit advertising to 30% of the total daily broadcast time;
- comply with the Code of Conduct for the Media Professions;
- keep and store video recordings of all programming for at least three months after broadcast;
- disclose the name of the producer at the end of a programme; and
- respect copyright and other rights in respect of broadcast material.

The February 2007 Media Services Bill proposes to repeal the 1993 Broadcasting Services Act discussed above. The Bill, however, retains much of the Act. It also includes provisions whereby broadcasting without a licence may incur a large fine and/or jail sentence for up to two years. It gives the Minister the power to order the TCRA to ban the broadcast of “any matter or matter of any class or character” that would be contrary to national security, public order, public health, or public morals. The Minister may also make regulations on all matters related to effecting the provisions of the Act.

The Zanzibar Broadcasting Commission Act, 1997

The Act establishes the Zanzibar Broadcasting Commission (ZBC), which is the regulatory body for broadcasting in Zanzibar.

Article 6 provides that the Commission is made up and appointed as follows:

- the Chairman, appointed by the President;
- the Executive Secretary (who is the Chief Executive Officer), appointed by the President;
- between four and eight other members, appointed by the Minister responsible for Information;
- a state attorney, appointed from the Attorney-General’s office.

Article 7 describes its functions which include:

- issuing broadcasting licences;
- regulating and supervising broadcasting activities;
- maintaining a register of licensees, dealers (of broadcasting apparatus and broadcasting stations (premises where a broadcasting service is carried on);
- being responsible for standardisation, planning and management of the frequency spectrum;
- protecting the culture and traditions of Zanzibar;
- inspecting broadcasters;
- giving necessary directions to broadcasters; and
- performing any other function assigned to it by the President or by any other law.

Article 7(3) requires the ZBC to have a system of consultation, coordination and cooperation with other bodies having similar functions to it (i.e. mainly the TCRA). Article 1 prohibits any persons from operating a broadcasting service without a licence.

Article 15(3) of the Act is (like the mainland legislation) effectively a code of conduct for broadcasters and contains the same list of duties that broadcast licensees on the mainland are required to comply with, except that they relate to Zanzibari expression, needs and resources.

In terms of Article 4, the Minister is empowered to carry on broadcasting services in Zanzibar known as the Zanzibar Broadcasting Services (ZBS) which may be constituted in two branches, namely: Voice of Tanzania

Zanzibar and Television Zanzibar. The ZBS is thus a state broadcaster reporting to the Minister.

Article 27 empowers the Minister to:

- require any licence holder to broadcast any announcement which he/she considers to be in the interests of national security or the public interest; and
- prohibit a licence holder from broadcasting any matter which, in his/her opinion, would be contrary to national security or public interest.

By mid-2005 the government of Zanzibar had licensed nine private electronic media (including two television stations).

The February 2007 Media Services Bill says that the TCRA must supervise compliance with licence conditions and can impose sanctions that include fines, suspensions or even licence revocations.

Are three categories of broadcasting licensed (public, commercial, community)?

Confusingly, the Tanzanian Communications Regulatory Authority Act empowers the authority to licence the state-owned broadcaster to provide public, commercial and community services. This is not the same thing as broadcast tiers based on differing ownership regimes and service rationales. The February 2007 Media Services Bill refers to public, commercial and community tiers of broadcasting, but without defining these.

Are there limits on private broadcasting — eg. not in television, no national licenses offered?

Private TV and radio may not broadcast to more than 25% of the country under a government directive of 1994 made in terms of the 1993 Broadcasting Sources Act.

Is the board of the state-owned media independent?

It would appear that this is not the case, according to the Public Corporations Act, 1992. The Act relates to state-owned companies such as Radio Tanzania, TV Tanzania and state-owned newspapers.

Article 4(1) allows the President to establish a state corporation by Order. Article 6 provides that where government is the sole shareholder of a corporation, the responsible Minister may give the Board of Directors of that company direction of a general or specific character as to the performance its functions. Article 1 provides that every public corporation shall operate its business according to sound commercial principles which are defined as a real rate of return on capital employed of at least 5% or such other figure approved by the Government.

Article 8(1) provides for the establishment of the Board of Directors, which shall be responsible for the policy, control, management, and commercial results of the affairs of a Public Corporation. In terms of Article 9, where the government is the sole shareholder in a public corporation, the responsible Minister shall appoint the members of the Board. The board chair is appointed by the President on the advice of the responsible Minister.

Article 52 provides for the power of the President to make orders concerning any provisions of this Act. In terms of Article 56, the Minister may make regulations for giving effect or enabling effect to be given to the purposes and provisions of this Act.

According to the February 2007 Media Services Bill, the Minister has substantial powers over the Tanzanian Broadcast Services. The Tanzania News Agency Act of 200 vests the agency under the authority of the government's Information Services Department.

Are there public-service oriented statutes or licence conditions for the state-owned media?

The TCRA is supposed to ensure a Charter between Tanzanian Broadcasting Services (TBS) and the Minister responsible for public broadcasting and the “Content Committee”. Regulations for all licensees set out by the TCRA say that news must be accurate and impartial, and that “matters regarding political or industrial controversy be presented with due impartiality”. The 1993 Tanzania Broadcasting Act calls on stations to undertake various public service programming functions, and comply with a code of conduct for media professions. The 2007 Media Services Bill creates a Media Services Board that has to draw up a Code of Practice for Broadcasters that will apply to every broadcaster in Tanzania. In addition, all broadcasters would, in terms of the Bill, be required to present news and current affairs in an accurate and impartial manner, and “encourage the development of Tanzanian and African expression by providing a wide range of programming that reflects Tanzanian and African attitudes, opinions, ideas, values and artistic creativity”.

Are there licence conditions impacting on content — including local content?

As described above, the Broadcasting Services Act of 1993 requires, in terms of Article 13, licensees to:

- present a wide range of programming to reflect Tanzanian and African expression;
- serve the needs of and reflect Tanzanian society;
- make maximum use of Tanzanian resources in the creation of programming.

2.9.4. Laws on ownership legislation (eg. limits on cross- or foreign ownership).

Article 9(3) of the Broadcasting Services Act of 1993 sets out provisions limiting media ownership. The TCRA has to take into account when deciding on whether to grant an application for a licence the desirability of allowing a person to control more than one broadcasting service or more than one radio station, one television station and one registered newspaper which have common coverage/distribution areas.

In terms of Article 10, broadcasting licences may be held only by a citizen of Tanzania or by a company in which at least 51% of shareholding is beneficially owned by a citizen or citizens of Tanzania. Thus foreign ownership in a corporate Tanzanian broadcasting licensee is limited to 49%.

Article 12(1) of the Zanzibar Broadcasting Commission Act, 1997 sets limitations on ownership. An application for a licence may be made only by:

- a Zanzibari or a Tanzanian;
- a company registered in Zanzibar with a Government of Zanzibar shareholding of at least 20%; or
- a company registered outside of Zanzibar which is controlled by Zanzibaris and in which the Government of Zanzibar has a shareholding of at least 30%.

Thus any corporate entity holding a broadcasting licence will have at least 20% of its shares held by the Government of Zanzibar. White and Bujito (2005: 79) point out that “this has a significant impact on whether or not it can be said that there are genuine commercial or community broadcasting sectors in Zanzibar”.

Article 12(3)(b) provides that when considering whether or not to grant a broadcasting licence to an applicant, ZBC must consider the desirability of allowing any person to control more than one broadcasting service. Article 12(4) prohibits the ZBC from granting a radio and a television licence to the same person at the same time. However, the possession of exactly such cross-media holdings by a company such as IPP Media suggests more flexibility than might first meet the eye.

The 2007 Media Services Bill which proposes to replace the 1993 Broadcasting Services Act if passed leaves it to the discretion of the TCRA to decide whether to allow multiple broadcast ownership.

2.9.5. Other media-relevant laws covering:

Access to information

None. President Jakaya Kikwete announced in October 2006 that the government planned an omnibus law to guarantee access to information held by public institutions. However, civil service regulations are said to allow only a handful of high-level officials to relay information to the media. Government tabled a draft Bill on Freedom of Information in February 2007. This refers to “accredited media practitioners” (as envisaged by the Media Services Bill). It covers rights of access to information “held by public authorities or private bodies that is required for the exercise or protection of any right”, which is a narrower formulation than that proposed in the draft Constitutional Amendment Act discussed above. It deals with limitations and it requires that reasons be given for refusal with access. It lists exempt documents and an appeal process (including to the envisaged Media Services Board). It requires public authorities to give access to an exempt document when it is in the public interest in regard to matters such as abuse or neglect of authority, health or safety threats, or misuse of public funds.

Legal framework for state-subsidy of private media

None.

Defamation — including where it is a criminal matter

The Newspapers Act, 1976, also relates to defamation. Article 38 defines as an offence the publication of any defamatory matter with the intention to defame, and Article 39 defines as defamatory any material likely to injure the reputation of a person by exposing him/her to hatred, contempt or ridicule. The Act also places the onus on the defendant to prove innocence, rather than the complainant having to do so.

The February 2007 Media Services Bill proposes that publication of defamatory material is a civil issue, and also that it will incur no liability if found to be true. Further, any such content will be presumed to have been published in good faith that it was true unless the contrary is shown.

Insult laws

The Penal Code (1945) makes it a criminal offence for a person to make defamatory statements reflecting on proceedings or the character of parliament or one of its committees, or concerning a member in respect of his conduct in parliament. Further, it is also an offence to disclose details of a parliamentary committee’s investigations before the committee has reported to parliament itself.

The 2007 Media Services Bill abolishes special protection for public officials in regard to defamation.

Another law that limits reporting on the political leaders is the Public Leadership Code of Ethics Act (1995). The law requires every public leader to submit to the Ethics Commissioner, a declaration in a prescribed form, of assets and liabilities of himself/herself and those of his/her spouse and unmarried children. Article 32 stipulates conditions for allowing a person to inspect the register of assets and liabilities. A person wishing to examine this record must have lodged a complaint with the Commissioner against a public leader. Secondly, the Commissioner must be satisfied that the complaint is genuine, relevant and was made in good faith. The law, however, does not allow anyone who has met these conditions to make the information public through the

media. A person who peruses a property declaration of a public leader and then publishes or broadcasts or communicates it to the public commits an offence, which upon conviction, is liable to a fine or to imprisonment for a term not exceeding two years or both. There is thus no way in which information about the property of public leaders can be made available to the public through the media.

Harmful content: hate speech, pornography

Regulations for licensees set out by the TCRA say that “nothing which offends against good taste and decency or constitutes incitement to crime should be broadcast”.

The Films and Stage Plays Act, 1976, regulates the film, video and theatre industries. Article 3(1) prohibits any person from taking part or assisting in making a film unless the minister has granted him/her permission. Article 3(2) restricts the making of films by a person for his/her own entertainment or private exhibition to his/her family or friends. Under Article 30, the relevant minister has power to revoke a permit, license or certificate of approval issued to the holder. The circumstances in which the minister can do so are predicated on his or her interpretation of “public interest”.

Under the Media Services Bill of 2007, the government-appointed Media Services Board will hear complaints about hate speech, publication of “false news”, seditious material, child pornography and several other issues.

Security laws and official secrets

The Newspapers Act, 1976, also provides for the offence of sedition. It defines an act, speech or publication as seditious if it aims to bring lawful authority into hatred or contempt, or excites disaffection against the same, or promotes feelings of ill-will and hostility between different categories of the population. An action is not seditious if its intention is to show that the government has been misled or mistaken. Anyone printing or publishing a newspaper, who contravenes these provisions, is liable to a fine or a prison sentence of a maximum of three years, or both. In terms of Article 36(1), any person who prints, publishes, imports or sells a seditious publication is guilty of an offence. This article also stipulates that any person who publishes a false statement, rumour or report likely to cause fear and alarm or disturb the public peace is guilty of an offence.

The National Security Act, 1970, makes it a punishable offence for a person to obtain, possess, comment on, pass on, or publish any document or information, which the government considers to be classified. Any government official who discloses classified information without authorisation is liable to prosecution and anyone who receives or communicates any classified matter is guilty of an offence. The National Security Act prohibits public servants from disclosing a wide range of information, even that which has no bearing on the security of the state.

This legislation gives the government wide power to define what should be disclosed to, or withheld from, the public. The communication of classified information by a person other than a government official targets secondary disclosures by the media. It is not a defence under the Act that an accused person could not reasonably have known that the matter was classified. The penalty for the above offences is imprisonment for up to 20 years.

Article 12(1) of the Act states that “communication with, or attempts to communicate with, a foreign agent in the United Republic or elsewhere” will be presumed to be “for a purpose prejudicial to the safety or interest of the United Republic” and directly or indirectly useful to a foreign power, unless an accused can prove the contrary to be the case. This provision also reverses the burden of proof, placing it on the defendant.

Refusal by a person to provide information under the Act or for a person to supply false information is punishable by a term of imprisonment not exceeding five years.

In terms of the Penal Code, Article 55(1), it is a criminal offence to make statements likely to incite disaffection against the president or the government.

The Records and Archives Management, 2002, established a Records and the Archives Management Department to administer and better manage Tanzania's public records and archives. Article 16 gives the public, including the media, access to certain public records after 30 years unless a shorter or longer period has been prescribed by the Minister. A longer period than thirty years may be prescribed only when there is a need to restrict public access on the grounds of national security, maintenance of public order, safeguarding revenue, or protection of privacy of living individuals.

The Tanzania Intelligence and Security Service Act, 1996, does not specifically apply to media, but Article 16 provides for restrictions on published and broadcast information and prohibits any person from publishing in a newspaper or broadcasting by radio or television or otherwise, the fact that any person (other than the Director-General of the Tanzania Intelligence and Security Service) is a member of the Service or is connected in any way with a member of the Service.

2.9.6. Laws on reporting courts

The Penal Code's Article 114(d) deals with court proceedings and provides that any person who, "while a judicial proceeding is pending, publishes, prints or makes use of any speech or writing misrepresenting such proceeding, or capable of prejudicing any person in favour of, or against, any parties to such proceeding, or calculated to lower the authority of any person against whom such proceeding is being held or taken" will be guilty of contempt of court.

2.9.7. Laws and regulations on media and elections

The Elections Act, 1985, sets out strict guidelines for the state-owned media. It says that political parties contesting an election and candidates for the offices of President and Vice-President "shall have the right to use the state radio and television broadcasting service during the official period of the election campaign". It continues:

Every print media owned by the government which publishes information relating to the electoral process shall be guided by the principle of total impartiality and shall refrain from any discrimination in relation to any candidate journalistically and in the amount of space dedicated to him.

These legal provisions apply to the government or state media because they are funded out of public money and therefore belong to all Tanzanians regardless of political persuasion. The same principle does not, however, apply to privately-owned media, which are free to choose their own editorial policy. However, private media are still guided by the ethical standards of the journalistic profession. Media practitioners and other stakeholders drew up a code of conduct to govern media coverage of the 2000 elections. The code of conduct provides the standard against which the non-governmental organisation, the Media Monitoring Project, measured the professionalism of all media, public or private.

Regulation by the Tanzanian National Electoral Commission oversees the use of public-owned media during elections. This ensures that candidates for the office of the President and Vice-President as well as political parties participating in an election have the right to use public-owned media during the official period of elections campaigns.

Regulations for licensees set out by the TCRA also cover party political broadcasts.

2.9.8. Ethics and the law:

Statutory mechanisms to police professional ethics

Aside from licensing controls, there is no particular body. According to a 2006 US State Department report, the government has fined and suspended newspapers under a code of ethics that is supposed to be voluntary. The February 2007 Media Services Bill requires newspapers and agencies to comply with “Codes of Standards and Ethical Practice” to be drawn up by the government-appointed Media Services Board. Elsewhere in the Bill, reference is made to broadcasters being required to comply with ethics “as formulated in the Code of Conduct for Media Professionals”.

Non-statutory mechanisms

The Media Council of Tanzania is a voluntary non-statutory body that comprises academics, businesspeople, and prominent citizens chosen by journalists. The 2003 government policy document envisages the Council as continuing to deal with complaints and promoting ethics, but this body seems to be entirely marginalised in the provisions of the 2007 Media Services Bill for a statutory Media Services Board.

Right to reply provisions

None. However, the 2007 Media Services Bill proposes that broadcasters under certain conditions “shall broadcast a counter-version” by persons who are affected by an assertion of fact on any programming that is a false.

Confidentiality of sources

The Penal Code of 1945, Article 14(1), states that non-disclosure in court of a source may lead to contempt proceedings. The punishment, if found guilty, is a fine or imprisonment for up to six months. The Media Services Bill (2007) says that journalists have a right to protect their sources unless ordered to identify them by a High Court finding that this is necessary in cases of serious crime or to protect life, and where the same information cannot be obtained elsewhere and where the benefit of disclosure outweighs non-disclosure with regard to the flow of information and personal safety. Elsewhere, it says that defendants in defamation cases should not be required to reveal their sources.

2.9.9 Respect for freedom of expression and law by governments, media and others (including examples of whether the laws are enforced or not; if other laws — eg. citizenship — are used against media)

A controversial case in 2002 involved George Maziku, a correspondent for the Kiswahili-language daily *Mwananchi*, who was accused of “contempt of Parliament” for an article alleging that some reforms proposed by the legislature were biased in favour of the ruling party, Chama Cha Mapinduzi. Maziku also criticised lawmakers for a bill that would allow them to “entertain” constituents, arguing that such legislation would foster corruption. Police detained and interrogated Maziku, releasing him without charge a few hours later. However, he was threatened with further legal action.

In May 2002, journalist Abdul Kenge of *The Express* was arrested and held in police custody for four hours for allegedly harassing vice president Ali Mohamed. Reportedly, Kenge approached vice president Ali Mohamed for comment on a book. The Vice-President’s Press Secretary apologised to Kenge but told him that journalists should approach either the “press secretary or security guards before speaking to a dignitary”. Media observers in the country say this is not an official policy.

In 2002 the Media Council of Tanzania called for the repeal of several laws that restrict press freedom, in-

cluding the National Security Act, which essentially gives the government absolute power to define what information can be disclosed to the public, and the Broadcasting Services Act of 1993, described as empowering the government to directly regulate the media.

A 2004 MISA and UNESCO publication (Louw 2004) describes the legislation in Tanzania that impacts on media as:

among the most repressive in the SADC region; indeed, it is surprising that the print and broadcast media there are able to operate without constantly falling foul of the extreme censorship or of the various laws with punitive punishments. The media is in a most precarious position and balances on a knife edge.

According to MISA's April 2003 to March 2004 annual report, its work, together with that of other advocacy groups, made the government release the Media Law Policy in November 2003. The policy is seen as relatively progressive, positive and democratic, but has shortfalls such as that gender mainstreaming has been left out; that it has been too broad in defining media and that it puts more emphasis on obligation of the media than on the obligation of the state.

The 2004 report of Reporters without Borders said that press freedom is in good shape but also excluded the islands of Zanzibar from this opinion to a large extent because of the harassment of weekly paper *Dira* and its editor. In late 2003 the Zanzibar government banned *Dira* — the first private publication to be launched in the post-revolution era. The government alleged that it had violated professional ethics and fomented hatred between the government and its people. The paper had published two articles published in January 2003 which accused President Amani Karume's children of using their father's influence to purchase state-owned companies. *Dira's* application for a new licence was rejected.

Earlier in 2003 a letter signed by the Zanzibar Assistant Director of Immigration Services, Ali Khamis Ali, said the editor of *Dira*, Ali Nabwa had been staying in the country illegally because his passport issued in Zanzibar on 7 December 1993 was issued illegally. According to news reports, the Immigration Department explained in a letter dated March 19, 2003 that Nabwa had lost his rights as a Tanzanian citizen when he took up the citizenship of the Republic of Comoros as an adult. The letter quoted Immigration Act 1995, Article 4(a), which says that "a citizen of the United Republic of Tanzania shall cease to be a citizen if having attained the age of 18, he acquired the citizenship of some country other than the United Republic of Tanzania by a voluntary act other than marriage."

This action was similar to that of the Tanzanian government in 2001 when it refused the naturalisation of veteran journalist and chairperson of the Habari Corporation, Jenerali Ulimwengu, because he allegedly could not prove his parents' citizenship.

The International Press Institute's 2004 World Press Freedom Review said there were encouraging signs for journalists in Tanzania and that the independent media were becoming stronger and increasingly more confident. Independent organisations rivalled their state counterparts in both power and reach. There was also a growing acceptance from all sides that plurality of the media leads to greater democracy and an increased vibrancy. However, IPI continued to express concern about Zanzibar.

Tanzania has seen a proliferation of tabloids. There was much debate around this in 2002 as articles with sexual innuendo irked authorities and some sections of the public, leading the Prime Minister's office to release a four-page statement threatening legal action against any publication that violates "professional ethics". The

publications, some of which are sold for very little money outside schools, divided the media community. There were accusations of extortion, blackmail, and bribery in regard to the tabloids, and some members of the mainstream press distanced themselves from “pornographers”. During 2001 and 2002, the government shut down nine publications because of pornographic content.

In 2005, two newspapers were temporarily suspended for violating the 1976 Newspaper Registration Act for alleged ethical violations.

The US State Department 2006 report says there was selective advertising by government during 2005. The same source says that many journalists practice self-censorship for fear of the criminal penalties for defamation.

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2.10 ZAMBIA¹

2.10.1 Relevant constitutional and broad provisions

Freedom of expression

Part 3 of the Constitution of Zambia, from 1991 (amended in 1996), includes Article 20, which enshrines the right to freedom of expression and explicitly refers to freedom of the press. Article 20(1) reads:

Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.

Freedom of the media (mentioned as an institution)

Article 20(2) of the Constitution reads: “Subject to the provisions of this Constitution no law shall make any provision that derogates from freedom of the press.”

A draft constitutional review report has recommended changes that provide for freedom of all print and electronic media from interference, for the protection of journalists from disclosing sources and the editorial independence of the state-owned broadcaster and regulation of broadcasting by an independent agency.

Right of access to information

None. In June 2005, the interim report of the Mung’omba Constitutional Review Commission was released. It recommended among other things that the right of access to public information held by the State (subject to security considerations) and press freedom should be enshrined in the Bill of Rights. The government is, however, opposed to including a clause guaranteeing access to information, arguing that it would compromise state security.

Whether limitations are “reasonable” in a democracy

The Constitution, in Article 20(3), specifies:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision –

- a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or
- b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving

6 This summary of media law in Zambia relies heavily on the 2004 publication of Mochaba, Rafinetti and White. See the bibliography of this document for the full reference.

instruction therein, or the registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television; or

- c) that imposes restrictions on public officers; and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.

Article 25 makes provision for the suspension of fundamental rights, including the right to freedom of expression, during wartime or when a state of emergency has been declared under Article 30 of the Constitution.

Other institutions mentioned in constitution (eg. regulatory bodies)

None.

Constitution takes cognisance of international law

There is no reference to international law in the Constitution.

Power of courts to assess constitutionality of media law

The Constitution does not specifically refer to media in this regard but Article 28 provides the right to seek judicial redress if any of the freedoms enshrined by the Constitution are contravened:

if any person alleges that any of the provisions of Articles 11 to 26 [the articles relating to the protection of freedoms] inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court ...

Cases may also proceed to the Supreme Court.

Constitutional right to reply

None.

Is there a national media policy?

According to Banda (2005), the 1996 Information and Media Policy was in effect until 1999 when the Ministry set out to review it. In January 2005, the Ministry of Communications and Transport released the final draft of a National Information and Communication Technology Policy. Banda says that “there appears to be a lack of a coherent, consistent and comprehensive policy framework that addresses ... community communication, technological convergence, cross-media ownership strategies, local content, foreign investment in the broadcasting industry”.

Accession to international agreements relevant to media

International Convention on Civil and Political Rights accession	1984
African Charter accession	1984

2.10.2 Laws relating to the status of journalists (do they need to be registered?)

There is a purely administrative procedure that requires that journalists obtain press cards from the state's Zambian Information and News Service (Ziana).

2.10.3. Laws and regulations on licensing media (print, broadcast):

Do print media need a licence?

The Printed Publications Act, 1947, makes provision for the registration of newspapers, the printing and publication of books, and the preservation of printed works published in Zambia. It defines "book" as "every part or division of a book, pamphlet, newspaper, sheet of letterpress, sheet of music, map, plan, chart or table separately published" and "newspaper" as "any periodical publication published at intervals of not more than one month and consisting wholly, or for the greater part, of political or other news, or of articles relating thereto, or to other current topics, with or without advertisements, and with or without illustrations". It is illegal, in terms of Article 5, to publish a newspaper without first registering it with the Director of the National Archives.

Is there an independent licensing body for broadcast?

The primary purpose of the Independent Broadcasting Authority Act, 2002, is to provide for the control and regulation of broadcasting in Zambia and it establishes the Independent Broadcasting Authority (IBA) to do so. The functions of the IBA in terms of Article 5 include:

- promoting a pluralistic and diverse Zambian broadcasting industry;
- developing broadcasting in Zambia through a public process that determines the needs of citizens and social groups;
- issuing licenses with the view to discourage monopolies;
- developing advertising, sponsorship and local content regulations;
- obliging broadcasters to develop codes of practice and monitoring compliance;
- developing programming standards for the industry;
- receiving, investigating and adjudicating complaints.

Article 6 entrenches the independence of the regulator by stating that the IBA "shall not be subject to the direction of any other person or authority" except as otherwise provided for in the Act. Mochaba et al (2004) argue that the IBA's independence from the executive arm of government is eroded by the fact that the Minister of Information and Broadcasting Services appoints the members of the appointments committee for members of the IBA (Article 8). The Minister makes an appointment which is then subject to ratification by the National Assembly of Parliament.

At the same time, there has been a lengthy dispute about the power of the Minister to accept or reject the names provided by the appointments committee, before these are presented to parliament. The clause at stake reads: "The Board shall consist of nine part-time members appointed by the Minister, on the recommendation of the appointments committee, subject to ratification by the National Assembly."

The appointments committee recommended a list of names to the Minister who wished to veto some names prior to submitting them to the National Assembly for ratification. This issue dragged on through to 2007 and the IBA board has yet to be appointed (see below).

In terms of Article 7, IBA members appoint a chairperson and vice-chairperson from among themselves. In terms of Article 17 it may appoint its own chief executive officer (referred to as the Director-General) although

subject to ministerial approval. Article 18 allows the IBA to appoint its own staff but, again, subject to the minister's approval.

Article 19 prohibits the operation of a broadcasting service without a license. In terms of Article 19(2) there are five types of broadcasting license: commercial, community, religious, subscription, and public. A political party or organisation founded by a political party and a person who is not a citizen of Zambia may not hold a broadcast license. In terms of Article 20, the IBA may invite applications for new licenses to provide specific broadcasting services. Applicants are shortlisted and obliged to attend a public enquiry.

In terms of Article 28, a license remains in force unless revoked or suspended, but may be renewed if it expires in terms of set conditions. Article 29 stipulates that a license may not be bought, sold, leased or mortgaged. Article 30 empowers the IBA to suspend or cancel licenses and Article 31 permits it to refuse renewal. An opportunity to be heard is given and decisions of the IBA are subject to judicial review.

Article 23 stipulates that subscription broadcasting licensees may draw revenue from subscriptions, advertising and sponsorship. They may not acquire exclusive rights to the broadcasting of national, sporting or other events that the IBA determines to be in the public interest.

Article 24 stipulates that free-to-air television broadcasters must include significant proportions of Zambian drama, documentaries and children's programmes that reflect Zambian themes, literature and historical events.

Article 32 allows, when a state of emergency has been proclaimed, the President to make an order authorising an officer or an authority to take over or control any or all broadcasting stations.

Are three categories of broadcasting licensed (public, commercial, community)?

The IBA Act provides for the issuing of licenses across four tiers: public, commercial, community and religious, and subscription.

Are there limits on private broadcasting — eg. not in television, no national licenses offered?

No.

Is the board of the state-owned media independent?

The Zambia National Broadcasting Corporation Act, 1987 and the Zambia National Broadcasting Corporation (Amendment) Act, 2002, are the relevant laws here. The 1987 Act established the Zambia National Broadcasting Corporation (ZNBC) as the public broadcaster. Article 4 relates to the Board of Directors. It was repealed in the 2002 amendment and the relevant article now reads as follows:

- 2) The Board shall consist of nine part-time directors appointed by the minister on the recommendation of the appointments committee, subject to ratification by national assembly.
- 3) A person shall not be qualified to be appointed to the Board unless the person is committed to fairness, freedom of expression, openness, and accountability and when viewed collectively the persons appointed shall be representative of ... the population of the republic.
- 4) The Chairperson and the Vice Chairperson shall be elected by directors from among themselves.

Article 4(5) stipulates that the following people may not be appointed as directors of the ZNBC: non-citizens of Zambia, non-permanent residents, members of Parliament or local authorities, and office bearers or employees of any political party or their relatives, undischarged bankrupts, anyone convicted of fraud or dishonesty, and anyone convicted of a legal offence and sentenced to prison for more than six months without the option of a fine.

In terms of Article 4A(1) the ad hoc appointments committee established by the Minister to recommend members of the Board of Directors should consist of:

- a) one member nominated by the Law Association of Zambia;
- b) one member nominated by a non-governmental organisation active in human rights;
- c) one member nominated by religious organisations;
- d) one member nominated by the Ministry.

Article 4A(3) states that the “members of the appointments committee shall be appointed on such terms and conditions as the Minister may determine.”

Article 30(1) grants powers to the Minister to make regulations “to prescribe matters which are necessary for the better carrying out of the purposes of this Act.” The regulations may include registration of dealers with the ZNBC, the keeping of books and records, fees to be paid under the provisions of the Act, and any other matter required to be prescribed under the Act. The Corporation is empowered in terms of Article 26(1) to establish an inspectorate unit to ensure that consumers are complying with their obligations to obtain TV licences.

Mochaba et al (2004) write of concern among the media fraternity in Zambia that the board of the ZNBC is government-appointed and belief that this often translates as editorial control by the government. The 2002 Amendment was an attempt at reform of appointments to the board but, as with the IBA Act, the Minister has interpreted the legislation as enabling her to veto the recommendations of the appointments committee — leading to ongoing controversy (see below).

In 2003 the live Saturday-morning ZNBC television programme, “Kwacha Good Morning Zambia” was stopped. The programme was presented by two independent journalists who reviewed the front pages of all national daily newspapers. According to Mochaba et al (2004) a number of Zambian journalists believe that the government banned the programme as it was perceived as being too critical. In November 2006, the board of the state-owned *Daily Mail* fired the managing director of the paper because articles had been published saying that the opposition was leading in the September vote count.

Are there public-service oriented statutes or licence conditions for the state-owned media?

Article 7 of the ZNBC Act sets out the functions of the ZNBC. It was amended in 2002 to read that the corporation should act to:

- a) provide varied and balanced programming for all articles of the populations;
- b) serve public interest;
- c) meet high professional quality standards;
- d) offer programmes that provide information, entertainment and education;
- e) contribute to the development of free and informed opinions and as such, constitute an important element of the democratic process;
- f) reflect, as comprehensively as possible, the range of opinions and political, philosophical, religious, scientific, and artistic trends;

- h) respect human dignity and human rights and freedoms and contribute to the tolerance of different opinions and beliefs;
- i) further international understanding and the public's sense of peace and social justice;
- j) defend democratic freedoms;
- k) enhance the protection of the environment;
- l) contribute to the realisation of equal treatment between men and women;
- m) broadcast news and current affairs programmes which shall be comprehensive, unbiased and independent and commentary which shall be clearly distinguished from news;
- n) promote productions of Zambian origin.

In terms of Article 21, the ZNBC may derive its funds from monies payable to it or from monies appropriated by parliament. Article 24 requires the ZNBC to submit a report to the Minister each year detailing its activities during the previous financial year, which the Minister must then table before the National Assembly.

Article 33 of the IBA Act stipulates that the Zambian National Broadcasting Corporation (ZNBC) and all other licensed broadcasters develop a code of professional standards that provide for the protection of human dignity, human rights and freedoms, tolerance of different opinions and beliefs, unbiased and independent news broadcasts, observance of the right to reply, protection of the integrity of minors, and clear separation of advertisements from other programmes. Articles 34 to 37 make provision for the IBA to receive and to adjudicate complaints relating to breaches of the codes of practice.

Are there licence conditions impacting on content — including local content?

The IBA Act (see above) lists one of the functions of the IBA as to “develop regulations in regard to advertising, sponsorship, local content and media diversity and ownership”. It makes reference to “significant proportions” of Zambian content, as noted above. As the IBA had not yet been constituted by mid-2007, there do not appear to be regulations to this effect. However, some radio stations anticipating such regulation, have been increasing their transmissions of local music.

2.10.4. Laws on ownership legislation (eg. limits on cross- or foreign ownership)

Article 19(5) of the Independent Broadcasting Authority Act stipulates that a person who is not a citizen of Zambia may not hold a broadcasting licence. In relation to a body corporate this means a company in which less than 75% of shares are held by Zambian citizens. This Article also stipulates that political parties or organisations or legal entities founded by them may not hold a broadcast licence.

2.10.5. Other media-relevant laws covering:

Access to information

The Freedom of Information Bill, 2002, has not yet been approved. It was withdrawn from Parliament in 2003 as the state argued that it first wanted to monitor implementation of the Independent Broadcasting Authority and Zambian National Broadcasting Corporation (Amendment) acts and hold further consultations. This is a matter of much contention and concern among the media fraternity in Zambia and media freedom observer and advocacy bodies.

The primary purpose of the Bill is to provide for the right of access to information, to facilitate the availability of public information held by public authorities and access to information held by semi-private bodies.

The proposed Article 5 establishes the Public Information Commission. Article 6 proposes that its members be appointed by the President on the recommendation of the appointments committee and subject to ratification by the National Assembly. The Bill does not state who must appoint the appointments committee. However, it permits the members of the Commission to elect a chairperson and vice-chairperson from amongst themselves.

Article 10(a) stipulates that “every person shall have the right of access to information which is under the control of a public authority”. Article 10(b) further stipulates that every public authority make available information under its control and Article 10(d) stipulates that every private body make available, on request, information which it holds if reasonable evidence is shown regarding the purpose of the request. A person who requests information need not give any reason or justification for information requested.

In terms of Article 13, a public authority is exempt from releasing information if it involves the privacy interests of a third party. In terms of Articles 14 and 15 it may claim an exemption where disclosure of information could damage the security of Zambia or a foreign government or disclose “trade secrets and commercial or financial information”.

Article 20 requires public authorities to publish, amongst other things, descriptions of its structure, functions, and responsibilities, and general descriptions of the categories of documents they hold. Article 39 empowers the President to pass regulations on the recommendation of the Commission.

In terms of Article 28, reviews to the Commission do not preclude an aggrieved party from seeking redress before the High Court or the Human Rights Commission. If passed into law, it would be an offence to contravene the Bill. In terms of Article 38, offenders are liable on conviction to be sentenced to imprisonment.

Legal framework for state-subsidy of private media

None.

Defamation — including where it is a criminal matter

Article 191 of the Penal Code, 1930 defines as libel and an offence to, by means of print, writing, painting or effigy, publish any defamatory matter concerning another person with the intent to defame that person.

Insult laws

Article 69 of the Penal Code prohibits defamatory statements against the President, foreign ambassadors and other notables — including “foreign princes”:

Any person who, with intent to bring the President under hatred, ridicule or contempt, publishes any defamatory or insulting matter, whether by writing, print, word of mouth or in any other matter, is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding three years.

Harmful content: hate speech, pornography

Article 177 of the Penal Code, 1930 makes it an offence for any person to make, produce or possess any obscene matter that has the tendency to corrupt morals.

The Theatres and Cinematograph Exhibition Act, 1929 controls the use of theatres and cinemas. Article 7 empowers the Minister to appoint one or more Film Censorship Boards “consisting of such number of persons as the Minister may determine.” In terms of Article 8 1) a descriptive title of every film intended to be screened and copies of all posters advertising it must be sent to the Board. In terms of Article 9 appeals against acts or

decisions of the Licensing Officer or the Board must be made to the President. It is an offence to contravene the Act in terms of Article 10. An offender will be liable on conviction to a fine or to imprisonment for up to three months.

The National Archives Act, 1969, deals with preservation, custody, control and disposal of public archives, including public records. It impacts upon access to information in that, under Article 18, it prohibits that publishing or reproduction of any part of the contents of public archives or records that have been transferred to the National Archives without the written permission of the Director. A conviction in this regard results in a fine or imprisonment for not more than twelve months or both.

Security laws and official secrets

The power of the Penal Code Act, 1930, is summarised by Mochaba et al (2004) who say that Article 53:

allows the President to ban publications “in his absolute discretion” that in his opinion are contrary to public interest. However, anyone who wishes to import a particular edition of a banned publication into Zambia can apply to a competent authority for a permit to do so, provided that the authority is satisfied that the publication does not contain any matter that is contrary to the public interest. (The Code does not define what it means by a “competent authority”.)

Article 57 defines the printing, publishing or dissemination of seditious material as an offence. It is also an offence to import seditious material, even if the person importing the publication has no reason to believe that the publication is seditious.

Article 60 defines sedition very widely. It is seditious to:

- advocate the desirability of overthrowing the Zambian government by unlawful means;
- bring the Zambian government or the justice administration system into hatred and contempt and to excite disaffection against either of them;
- excite the people of Zambia to bring about change in the country unlawfully;
- raise discontent or disaffection amongst the people of Zambia generally;
- promote feelings of ill will or hostility between different communities or different parts of a community, as well as between different classes of the Zambian population;
- advocate the desirability of the secession of any part of Zambia from the Republic of Zambia;
- incite violence or any offence prejudicial to public order or in disturbance of the public peace;
- and
- incite resistance, either active or passive, or disobedience to any law or the administration thereof.

Article 60 contains a number of exceptions that save material from being classified as seditious. An action is not seditious if its intention is to:

- show that the government has been misled or has made a mistake in anything that it has done;
- point out any errors or defects in the government, the Constitution or any law with a view to reforming them;

- persuade the people of Zambia to bring about lawful change in the Country; or
- point out any matters which tend to create feelings of ill will or hostility between different classes of the Zambian population.

In terms of Article 61, editors, assistant-editors and publishers can be held criminally liable for the publication of seditious material, except if they can prove that the material was published without their consent. In terms of Article 58 the written consent of the Director of Public Prosecutions needs to be obtained before any person can be prosecuted for sedition.

Article 67 refers to the publication of “false news” and makes it an offence to publish any statement, rumour or report that is likely to cause fear and alarm to the public...” knowing or having reason to believe that it is false. It is no defence for the publisher to claim that he or she did not know or that he or she had no reason to believe that the material was false unless the publisher can show that he or she took reasonable measures to verify the information before it was published. Conviction results in imprisonment of up to three years.

The legislation makes it an offence for anyone to insult the national anthem of Zambia.

Mochaba et al (2004) summarise penalties for the offences described above as follows:

- the offence of sedition under Article 67 will attract a penalty of imprisonment for up to seven years or a fine or both;
- the offence of publishing false news under Article 67 carries a maximum penalty of three years’ imprisonment;
- the offence of insulting the national anthem under Article 68 attracts a maximum penalty of two years’ imprisonment;
- the offence of defaming the president under Article 69 attracts a maximum penalty of three years’ imprisonment.

Obscenity and state security

Article 177(1) of the Penal Code criminalises obscenity (imprisonment up to five years) without defining what constitutes obscene matter. Conviction can result in imprisonment of up to five years.

Article 4 of the State Security Act, 1969 Act makes it an offence (punishable with up to 25 years imprisonment) to retain or communicate to other persons any information obtained as a result of present or former employment with government.

2.10.6. Laws on reporting courts

Since 1957, the Penal Code has had an amendment that no live coverage is allowed in courts, nor can there be photographs in court or the making of any sketch or portrait of any of the actors in a trial. There are also provisions under various legislation that deal with contempt of court and prejudicial reports, which have a bearing on the media.

2.10.7. Laws and regulations on media and elections

Statutory Instrument No. 179 of 1996 is a legal instrument that provides the Code of Conduct for elections in Zambia. It derives its authority from Articles 17 and 18 of the Electoral Act of 1991. The media are covered in Article 8. Duties of the media are clearly spelt out as being to provide fair and balanced reporting during the election campaign, and in particular to:

- report election news accurately, and avoiding inflammatory racial or religious commentary;
- identify editorial comments and separate such comments from the news; and
- where media personnel broadcast their own commentaries, clearly identify this as their own and balance it in order to avoid bias.

The issue of airtime is also specifically addressed in Article 9. All television and radio broadcasters are required to allocate equal airtime to parties for their political broadcasts. A party is not allowed to purchase more than thirty minutes air time on television or radio except where one party's allocated time is totally or partially unused, in which case other parties may buy that extra time on a first come, first serve basis. Television and radio broadcasters shall not schedule any party's political broadcast or other political discussion or interview, opinion poll result or broadcast prediction of the result of polling day until the polls have closed.

Further, media are expected to have an election results programme to keep the electorate up to date with progress of the vote-counting process. In addition, media are required to avoid unfounded speculation which may cause instability. This is a requirement under Article 10.

Television and radio stations must:

- maintain full records of all television and radio news bulletins and recordings of all other programmes related to the election, including party political broadcasts and shall institute a close and meticulous monitoring system to ensure balance through-out the campaign and up to the close of poll; and
- provide the Electoral Commission at any reasonable time with all such records, information and recordings as the Commission may require to fulfil its monitoring role.

However, despite all this law, the ZNBC was said to have offered substantially less coverage to opposition candidates than those of the ruling party in the September 2006 elections. (US State Department country report for 2006).

2.10.8. Ethics and the law:

Statutory mechanisms to police professional ethics

There is no body in place beyond the existing laws.

Non-statutory mechanisms

The Media Council of Zambia (MECOZ) has been established as a non-statutory, voluntary, self-regulating council. It has drawn up a code of ethics that sets out the journalistic standards that its members are expected to follow. Mochaba et al's (2004) summary is reproduced below:

1. Journalists must report the truth and represent what their sources tell them fairly, accurately and objectively;
2. Newspapers should carry headlines that are fully warranted by the contents of the articles that they accompany. Likewise, photographs and telecasts should give an accurate picture of an event and should not highlight an incident out of context;
3. Journalists must respect the confidentiality of sources to which they have pledged anonymity;

4. Journalists should only use fair methods to obtain news, photographs and documents except where the overriding public interest justifies the use of other means;
5. Journalists must not accept bribes or compensation in any form in consideration for the dissemination or suppression of information;
6. Journalists should promptly correct any harmful inaccuracies and should ensure that corrections and apologies receive due prominence. Where necessary the person affected must be afforded the right to reply in order to get a balanced view;
7. Journalists should not encourage discrimination on arbitrary grounds such as sex or race;
8. Journalists should not obtain secondary employment, become involved politically, hold public office and serve in community organisations if it is going to compromise their integrity or that of their employers;
9. Plagiarism as a dishonest practice;
10. Journalists should respect the moral and cultural values of Zambian society. Journalists are also encouraged to respect the privacy of others unless the public interest demands otherwise.

MECOZ is responsible for enforcing compliance with the Code and may impose the following penalties on persons who breach the Code: a reprimand, a demand that the error corrected within two weeks, a demand that an apology be published within a specified time, or a demand that compensation be paid to the complainant. However, MECOZ appears to lack full backing of its membership in terms of enforcing penalties on errant media houses. In addition, some private media such as *The Post*, are not members of the organisation.

Right to reply provisions

None, although there are in-house media policies in many cases.

Confidentiality of sources

The Criminal Procedure Code Act, 1933, has disclosure provisions that impact directly upon the media. Article 143 authorises the courts hearing criminal matters to compel witnesses to attend court and to give evidence if it appears that the witnesses are able to give material evidence or if they have documents in their possession that are relevant to the case. In terms of Article 145, a court may issue a warrant for the arrest of any witness who has been subpoenaed but who does not attend court without a lawful excuse.

The significance for the media is that this legislation allows courts to force journalists to disclose their confidential sources of information.

2.10.9. Respect for freedom of expression and law by governments, media and others (including examples of whether the laws are enforced or not; if other laws — eg. citizenship — are used against media)

Zambia has a long history of media law being used against journalists, and at the same time of governmental foot-dragging when it comes to abiding by laws and policies to do with privatisation and/or conversion of governmental broadcasting into public broadcasting. The latter seems evident around the long-dragging saga of the Minister refusing to process the nominations for both the ZNBC and IBA boards. In December 2005, the High Court rejected a government attempt to stay a judgement pending the authorities' appeal against it to the Supreme Court. As a result of this decision, the government was supposed to respect the original ruling, made in December 2004, that the Minister of Information and Broadcasting Services should present to parliament the names that were

recommended by the appointments committee for the ZNBC and IBA boards. That original judgement itself was the result of civil society media groups having to approach the courts to break the logjam. However, since then, the government has secured a favourable ruling in the Supreme Court and is not bound by the recommendations of the appointments committee, although parliament presumably still has the power to ratify government's proposed list. Yet, there still seems no movement on the establishment of the boards of the IBA and ZNBC. Notwithstanding the Supreme Court ruling, it would appear that the spirit of the original legislation was to empower parliament, rather than the Minister, to be the primary power in deciding who would be on the boards of ZNBC and IBA.

Another important court case, and whose precedent still stands, was *M'Membe & Mwale vs. The People* (1995-97) ZR 118 (SC). The principles in the case apply equally to the print and the broadcast media. The case upheld the constitutionality of Article 69 of the Penal Code which criminalises the offence of defamation against the President. In this case, the two accused had been charged and convicted in a magistrate's court with contravening Article 69 of the Penal Code for allegedly defaming the President. They appealed on the basis that the law violated the right to freedom of expression. The court upheld the constitutionality of this article in the Code, stating that the maintenance of the public character of public men for the proper conduct of public affairs was a very important public interest that ranked alongside freedom of speech. The court reasoned that this public interest required that they be protected from destructive attacks upon their honour and character and that when the public person was the head of the state, this public interest was even more self-evident.

In 2002, journalists at the newspaper *The People* were arrested and pressured to disclose a confidential source of information about an article alleging that the President was suffering from Parkinson's disease. The editor was also charged with defaming the President, but the case was withdrawn and detainees released after they identified the source.

In January 2003, three journalists of the *Monitor* were arrested after the paper published an article alleging that the President's brother was involved in corruption. However, the case did not come to court. In November 2005 *The Post* chief editor, Fred M'membe again pleaded not guilty to a charge of defamation of the President. He is alleged to have published, in a 7 November 2005 editorial, that "[President Levy Patrick Mwanawasa] exhibited foolishness, stupidity and lack of humility" with regard to the adoption of the proposed new constitution. Charges were dropped in 2006.

Courts have also interpreted law in a way that reduces arbitrary repression by the authorities. A case here is the closure of a privately-owned broadcaster Omega TV. The broadcaster was granted permission by the Minister to run on a test transmission basis. In November 2003, police officers raided the station and ordered staff to immediately cease test broadcasts. This was after a letter from the Solicitor-General to the Minister of Information and Broadcasting Services which said that the station was operating illegally and should be shut down by police. The Minister cancelled the temporary broadcasting licence stating that it was "in the public interest" and that the station was operating illegally, even though it had been given a test transmission licence. In December 2002, the High Court ruled against the government, thereby validating the need for an independent IBA and the principles in the Constitution.

In January 2004, in what the International Press Institute's 2004 World Press Freedom Report refers to as "an effort to limit foreign influence on Zambian listeners", the Ministry of Information and Broadcasting Services (MIBS) banned the community-based commercial radio station Breeze FM in Chipata, from airing BBC programmes. It was argued that in terms of licensing conditions, the station was only permitted to carry foreign news from the Zambia News Agency, the Southern African Broadcasting Association and the Pan African News Agency.

In 2003, the government tried to introduce a new licence condition to permit only indigenous Zambians to hold a broadcasting licence. This was apparently aimed at the proprietor of Radio Phoenix who was born in Zimbabwe but who resides in Zambia. The law was not passed, but Radio Phoenix has since avoided any controversy in relation to government.

The 2003 to 2004 report of the Media Institute of Southern Africa speaks of their campaigns for the re-introduction of the Freedom of Information Bill in parliament and the reluctance of the Minister of Information to take a stand on the matter.

Reporters without Borders, in their 2004 report, expressed concerns about harassment and intimidation of journalists who are critical of the state. The International Press Institute’s 2004 World Press Freedom Review expressed concern about the predominance of state-run broadcasting and the lack of political reportage on private radio stations whose journalists who provide critical opinions do so at the risk of recrimination from the state. They lamented that a foreign journalist was threatened with deportation and foreign radio broadcasts were banned and that several Zambian reporters were harassed, intimidated and assaulted for expressing ideas that were perceived as critical of the authorities. The “foreign” journalist referred to is Roy Clarke who in 2004 wrote a satirical piece in *The Post* comparing the President to a “foolish elephant” and two government ministers to “baboons”. In response to the article, the Zambian Minister of Home Affairs attempted to have Clarke, a British national and a permanent resident of Zambia, deported to the United Kingdom. Clarke successfully challenged the deportation order in the Lusaka High Court. Government has continued to appeal the ruling at the Supreme Court.

The ZNBC in 2006 came under strong criticism for allegedly defying the Electoral Code of Conduct by skewing airtime towards the ruling party.

In May 2007, the Information and Broadcasting Services Minister was accused of intimidating a commercial radio station, although he claimed to have only been inquiring about a complaint. Even if the latter was the case, the intervention demonstrates the need for a functioning IBA able to process complaints independently of government. The Minister’s predecessor in 2006 had also threatened to withdraw licenses from stations that failed to abide by the law. In that speech, the predecessor announced that the government would be cautious about enacting a freedom of information bill. Even a year prior to this, the government had not only, as noted earlier, opposed clauses in the draft constitution that provided for access to information, but also those providing for protection of media from government interference, and partial shielding of journalists from disclosing their sources.

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Chapter Three

COMPARISON OF MEDIA LEGISLATION BASED ON VARIOUS THEMATIC APPROACHES

3.0 Introduction

This chapter provides national comparisons, analysing the summarised, schematic overview in Appendix 4 (which can be profitably consulted while reading this chapter).¹ The analysis below is based on a maximum standard for free expression and transparency, as expressed for example in the DPFEA. Africa should be assessed at this level, and it would be insulting to operate with any lower level benchmark.

3.1 Constitutional provisions and status

Limitations of rights

The country constitutions described in this report do not provide for unfettered rights to free expression. There are limitations in all of them, whereby rights can be weighed against each other or set aside for other reasons, providing thereby a rationale of defining what inroads can legitimately be made into freedom of expression and the media. However, in terms of international best practice, the majority of the criteria for limitations should be coherent with the ICCPR standards, and also take guidance from the Johannesburg Principles and the Africa-wide and sub-regional accords where applicable, and not to forget the highly pertinent African Declaration (the DPFEA).

Approximately one third of the constitutions studied do not come close to meeting the conditions laid down by these instruments, such as the parameter of democracy. Further, reference to necessity (and thereby proportionality) in restrictions is generally absent in most of the countries surveyed, which creates space for arbitrary action and politically-biased interpretation of restrictions on the part of the authorities. Changes are needed if the countries concerned are to meet the international standards for acceptable limitations of rights.

Judicial review

It seems that some countries, like Ghana, Ethiopia, and to an extent, Tanzania, do not have an explicit legal system whereby their constitutions serve as the standard against which other laws, including media ones, can then be tested in court. This situation weakens the overall rule of law, and risks rendering constitutional principles into hollow symbols rather than effective realities. The situation also accounts in part for the persistence of seeming contradictions between the spirit of a constitution and the terms of certain legislation (as in Ethiopia, for example).

¹ It should be noted that the tables in this Appendix have entailed complex judgements about how to compress detailed information collected from the countries reviewed into short “bottom-line” assessments. Different analysts may produce alternative conclusions to those given in this report. For example, an assessment about whether constitutional limitations on freedom of expression are “reasonable” is open to contestation, as it is the interpretation of whether “free reporting” of courts is possible. The same goes for whether registration of journalists always amounts to licensing.

Respect for international law and obligations

As noted, the countries under review are all signatories to several international conventions, protocols and treaties. In many cases, such international commitments should “trump” the legal regime in a given country. The question is whether this is the case and what is the domestic legal influence of these international accords. The issue under consideration here is not whether a government’s actions against media are lawful (as important as this is), but whether the laws are “good” or “bad” when measured against international standards. In this regard, the African Charter and also the SADC Protocol on Culture, Information and Sport, which provide that the media sector must operate “in accordance with the law”, fall short. However, where a constitution makes special reference to international agreements (as happens in half the countries studied here), this provides more leverage for reforms in order to ensure that national laws conform to those standards.

Specific mention of media freedom

Many of the constitutions specifically mention freedom of the media (as an institution) alongside freedom of speech (for individual citizens), but not all. For example, Tanzania’s and Kenya’s constitutions do not. This gap weakens the potential protection of media freedom. On the other hand, constitutional recognition of the media may also open the door to related definitions of who constitutes the media, and from there, in turn, who counts as a journalist. As noted in Chapter 1, this logic can lead to politically-motivated exclusions of certain persons from exercising their freedom of expression through the media, or to the laying down of legal responsibilities and obligations which curtail freedom of expression for a category of citizens. It is therefore a moot point as to the benefits of a constitution leaning in one or the other direction. On balance, however, it is probably more positive to have specific reference to the media as an institution, than not to.² It carries some weight to have specific recognition of an aggregate of people collectively exercising freedom of expression, according to journalistic codes of conduct, and constituting a social institution that plays an important institutional role from the point of view of democracy. Having freedom of expression but not an explicit right to media freedom in a constitution is a bit like having the right to vote but without the right to form political parties.

Whether a constitution mentions media freedom or not, however, it is certainly a positive thing to have constitutional enshrinement of media-related matters such as an independent broadcast regulator (South Africa), an independent body to oversee public media (Ghana), and public media having to be impartial (Mozambique, Ethiopia, Ghana).

Access to information

The constitutions of Mali, Tanzania, Nigeria and Kenya are among those that do not recognise a real right to access information. While this does not negate the possibility of subordinate legislation to this effect, the constitutional lacuna does not help strengthen the realisation of this right. The absence also serves to reduce the significance of free expression, given the way these two distinctive issues constitute, as argued in Chapter 1, the two sides of the same coin. A report in February 2006 recorded no pending legislation in Ethiopia, Mali and Senegal (Vleugels, 2006), probably because of the vague progress in these countries. Worse, draft laws had stalled or ground to a halt in half of the countries surveyed.

² It is recognised that the rise of new media and citizen journalism makes it increasingly difficult to draw clear distinctions as to what constitutes “the media” as distinct from other groups and individuals involved in mass communication. However, this complexity does not (yet) eliminate the distinctions altogether.

3.2 Licensing

Licensing of journalists

Registration of journalists may be *pro forma*, which begs the reason why it is then even necessary. In some cases (Senegal), it may bring recognition of special rights. But more often (and over time) it is also likely to bring special statutory responsibilities (such as in Mali). It may also criminalise unregistered practitioners, although the law is not always clear if registration is voluntary or compulsory. In Senegal, journalists' profession is defined in the country's constitution and they are required to register. In Mali, this is taken further and only individuals with certain qualifications can practice as editors. In Tanzania, Kenya and Ethiopia, draft press laws have proposed registration of journalists with defined qualifications being required. In Mozambique, journalists are defined in the law, but are not required to register. In Nigeria, registration is required, and especially if journalists wish to cover the government. SADC countries, according to the 2000 Protocol, are supposed to operate a system that is somewhat ambiguous.

One danger of registration, although not the only one, is that its converse may be de-registration or refusal of registration. This exclusionary power violates the general right to freedom of expression. In particular, it can provide a legal cover for authorities to make politically-motivated decisions to ban critical individuals from practising as journalists. Although cases of this were not evident in this research, the legal potential means that it could occur in the future in the applicable countries, and this should not be ignored. Only in three of the ten countries surveyed (South Africa, Ghana and Mozambique), there is an unambiguous right for any citizen to exercise his or her freedom of expression through journalism.

Licensing of print media

The rationale for singling out print media is, in principle, not naturally given. This is increasingly acute in an age when other forms of disseminating communications via cellphones or websites usually do not have such a requirement — and indeed where new media can defy national registration by being based outside the jurisdiction of a given state. Most countries studied here, however, require newspaper registration, and some also attach some conditions as part of this process (such as adherence to codes of conduct in Tanzania and Mali). This provision means that the threat of deregistration exists, and there do not always seem to be clear procedures for assessing non-compliance with conditions, nor for appealing against decisions. Relevant here is the status of the body in charge of registration (or deregistration), and whether it is sufficiently independent to obviate the dangers of political abuse. In many cases, such as Zanzibar, government is the licensing authority and can (and does) effectively ban any publications it deems undesirable.

On the model of independence spelt out in Chapter 1, most of the licensing authorities considered in this study — whether they regulate individuals (journalists) or media institutions (print or broadcast) — are still a long way from being fully independent.

Licensing of broadcasting

The argument for licensing broadcast (and for other uses of the airwaves) is to ensure an orderly allocation of frequencies that are both a finite and a public resource. This presumption holds even in an environment of less scarcity — i.e. digital broadcasting (although Africa is anyway only taking early steps in this regard). However, in South Africa, low-powered broadcasting is exempted from licensing, and so is the World Space satellite service (although other satellite broadcasters seeking to collect revenue in South Africa do require licenses). As with print licensing, the question of the independence of broadcast (or telecommunications converged) licensing

bodies is significant. Fewer than half the ten countries surveyed have independent regulators, and many give the power directly to government ministries. The powers and process of appointment for the regulators is an important issue in ensuring the extent of their independence. A dispute over this matter has delayed the effective implementation of the *Zambian law* since 2002.

Tiers of broadcast licences: public service, commercial and community

The African Charter on Broadcasting and the DPFEA both specify the need to distinguish three sectors of broadcast licensing: public, community and private. However, although many countries have licensed community radios, not all of them actually have clear legislation or regulation about the specificity of this sector. Mozambique is one country which has had proposals in the pipeline for several years, but without results. In Senegal, government has not yet allowed for the licensing of private television to do news programming on a national basis. In Nigeria, only one community radio station has been licensed.

In many cases where a dedicated licensing body does exist, the state-owned broadcaster remains outside the common licensing framework, and it is only the non-state broadcasters who are accountable in such terms. State-owned broadcasters instead report directly to their governments. At the same time, most countries (as a matter of policy — rather than law) prohibit private broadcasters (whether commercial/private or community) from acquiring national licenses. These issues are matters of controversy, and they are sometimes seen as unfair market competition and as conflicting with rights to free enterprise on a level playing field. An independent regulator overseeing all broadcasting matters can reduce these problems — and also insulate a state-owned broadcaster from government interference, but such an institution is only found in one of the ten countries studied (South Africa).

Independence of state-owned media

The appointment of the boards of state-owned media and the constitutional or legislative enshrinement of this sector's impartiality are important points for comparison among countries. At one extreme, Ghana specifies this in its constitution, which also designates a body to implement this (the National Media Commission). Senegal has the experience of a body that has criticised state-owned media for biased content. South Africa has a parliamentary process of appointment and oversight of the SABC Board, plus a legislated Charter for the public broadcaster setting out the broadcaster's political independence. In total, at least half the countries treat their public broadcasters the same as any other parastatal companies, with the governments directly appointing their leaders, who in turn account only to them. This practice clearly fails to follow the positions outlined by the DPFEA and international jurisprudence.

3.3 Access to information laws

Constitutional provisions in this regard (where they exist) seem to have seldom been successfully followed by enabling legislation, except in South Africa and, in part, Mali. Mozambique, Ghana, Zambia, Ethiopia and Kenya have produced draft proposals over the past five years, but progress on this matter has been very slow. Nigeria and Zambia have, in effect, scotched momentum towards such laws, and Ghana may be in the process of doing the same.

3.4 Limits on foreign ownership

Most countries set limits on the extent of foreign ownership of media.

3.5 Concentration of media ownership

Half the countries, sometimes correlated with the larger economies, have restrictions in this regard. Tanzania and Kenya have substantial cross-owned enterprises.

3.6 Content controls

Harmful content

The Rwandan genocide that was part fuelled by radio programming underlined the need for hate speech to be regulated by a judiciary independent of the ruling political party. Many countries control this kind of speech in terms of their licensing conditions. It does not seem to have been necessary to ever invoke this power to cancel licenses in the countries studied in this survey. South Africa, also reflecting its own history, has a Film and Publications Act that covers hate speech in media outside of broadcasting and self-regulated mainstream newspapers.

Most countries surveyed also have laws or registration conditions that can control pornography. Broadcast codes of conduct, where they exist and have some legal backing (e.g. South Africa), can also serve as an appropriate mechanism. Some countries have specialised laws to deal with these issues (such as the Film and Publications Act in South Africa, or the Film and Stage Plays Act in Tanzania). However, the penal code decency provisions are often too wide. As used in Nigeria, Zambia, Mozambique and Tanzania where such codes also cover “seditious” content and “false news”, this kind of broad legal apparatus can also serve politically-motivated interpretations and implementation.

Local content

Senegal, South Africa and Zambia are countries with rules promoting or protecting local content in broadcasting. Mozambique, Mali, Ethiopia, Ghana and Kenya have no such system. The aim of such regulation is to promote indigenous freedom of expression, and to ensure that it is not drowned out by imported culture.

3.7 Defamation and insult laws

Defamation continues to be taken as a criminal act in most countries, except in South Africa and Ghana. Insult laws regarding the presidency are also very common, and in Mali and Tanzania they extend to encompass members of other state institutions including the parliament. These provisions seem to constitute a high percentage of the legal instruments deployed by governments against journalists, and they are a source of much protest among many sectors of society. Most recently, insult laws were the focus of criticism in the Declaration of Table Mountain, adopted in Cape Town in June 2007 by the World Association of Newspapers and World Editors Forum. An annex to the Declaration says that in the first five months of 2007, year, 103 African journalists were harassed under insult and criminal defamation laws.

It is questionable whether such laws are compatible with democracy. Some Latin American countries and some old-established democracies, such as France, retain similar legal powers, despite the contrary direction taken by the majority of international instruments. African countries can do better than this, however, by scrapping such laws from statute books altogether. The case of Mali in 2007 shows that these kinds of provisions may lie dormant for years but still end up being used against the media.

3.8 Laws on right to reply

Mozambique, with the most complete legislation on this issue, has a constitutional entry on the right of reply with a legal regime that can enforce it. Ghana also has it inscribed as a constitutional right, while Mali and

Senegal have legal provisions, but no constitutional mention. In the other countries, the notion is a voluntary component of self-regulation or simply absent. Both state-owned and private media often violate rights to reply, but it is a moot point from a free expression point of view as to whether it should be a legal requirement as distinct from being part of a voluntary and self-regulated code of ethics that is effectively enforced outside of governmental authority.

3.9 Protection of confidential sources

Only in Mozambique (in the constitution), in Senegal and in a draft press law in Ethiopia is this protection given legal status. The absence of such provisions puts pressure on journalists to reveal their sources of information in countries such as South Africa and Kenya (and, in Ethiopia, as it is under current law).

3.10 Reporting the courts

Information here is hard to come by. Most countries allow limited access to reporting on court cases, with some exceptions, and often it does not include television. This is a component of the right to information, and the degree of transparency of proceedings in the African Court on Human and Peoples' Rights that emerges, for instance, could become a role model in this regard.

3.11 Laws and regulations about media coverage of elections

Almost all countries have such a formal and elaborated legal system on this issue, usually operated by national electoral commissions. A wide diversity of regimes exists, with most of them also requiring political impartiality from the state-owned media. While this regulation is sometimes respected, it is also very often a matter of contestation (even in the courts) as regards its actual implementation — such as in Senegal and Zambia.

3.12 Other laws deployed against the media

Zambia and Tanzania have seen government action against media personnel by means of applying citizenship laws to try to disqualify media critics. The penal code has been used in Ethiopia and the Official Secrets law in Kenya. These instances do not square with most of the international accords on legitimate intrusions into freedom of expression. In particular, disproportionately heavy sentences in countries like Ethiopia are at odds with international jurisprudence.

3.13 Ethical standards and the law

South Africa recognises the role of independent bodies in upholding professional standards, as in the Broadcasting Complaints Commission of South Africa and the Press Ombudsman (since 2007, now “Press Council”). Statutory bodies also exist like the Complaints and Compliance Committee of the South African regulator, the High Council (CSCS) in Mozambique and the National Media Commission in Ghana. In many countries, unrecognised private bodies, such as Zambian journalists' organisations or Senegal's CRED, play this role but without much practical authority.

There are also countries where governmental bodies directly enforce standards, such as through warnings, application of license conditions and even withdrawal of the licence. Some specify codes of conduct, others do not. In some cases such as Kenya, a statutory body has been proposed by government to ‘police’ ethical conduct. International best practice puts the emphasis on effective self-regulation, with the onus on the media industry to ensure that its members live up to codes and ethics.

3.14 Laws authorising governments to subsidise private media

South Africa, Mali and Senegal have such systems. The independence of these systems, however, merits further detailed research. Cases of government partisanship in placement of state-controlled advertising have been reported in Kenya.

3.15 Do governments act according to the law?

It appears that in these democracies, most governmental actions against the media are taken in terms of one law or another, rather than by *ad hoc* or unofficial violence and harassment. However, lower officials and policemen occasionally act outside of legal frameworks in obstructing or harassing journalists. Governments are seldom at the forefront as champions of investigation or redress in these unfortunate instances. Government commitment to freedom of expression, apart from the mixed case of Mali and to an extent South Africa, is not always evident in the political will.

3.16 Do the media respect the law?

Generally, there appears to be a culture of abiding by the law, even when the law itself does not respect rights to communication. However, tabloids in Zanzibar have been accused of violating regulations, and South African media has frequently ignored *sub judice* restrictions as well as other limits. Media's business interests in some cases and its ethical beliefs in others, do sometimes lead it into pushing the limits of freedom of expression. The resulting excessive sensationalising at one extreme, and the dedication to professional vocation at the other, can sometimes conflict with "law" when it comes to interpretations of what is in the public interest. It is hard to see, however, how media professionals can genuinely respect those legal provisions that flagrantly violate international standards on communications rights.

Chapter Four

A CRITICAL ANALYSIS OF FACTORS CONTRIBUTING TO THE EXISTING SITUATION

A complex of factors related to policy, history, public awareness and political will have contributed to the existing legislative situation on media and freedom of expression and information.

4.1 The policy vacuum

One major factor affecting media law anywhere is public policy. While law often informs regulation and micro-policies, statutes typically reflect, formally or informally, a broader policy regime to greater or lesser degrees. As the SADC protocol (2000) puts it, “media policy” is “a general framework and guidelines adopted by Member States, which set out the basis for media diversity and development”. However, it appears that in half of ten countries covered here, media policies are out of date or not explicitly articulated and/or developed in final form by respective governments. There have been decades of activities encouraging developing countries to draw up national communications policies. It may be that limited implementation has served to discredit the endeavour. However, whatever the reason, there is always an implicit policy that informs law and practice, and it is a problem if this determinant is not surfaced and articulated in an elaborated form that can draw on research, global experience and public input. Policy, in short, should be at the heart of law, but this logic is too often obscure, ill-considered or unelaborated.

The absence of such explicit public policy has repercussions in terms of “patchy” and inappropriate law as regards media. The general logic should be that media policies should follow within the values of a country’s constitution, and in this way serve to guide legislation to enable governance of the communication arena according to the constitution’s provisions. That there is frequently a shortfall, or a direct disjuncture, between a constitution and a specific law is partially due to the absence of coherent and comprehensive governmental policy. For example, Mozambique has policy and practice for community radio, but not a legal framework. That there is also sometimes a gap, or even a contradiction, between legislative elements, on the one hand, and actual governmental practice on the other, is also a function of the policy vacuum. For instance, Mali has good provisions on access to information, but these are not implemented, in part because there is no background policy that takes cognisance of implementation challenges. In some cases like Ethiopia, it may be that the absence of formal media policy itself reflects a kind of policy decision, because it means that governments can escape being held accountable to explicit objectives and principles. For good governance in a democracy, however, public policy is a precondition.

A further dimension of good policy, and thence good law, is the definition and elaboration of key terms. For example, the SADC protocol (2000) defines media pluralism as “diversified media in terms of ownership, control and content”. However, many countries in this study lack legally framed concepts of public service broadcasting, or are narrow and unrealistic on their definition of who constitutes a journalist.¹ The same absence of definition applies to the independence of regulators and to editorial independence.

¹ For instance, requiring higher educational certification as a qualification to be a journalist is not just problematic in principle, but highly unrealistic in most African countries — especially given the reliance of much of the continent’s media industry on minimally-trained (and low-paid) freelancers and stringers.

In the past decade, there has been some progress in African countries in developing ICT policies, with encouragement from the UN Economic Commission for Africa and the World Summit on the Information Society. However, these are typically elaborated without reference to the media dimension and freedom of expression. In an age of convergence, it makes little sense for telecommunications and media to be legislated for, and regulated, separately. The two sectors will become increasingly indistinguishable over the next decade. In dealing with this, only South Africa has so far developed a legal framework (but unfortunately without a fully-elaborated policy). What also needs policy and legislative attention in coming years is the matter of migration from analogue to digital broadcasting. There is little evidence that this issue is yet on the radar screens in many countries studied except in South Africa.

4.2 Lack of an institutional separation between law/policy and regulation

The SADC Declaration on Information and Communications Technology (ICT) of 2001 promotes the creation of a three-tier separation of powers in each country. As already stated in Chapter 1, governments are responsible for creating a conducive national policy framework, independent regulators responsible for licensing, and a multiplicity of providers in a competitive environment are responsible for providing services. Similar sentiments are to be found in the DPFEA.

Indeed, it is increasingly accepted around the world that especially as regards media issues, governments should concentrate on policy development plus drafts of law, and parliaments on debating and amending laws. The actual implementation in the form of regulation (and micro-policy) should then be delegated to a separate and independent authority. This institutional and functional separation is warranted for several reasons. One is the nature of communications as encompassing basic human rights to be enjoyed by all, and the corresponding need in a democracy to have a diversity of voices rather than all being under the control of a government. Another reason is that very often governments are also players in the communications arena as media-owners, and if they act as referees at the same time, it can distort fair competition within the media sector as a whole.

The situation in many of the countries surveyed falls short when compared to international best practices. Governments are too deeply involved in both law-making, regulation and, especially, operational implementation. This is partially a relic of governments wanting direct ownership and political control on the major levers of mass communication. It reflects a lack of appreciation of media pluralism in a society and resistance to the necessity for independent regulation for fostering investment in the media. At any rate, the over-involvement of government in mass communications is an anachronistic characteristic that needs addressing.

4.3. Low public awareness of international commitments

That many of the countries studied do not match international standards to which they have signed up to is likely to indicate *inter alia* a lack of societal awareness that might otherwise mobilise public opinion in this regard. In particular, one can point to a lack of media's own awareness of international commitments. Knowledge levels are possibly even lower in regard to developments such as the African Court of Human and Peoples' Rights, even though this particular institution will be critical in enforcing compliance with rights in the African Charter and other instruments. The press and the public should know what commitments their governments ought to be living up to, and the authorities themselves often need reminding so that the issues remain on the agenda. It is evidently not enough that conventions are agreed upon. They need, in addition, to be accompanied by plans of action that engage governments, the private sectors and civil society groups — and particularly the media institutions that are spread across these three sectors.

4.4 Democracy and broadcast pluralism

A factor related to democracy is that the countries in this study have generally ended state monopolies on broadcasting. However, Senegal and Mali have yet to license substantial private television, and Ethiopia has still to liberalise television and much in radio. In most countries, the state-owned broadcaster is the only national medium, and indeed the largest broadcaster in terms of channels and audience reach. Questions can therefore be asked about the predominance of the state-owned sector — also in terms of numbers of licensed channels, national frequencies and state subsidies (and especially where these outlets are skewed towards government voices — see below), and the extent to which this militates against pluralism.

What is also worth noting is the absence in most of the countries in this study of implementation of the principles of the African Declaration (DPFEA) and the African Charter on Broadcasting about recognition of distinct tiers of public service, commercial and community broadcasting. To explain this state of affairs, one needs to point to the mindset of many governments wanting to hold onto critical mass in broadcasting, and their negligence or suspicion of private outlets, both commercial and especially, it seems, community stations (for instance the case of Nigeria). Again, this means a situation that falls short when compared to best international practice.

The current inertia is attributable to the fact that state-predominance in broadcasting suits many governments today. But it is not in any country's national interests for tomorrow. Competition (including from satellite and mobile phone platforms) will, in the medium term, threaten to marginalise state-owned broadcasters and the inevitable should simply be accepted and indeed welcomed, with the new landscape then properly planned for. However, governments and many incumbents in the state-owned broadcasters fail to recognise the extent to which change is needed in a changing world.

4.5 State media rather than public media: short-term thinking

In most of the countries under review, state-owned media is a contested matter. This covers television, radio, newspapers and news-agencies. The legal regimes that could guarantee independent and impartial public service communication through these media are absent, and the result is either abuse or perceptions of abuse. In some cases, the advent of democratically-elected governments has maintained the subservient character of these media, so that they continue to serve as low-credibility government-mouthpieces.

This situation results in part from a lack of thorough-going transformation in several respects: historical appointment procedures, journalistic culture in these organisations, accountability processes and funding models. Curbs on competition are another factor explaining the lack of transformation in these broadcasters. There have also historically not necessarily been enough changes of government through the polls to convince political parties that their best long-term interests are in public media that keep a distance from power. Sensitisation and education on this particular point has been rare, despite the calls made by the African Charter on Broadcasting and DPFEA that state broadcasters should be transformed into public broadcasters.

4.6 Inadequate legal elaboration on public broadcasting

A detailed specific role for public broadcasting in the multi-cultural and multi-lingual countries under study tends to be lacking in legal and regulatory aspects. An exception is South Africa which has its own SABC charter, a code of conduct and editorial policies, as well as elaborated licence regulation. This is not evident to the same extent in other countries, such as Kenya where public broadcasting is simply equated with the Kenya Broadcasting Corporation. Editorial independence as one area which requires legal elaboration and specified

processes is especially absent. The financing model in particular is in need of legal specification. Public broadcasting should also fall under an independent regulator, as distinct from reporting directly to a ministry or other government body. A legal definition of independence and accountability, with the necessary nuances, is also absent, and this issue too needs to be addressed.

4.7 Inflexible rationales for state-owned broadcasters

There is a considerable consensus worldwide that public service media (as distinct from governmental media) are a legitimate part of the media landscape. This situation is linked to two beliefs. The first is that airwaves are a scarce resource, and that it is therefore legitimate that some of them should be reserved for media operating for the public interest, as distinct from private objectives. From this belief flows the ideal of state-owned media that are designed to promote a sense of common national citizenship, serve minority language and interest groups, promote local content and educational broadcasting, etc.

The second justification for public service media is that “market failure” is intrinsic to private — and especially commercial — media which have no interest in serving unprofitable markets. Therefore, it is argued, neglected audiences should be “compensated” by services from non-commercial media that are state-owned and not driven entirely by profit-making.

In Africa, these two arguments appear at first sight to be compelling — after all, building a nation, especially amongst the poor and rural audiences who have no access to the largely urban-based commercial media, is self-evidently a good thing. However, both arguments are not without challenge. The first one does not exclude the scarcity “problem” being solved in a different way — i.e. through prescribing public service obligations for private broadcasters who after all use public frequencies, rather than rationalising the existence of a state-sector player. The second “problem” could also be addressed by state subsidies for private players to incorporate unprofitable programming into their mix. Further, as regards the “market failure” rationale, the common situation among the countries studied is that the state-owned broadcasters are very market-minded, because they typically receive only a fraction of their budgets through public funding mechanisms. This situation is rationalised — understandably to some extent — on the basis of governments not having the budget to pay for public broadcasting. But the “worst of all worlds” develops in the form of state-owned commercial broadcasters that are neither public in terms of accountability nor control, and which not only distort their own content mix to attract the very particular audiences that will bring in advertisements, but also deprive (or compete with) fully-private broadcasters in regard to this source of revenue.

What all this means is a need to debate the political and economic options around seeking state-owned broadcasters and true public service broadcasting. One alternative, for example, is to explore possibilities of conditional privatisation or further freeing of the airwaves to private broadcasters, to deliver public service programming, even on a national footprint. It goes without saying that a strong and independent regulator would be a necessary component for such a scenario to be successful.

In short, there is a need to reassess the rationales and prospects for state-owned broadcasters, and the range of possible reforms in policy, law and regulation. In the light of transition to digital broadcasting, and to convergence, there is all the more reason to revise existing thinking.

4.8 Legacy existence of state-owned print media

All the countries studied boast a diversity of print publications, although state-owned and funded newspapers dominate circulation in countries like Zambia and Mozambique, and Ethiopian government has banned many

newspapers. Critical questions can be asked where countries have significant newspapers held by the state (whether this is through direct or indirect holdings). While state-owned broadcasting usually lays claim to the scarce frequency and public service argument (notwithstanding the questions posed above), these reasons have no standing for the printed press. The rationale for state involvement in newspapers is thus even more in need of being questioned than broadcasting. In particular, state newspapers do not generally meet the “market failure” argument, given that they are already mainly urban, commercial, and advertising-funded and charge a cover price akin to that of the private newspapers.

Accordingly, the existence of a large state-owned newspaper sector is at best an archaic hangover of a bygone era. While governments do have a legitimate and important need to get their messages across, the ownership of (what turns out to become low-credibility) newspapers (or broadcasters) is not an effective way to do this. The misguided continuation of state-owned media arises in part from a lack of proper media liaison strategy on the part of governments. Investment in such an apparatus and a strategic advertising budget, is still a novel approach for many governments. There is also not the understanding that good coverage by an independent watchdog press is worth far more in terms of credibility than the same content published in media that is seen by the public as being under the government’s own control.

While this study has not looked in detail at state-owned news-agencies, these bodies attract similar concerns as discussed above. Unfortunately, in Zambia and Mozambique, their legal status as reporting direct to ministers makes them even more vulnerable to being a government mouthpiece than a public service operation.

An additional observation can be made about the biased content of a state-owned media sector. This is sometimes justified by governments as being a means to balance the output originated by the independent media, which is often highly critical of the authorities. But it is a question of who “casts the first stone”. Too often, state-media vehicles are reduced to partisan mouthpieces of governments, rather than balanced and impartial vehicles playing the role of a neutral and trustworthy “public sphere”. It is this orientation at root that pushes private media to go to the other extreme. The resulting media polarisation sacrifices accuracy, depth, complexity and debate — at the expense of the public. It is incumbent on state-owned media to break the logic of this “logjam” by positioning themselves as the bastions of fairness — and thereby pressuring private media to compete on this terrain, rather than perpetuating a picture of propaganda and counter-propaganda. The Ethiopian government says that private newspapers supported political parties in the 2005 conflict, as if there was something illegal in this exercise of free expression. By inference, this situation is also projected as one that justifies state-owned media supporting the government. Both assumptions are incorrect and show limited appreciation of free speech and the even-handed role that is required of media which is owned by the state on behalf of the populace as a whole.

4.9 Bureaucratic mindsets about licensing private newspapers

Many of the countries studied here tend to have licensing (as distinct from purely registration) of private newspapers. This does not seem to have been abused in the sense of blocking newspapers from coming into existence, although in Zanzibar it has enabled the closure of several publications. Generally, the purpose of registration or licensing is typically not spelled out, and the system is not administered by an independent authority. It seems that many governments keep the *status quo* because it gives them direct power over print media should they decide to use it. Again, political will and respect for media freedom in a democracy are not at the level at which they could or should be.

4.10 Underdeveloped election coverage legislation

Most of the countries surveyed have — correctly — stipulations about the importance of state-owned media being impartial during elections, although they are not elaborated in many cases, nor are there measuring or monitoring provisions in the legislation. Not surprisingly, there are often complaints about pro-government bias in media coverage during elections (for example in Zambia and Senegal). Of course, it also does not help democracy if fairness applies only in formal election times and not more generally, although of course such periods around polling are especially important.

4.11 Vacuum regarding local content regulations

While most of the countries studied here restrict foreign ownership of the media, there is a dearth of provisions for promoting local content in broadcasting specifically. Given the cheapness of importing foreign content (whether US, British, Nigerian, Brazilian or Indian), it is especially likely that indigenous languages and music — especially from minority groupings — are not being adequately reflected in the studied countries' broadcast media systems. In part, this reflects the absence of a significant local content production industry in many countries. On the other hand, local content quotas could stimulate precisely the rise of such a sector. Law regulating international satellite-delivered broadcast content seems particularly underdeveloped.

There is also limited law and regulation concerning broadcast in indigenous languages, beyond some broad and unquantified directives that public media should do so (South Africa excepted).

The whole situation described in this section seems to result from a paralysis in the face of a cultural 'onslaught' under globalisation. It reflects an unwarranted sense of powerlessness that such 'modernisation' can be withstood, and/or insufficient appreciation that local content has value both culturally and economically.

There also seems to be an absence of law and regulation on advertising — in terms of its standards and in terms of proportion of overall broadcast content.

4.12 Minimal attention to concentration of ownership legislation

There is an irony in many governments having cross-ownership of media and operating a single centre of power in regard to multiple media outlets while also blocking the same in their societies at large. Nonetheless, in the interests of pluralism, there is a case to be made for regulation that covers concentration of power in the private sector. That there are not many developed regimes here among more than half the countries studied reflects the weak state of the economies in most of the countries. In countries like Kenya and Tanzania several large cross-media companies have emerged. Unlike what happens in developed countries, this is arguably not a major issue in Africa. That governments are more worried on imposing tight restrictions on foreign ownership of media (and even on who can practise journalism) may reflect an enduring backlash against colonial past practices, but one that is not necessarily appropriate in an age of competition for international investment.

4.13 The “over-interventionist state” intruding on speech, information and media rights

A legacy of colonialism and post-colonialism is the preponderant role of the state in seeking to determine all activities within its borders. This appears in areas of life that could be better left alone as purely civil matters. Defamation is a key issue here — private defamation and civil law precedents can protect rights of privacy and dignity on the one hand, and rights of free speech on the other, by weighing up the balance on a case by case basis. There is certainly no intrinsic need for a government to proactively protect privacy and dignity through criminal procedures against defamation. That this practice continues to exist — for apparently political reasons in countries like Kenya,

Nigeria and Zambia — reflects a “nanny state” that is out of kilter with much contemporary thinking about the appropriate role of government in society. The widespread persistence of pre-colonial insult laws, as well as other penal code provisions that are often used against media, is further evidence of this. The archaic nature of these is underlined in the case of Senegal and Zambia which even outlaw criticism of foreign leaders.

The other side of the intrusive government is the glaring absence of access to information rights and corresponding laws that would open up state power to public scrutiny. The notion that citizens are the owners of information that the state holds on their behalf is not widely understood. And although this study has not gone into detail as regards the dispensations concerning access to court cases by the media, this area merits more transparency albeit balanced against the interests of justice.

The question of access to information raises, once again, the issue of political will. A government, confident of its elected status, ought to see freedom of information as a major enabler of its ability to introduce reforms, to combat corruption and to enable wider citizen participation and accountability. But transparency as a value and as a driver of progress is not sufficiently cherished by many of the existing authorities. Likewise, aside from Mozambique, there is very little legal recognition of the value of allowing journalists to withhold information about the identity of sources. On the contrary, a lot of pressure is put on media professionals to break their ethics and disclose their sources.

In Kenya and Tanzania, updating legislation has had mixed significance. On the one hand, there is a welcome proposed reform of draconian defamation law and recognising a right to protect sources. On the other, change also seems to have been read as an opportunity for governments to engage in severe retrogression as regards registration of journalists (see below). Progress towards realising the family of communication rights in some respects is undermined by constraints in possibly more fundamental respects. Again, this casts aspersions on the political will of governments to genuinely embrace the international lessons on rights to speech, information and the media, creating instead a cynicism about motives and suspicion of trade-offs.

Also indicative of an overdeveloped state are the disproportionately heavy penalties attached to criminal defamation in countries like Mozambique and Senegal. Nigeria, Tanzania and Ethiopia also stand out as countries where limitations on free speech and media freedom, such as minor infringements in publishing, are backed by inordinately tough sanctions of imprisonment and fines. These features do not correspond with international jurisprudence about necessity and proportionality.

4.14 Misperceptions about registration and licensing of journalists

The problematic practice of licensing journalists exists in some of the countries under study, and with Kenya and Tanzania possible be going backwards in this regard. Where it exists, it again reflects fear by governments of allowing a free flow of ideas and opinions. Fuelling this fear are experiences where some independent newspapers have indeed traded in clear untruths, sometimes on behalf of opposition political forces, while others are culpable of news fabrication and extreme sensationalism. However, seeking to combat bad professionalism by licensing a sector of journalists is mistaken. It typically assumes that making educational qualifications a pre-requisite for practising will lead to a media that would abstain from criticising the authorities. The opposite, in fact, might prevail. Again, apart from questions that can be raised about this licensing *per se*, there is also the question of the lack of independence of the licensing authority and the danger (as in Zimbabwe) of preventing the exercise of free speech of critics by declining to license such people. This situation is incompatible with democracy and needs to be recognised as such. Low standards as regards accuracy and “truth” are also not remedied by including enforceable codes in a licence that compels journalists to be “responsible”. Instead, promoting self-regulation, and accepting

that free speech comes at the price of “irresponsible” speech is increasingly accepted internationally as the most appropriate approach. The “free-market of ideas” is seen as a better mechanism to expose which media are most reliable as sources of information, and which ones traffic rumour and lack credibility.

4.15 Uneven respect for freedom of expression and law

In the countries being studied, there are many cases of police and minor bureaucrats demonstrating scant respect for freedom of expression, information and the media, or even for basic law. Journalists have been victims of illegal actions by these officials in almost every country. However, it is a positive thing that governments in the ten countries have generally over the past six years acted in accordance with laws. This shows a respect for the rule of law and an eschewal of arbitrary or covert actions against the media. It also illustrates that the elected authorities in these countries nowadays regard lawful behaviour as having to be respected, and that they accept that they have to do with extant legal instruments to try and achieve their objectives. One exception, however, is the clear lack of political will over many years on the part of the Zambian government to work within the spirit of the law concerning parliamentary powers in selecting the boards of the regulator and the state-owned broadcaster.

However, working within legal constraints is one thing, and proactively promoting laws is another. For example, there is a lack of political will to implement certain laws. Yet another consideration is political will to change problematic laws. An example here is in regard to transforming government broadcasters into public service broadcasters, and another is the lack of political commitment to drive freedom of information legislation. These failures may lead to a degree of cynicism among some media about the authorities themselves. The resulting journalism also feels unconstrained to respect the law, and the consequent coverage further fuels governmental intolerance — and the use by authorities of laws — including non-media laws, to clamp down. The picture then is one of both governments and media developing opportunistic, and even cavalier, approaches whereby they abide by some laws but pay little respect to others.

At the same time, it should be acknowledged that there will always be some cases when the imperatives of law and journalism are intrinsically conflictual — such as in the different institutional perceptions between state and media about a reporter having to reveal confidential sources (a matter that is also debated within international jurisprudence).

4.16 Summing up

This chapter has undertaken a critical analysis of key factors underpinning much of the legal situation described in this study. It traced part of the problems to hidden and poor policy making, and to an absence of clear distinctions between public policies, laws and regulations and the appropriate agencies to act in these areas. The lack of public awareness about government commitments to international accords has also been noted. Orthodoxies around public service broadcasting were examined and alternatives presented.

As also discussed, the predominance of state-owned media, the licensing of private media plus the registering of journalists is attributable to misconceptions of how free communications can serve both the authorities and their societies. Linked to this is a lack of political will which accounts for cases of sub-optimum performance on both ensuring fair election coverage and promoting local content. All these elements tie up with an over-interventionist state in general and inappropriate involvement in the media in particular. In conclusion, the situation in the surveyed countries has many elements that work against building law-governed cultures aligned to international standards for free expression, information and the media.

Chapter Five

CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

Relevant countries studied in this report are signatories to global accords which reflect the world's collective wisdom on free speech, information and media. There are also legally-significant regional agreements, in particular in Southern and Western Africa. The seriousness with which regional structures, SADC and ECOWAS, take the issue of media, and some (but not necessarily all) of the principles that they lay down, could be profitably echoed in law and practice at the national level. However, it is clear that most countries studied in this report fall short of these principles in several respects. This disjuncture arises *inter alia* largely from a lack of political will by governments, and it is something that should be of concern. What follows below is a list of recommendations could assist in addressing the challenges of changing laws to deepen communication rights in Africa.

5.1 Research

It was evident to the researchers engaged in this project that relevant and timely facts about media/information policy and law are not easy to find. Much documentation is not available online in the Internet, and especially when it comes to recent developments in law-making. What can be located is sometimes fragmented and incomplete. The launch of a 'one-stop' portal that could give access to a living database of information (media and ICT) policy and law would be of great value.¹ Such a knowledge portal would be invaluable to law-makers, civil society, academics, legal professionals and the media itself.

5.2. Information and education

Changing deep-seated political cultures that are non-transparent and which are control-oriented into more open, tolerant and debate-oriented ones is a long-term process. Here, much work could go into educating media stakeholders and the wider public. This could be through disseminating comparative information (e.g. standards for media policies and law) through seminars and publications, as well as commissioning further relevant research and best practice on an expanded scale. Topical issues would be the relevance of international practice to laws on freedom of information, convergence and self-regulation. One audience where this would be relevant would be regulators, and another would be amongst staff of the government-controlled broadcasters making a transition to independent public broadcasting. A further arena for information and educational work is in promoting public knowledge of the international commitments which have been freely adopted by their governments. There is also value in encouraging international fora to put stress on action and communications plans to accompany any declarations and statements emerging. Also important in terms of education and legal reform is the gender question — for instance, ensuring that regulatory bodies or boards of state-owned media are not imbalanced.

¹ Disclosure: the co-ordinator of this report has — even prior to this research study — been promoting a similar project. Details are freely available on request – G.Berger@ru.ac.za

5.3 Constitutional issues

Parliaments should consider amendments to their countries' constitutions which would bring them into line with international commitments. Explicit references to rights to media freedom and rights of access to information should be included at minimum. Given the history of government abuse of state-owned media as propaganda instruments, provisions setting out the right of the public to independent public service media, and independent regulation, are also recommended. These foundation stones are necessary if a society is to build a 'house' in which free, diverse and ethical media practice is to flourish.

5.4 International commitments and obligations

There are more than enough international, pan-African and regional accords that have been developed and signed by many countries. The challenge now is to move to implementation and respect for these in terms of real law reform.

As noted above, this requires a concerted awareness-raising campaign among the media, so that the public agenda includes the need for countries to know about and honour the international agreements to which they have subscribed. However, also significant is the African Peer Review Mechanism, especially if it is amended to take freedom of expression issues into consideration. Work could be done to consider the international experience of peer review systems in this regard. The moves to try and develop an international treaty on free expression by civil society groups, and a proposal by The African Editors Forum for the AU to proclaim a Year of African Media in the near future, are opportunities for further partnerships.

5.5 Access to information

This seems to be a very topical issue, and there are a number of stalled attempts to generate legislation on this. Further impetus is needed here, such as by prioritising research into best practices and supporting advocacy efforts. Legislation is needed that also takes into consideration a balance between combating terrorism and communication rights, and into the regulation of electronic privacy data about persons.

5.6 State ownership and independent regulation

The ownership regimes are sensitive issues, but work is needed to pose the critical debate questions — like the rationale for state-ownership in the first instance, and distinctively, systems to avoid political control of such media. The subject also impacts on local content requirements and cross-ownership issues, which should be matters for legislated independent regulators operating only under broad policy guidance by governments. Nigeria and South Africa with quantified quotas for local content are models here. UNESCO has done a lot of work on public service broadcasting in developing countries, and groups such as ARTICLE 19 are active in the area of independent regulators in Africa. These efforts could be further promoted. A fully-developed dispensation around communication rights should entail an end to state-owned print media and news-agencies, and the installation of fully-fledged independent regulators.

5.7 Content controls

Many countries utilise the blunt and centuries-old provisions of a Penal Code to control media content, rather than more specialised and nuanced instruments which provide a balance between rights and limitations to free expression. Countries need to review their laws in this regard, and consider omnibus legislation to repeal those parts that contradict free expression, access to information and free media. Workshops on this matter could

also explore whether countries should consider custom-designed legislation to deal with problems like child pornography and information security.

5.8 Defamation and Insult laws

These legislative provisions are also often parts of outdated Penal Codes. Several civil society groups are engaged in change-oriented interventions here, and there should be further support for this. This is an issue in many of the democracies discussed in this report, and even more so for many other African countries. These particular laws have no place in a democracy and should be scrapped following the example of Ghana.

5.9 Right to reply

This does not seem to be a major issue, and it is not recommended for immediate action beyond support for self-regulatory mechanisms for the media.

5.10 Confidentiality of sources

This is important, but does not seem to be among the major issues. Yet even if prospects for shield laws for journalists are not on the immediate agenda, it is recommended that agreements be brokered between media practitioners and prosecution authorities as to at least certain limitations around when journalists may face subpoenas.

5.11 Media access to courts

This does not seem to be a major matter, although it does attract attention in several of the countries under study — not least being Mozambique. The role of the African Court in regard to issues such as transparency of its proceedings and its cognisance of the DPFEA could be the subject of an important seminar. Judiciaries at large could profitably consider improving access to their proceedings in the interests of transparency, public education and the rule of law. There is a wide variety of international experiences in this regard — concerning, for example, significant nuances around issues such as ‘cameras in the courtroom’.

5.12 Elections

There is space here for work with and by public broadcasters and national electoral commissions about elaboration and implementation of media standards, systems and codes of conduct — and especially monitoring and corrective mechanisms. In reference to continental and sub-regional instruments, the issue of whether media freedom should be one of the preconditions for an election to be declared “free and fair” ought to be elaborated and included as an amendment in existing codes and standards.

5.13 Ethics

Both statutory and voluntary mechanisms exist, but neither appears to be without problems of one sort or another. The former are too often government-dominated, the latter are too weak. However, it is not wholly clear what kinds of effective interventions could be initiated here, beyond awareness-raising. The causes of violations of ethics of accuracy and fairness lie primarily in government bias in state-media on the one hand, and only secondarily in excessive reaction or in competition in private media on the other. Ultimately, therefore, the solution lies in two legal reforms. One is removing government bias in state media. The other is providing audiences with more choice, i.e. legislating and regulating a pluralistic media environment that will expose ethical problems

by enabling audiences to compare coverage and realise which vehicles are more credible. Governments should certainly refrain from any form of statutory regulation of journalistic ethics given the possibility for such to be abused and thereby narrow freedom of speech. Maximum support should be given to industry and professional self-regulation.

5.14 Other laws

National and regional civil society organisations could contribute to compile lists of outdated legislation which remains on the statute books, even that which is not always used but kept threateningly in obeisance (e.g. criminal defamation in Mali). This is especially relevant where much legislation contradicts more recent constitution rights, and which such anachronisms should be repealed. In this regard, the Ghanaian academic Kwame Kari-kari (nd) has written that legal attacks on the media are made possible by the fact that laws which criminalise media work and free expression have remained on the statute books and have seldom been repealed or replaced. “These laws, part of the criminal code of the countries, generally protect officials and rulers from media criticism and exposure of wrongdoing.” His own country has passed an omnibus act to repeal such unconstitutional legacy law.

At the same time that there is need to scrap redundant law which would threaten free expression if it were used, it should also be noted that there is also a need to develop a large amount of new law to deal with changing conditions like convergence, satellite technologies and intellectual property.

5.15 Respect for free expression and the law

It would seem that despite a catalogue of violations, there is not systematic infringement of the rule of law by government and media (except perhaps in the form of pro-government bias in what is legally an impartial public media). However, it could be appropriate for media monitoring groups to consider not just lists of the worst culprits, but also of those governments that have the best record in law reform as regards media, and/or media that have done the most to build respect for the rule of law in democratic conditions of freedom of expression and information in terms of internationally-aligned standards. What is also needed in reform of the penalties in many legal dispensations, bringing them into better proportionality with the actual limitations on communication rights. For example, draconian sanctions on civil servants providing unauthorised information to the media need to be reduced, and indeed complimented by whistle-blower protection law. Jail terms for defamation are wholly inappropriate in terms of international jurisprudence and should be abolished. In addition, changing the onus of proof of defamation to complainants (rather than the accused having to prove their innocence) would be a sign that the authorities embrace a climate for free debate and repudiate a “chilled” environment where journalists operate in fear and practice self-censorship.

5.16 Conclusion

These recommendations arise from the research in this study, and are aimed at providing more impetus towards national legislation complying with international standards. They have dealt with research, awareness-raising and reform of constitutions and the APRM. There has also been attention to recreating momentum on freedom of information laws, to gender-sensitive legislation for independent regulatory bodies, and to unbundling state-ownership. New regulation in promoting local content merits support, but probably even more important is the need to repeal many outdated and undemocratic laws. Other recommendations have covered access to courts, coverage of elections and bolstering ethics. These pointers to the way forward are not by any means exhaustive

or definitive, but they do indicate fertile areas for legislative reform if African societies are to advance democracy and development at home, and achieve full participation in the Information Age internationally.

A long way has been travelled to reach the state of democracy and media development in the ten countries of this study. The journey is far from over, especially if these states are to keep pace with international jurisprudence and Information Age. However, action to accelerate media law reform could produce role models for other states on the continent, and indeed for the wider world as well.

Glossary of terms

Access to information: The practical right of citizens to obtain information that is especially held by the State, but also sometimes by private bodies. The term “freedom of information” is usually used in this sense, but also sometimes to designate the degree of common intellectual property. Elaborating the right entails criteria for *locus standi*, systems for record keeping, access procedures, exemptions on certain kinds of information, and appeal mechanisms.

Community media: A sector of media distinguished from state-owned and business-owned media in terms of ownership that is based on community organisations or trusts; operating on a non-profit basis even if carrying advertising; providing audiences with access to the airwaves as volunteer broadcasters.

Confidentiality of sources: Part of many journalistic codes of ethics and conduct, requiring journalists not to disclose the identity of parties supplying them with information in confidence. The argument is that this protects the free flow of information and the right of the public to receive information, and that it should take precedence over state interests in establishing the identity of anonymous sources (such as in police investigations).

Criminal defamation: Diminishing the reputation of a person may be regarded as a civil matter (between persons), but some dispensations regard this mainly as something in which the state has primary interest. In such cases, if a journalist is found guilty of defamation that is not justifiable, the culprit receives a criminal conviction as well as possibly having to pay damages to the complainant. Truth and/or public interest of defamatory information may be used as defences against liability.

Defamation: When the reputation of a person is diminished by the publication of particular information. In some dispensations, defamation may be condoned if the information is true and/or in the public interest.

Ethics: Decision-making choices that draw on norms and principles about the ‘right’ thing to do. In the case of media, these choices are usually guided by professional codes. Media ethics may inform the design of some media laws, but also sometimes conflict with legal provisions that violate or ignore specific claims around media as having special rights and privileges.

Freedom of expression: The right that protects speech (verbal, written or visual) irrespective of the medium used. The phrase is often used to also encompass a right to seek and receive information, and the right to media freedom, although these are better conceptualised as distinct (if related) aspects within a wider family of communications-related rights. In much jurisprudence, restrictions on any of these rights are permissible only under very strict conditions.

Freedom of the media (sometimes referred to as “press freedom”): The guarantee of rights of expression and ac-

cess to information as aggregated in a collective of citizens using any platform (not only the “press” as such, but also broadcast, internet and other platforms). As such, the institutions involved and their members are taken to have the freedom to gather and disseminate information to the public. Often debated is whether this freedom should include special privilege (such as immunity from having to disclose sources) and if this goes hand in hand with special responsibility as well. Who defines such responsibility (self-regulation or state-regulation for example), and who is recognised as a journalist, are further dimensions of this debate.

Harmful content: Certain kinds of content that are sometimes deemed to be detrimental to a particular society, such as pornography and racial hate speech. Definitions of the categories of “harmful content” can be highly contentious, and under many African Penal Codes are problematically lumped together with defined crimes such as “seditious content” or “false news” which are over-broadly defined. Regulation of harmful content should require establishing whether indeed there is harm, and then whether allowing such speech might nevertheless still outweigh the public interest in free speech and the right to information. Further, even after weighing the considerations of harm and benefit, regulation also requires an assessment of what kind of action is proportionate to the matter at hand. The range of appropriate controls (from access limits like age group or timing of broadcast, through sanctions and up to pre-publication censorship) is a matter of debate. In practice much actual law on harmful content fails to provide such nuances, and instead assumes *a priori* that a harm of great severity is intrinsic to certain speech, and that this content therefore automatically attracts restrictive or punitive consequences. As such, the whole area lends itself to being exploited for reasons of illegitimate politically-based suppression of criticism of authority.

Independent regulatory body: Mainly, but not only, applied to broadcast licensing authorities, this is an institution that is part of the executive branch of a society’s governance, but without being a direct part of government. The autonomy of such a body is argued for in terms of the sensitivity of freedom of expression and the dangers of governmental abuse of direct control over communications. Independence hinges a lot on the particular method and duration of appointment of members, and who indeed is eligible. In addition, particular models of financing, structures of accountability, and transparency of operations are often highlighted.

Legal instruments: Agreements that serve to define, promote and/or regulate the family of communications rights. They range from treaties – binding agreements between states, through to protocols, conventions, covenants and up to declarations which often have lesser legal weight. When an international agreement is ratified by a national government, the terms become part of the internal legal commitments.

Insult laws: These are controversial laws, in Africa often inherited from colonialism, which are supposed to protect the dignity of certain offices. Such stations can range from the head of state through to ministers, civil servants, parliaments and foreign dignitaries. Their practical use has been to criminalise criticism of the incumbents in these offices.

Public policy: The broad guidelines, preferably explicit, which inform law. (In turn, law informs more specific regulation and micro-policy). When applied to the field of media, these guidelines are likely to cover both the structure and the content of the media landscape. A recent challenge is how policy deals with “convergence” whereby the institutions of media spread and blur with those of telecommunications, and the idea of media

regulation impacts not only actors in the traditional newspapers and broadcasters, but to individuals and institutions now using cellphones and the Internet for mass communication purposes.

Public-service media: Not to be conflated with state-owned media (whether broadcast, print or news-agency). State-owned media is often controlled by government (and is therefore government media), rather than being accountable to the public and guided by an elaborated public service mandate within which editorial independence is guaranteed. Some private (and community) media may also play, or be required by license to play, a public service role in certain respects – such as impartiality of news and current affairs, local content, minority language provision, universal service in a given zone, etc. “State media” or “Public media” are sometimes used as descriptors, but they obscure whether the character of the institution concerned makes it government media or public service media.

Right to reply: Where a named party feels that the principle of a fair hearing for an accused has been violated as regards him- or herself, there may be ethical and even legal stricture requiring the media concerned to provide an opportunity for correction or provision of alternative perspective.

APPENDIX 1: RESEARCH TEAM

Professor Guy Berger as team leader, overall editor and final report writer has extensive experience of African media conditions, both through networks and academic study. He has authored numerous articles on the continent's media with special reference to issues of democracy and freedom of expression. The following team assisted in executing the research:

Senegal and Mali: Dr Lilian Ndangam. At the time of the research, she was a Mellon post-doctoral fellow at the School of Journalism and Media Studies, Rhodes University. Her expertise is in the conditions for the flourishing of online journalism in Africa. Cameroonian-born, she is bi-lingual in French and English, and familiar with West African media.

South Africa: Robert Brand. He holds the Pearson Chair of Economics Journalism at Rhodes, and is a lecturer on South African media law. He is an experienced journalist, with undergraduate studies in law and a Masters degree in journalism.

Mozambique: Zenaida da Conceição Machado. She is a journalist at Radio Mozambique, with experience in several research projects including the country chapter in the book "Absent voices, missed opportunity: the media's silence on ICT policy issues in six African countries".

Remaining countries: Prof Guy Berger, with some support from *Carol Christie.* At the time of the research, she was a contract lecturer in the School of Journalism and Media Studies, with experience in sociology and media studies, as well as research methodology. Prof Fackson Banda, Chair of Media and Democracy in the Rhodes school also assisted with the Zambian chapter.

Andrew Kanyegeire, a doctoral student in the School of Journalism and Media Studies part-updated the chapters, and contributed first drafts of chapter one and Appendix 2.

APPENDIX 2: LIST OF ORGANISATIONS

It is relevant to bear in mind some of the civil society press freedom and media support organisations that are at the forefront of laws concerning the right to freedom of expression. Some specialise in general freedom of expression, others focus on access to information and still more concentrate on particularly media freedom. All bring specific understandings of the associated rights – i.e. interpreting them in particular ways, with a diversity of perspectives that results.

Prominent here is the *International Freedom of Expression Exchange*, an alliance of more than 70 civil society organisations around the world set up in 1992 and responsible for a global alert system when there are violations of freedom of expression. This initiative flowed out of UNESCO's work in promoting the Windhoek Declaration, and the subsequent Alma Alta (Kazakhstan) and Santiago (Chile) Declarations (and later, Sofia and Sana'a). Out of the Windhoek Declaration, also emerged the Media Institute of Southern Africa (*MISA*) – an influential advocacy group with chapters across the Southern African Development Community (SADC). Another prominent organisation that relies on freedom of expression as its point of departure for activism is *ARTICLE 19*.

A particular focus on media freedom as an instance of freedom of expression has come from groups like the *International Press Institute* (IPI), the *World Association of Newspapers* (WAN), the *Committee to Protect Journalists* (CPJ), *Reporters without Borders* (RSF), the *International Centre for Journalists*, the *International Federation of Journalists* (IFJ), *Internews*, and the *World Press Freedom Committee* (see <http://www.freedomhouse.org/template.cfm?page=280#reports> for their links).

One of the longest running organisations that has focused on both freedom of expression and media freedom at the global level is *Freedom House*, which started collecting data in this regard in 1980 (FH 2006). Freedom House classifies the press and broadcasting systems in countries into free, partly free, and not free categories. It started assigning numerical scores to each country from 1994 onward using four criteria that it argues are founded on Article 19 of UDHR. Within Africa, besides for *MISA* (mentioned above), there are a range of civil society organisations such as the *Freedom of Expression Institute* (South Africa), *Panos West Africa*, *Panos Southern Africa*, and the *Media Foundation of West Africa*, *Media Rights Agenda* (Nigeria), *West African Journalists Association*, *SYNPICS* (Senegal), *Centre for Research, Education and Development of Rights in Africa* (CREDO), and *The African Editors Forum*. Many of these (said to number more than 20) are now grouped in the *Network of African Freedom of Expression Organisations* (NAFEO). *Highway Africa*, the biggest network of African journalists, is also active, especially in regard to the convergence of rights to expression and information, and Information and Communication Technologies (ICTs). (See List of Sources for URLs of these groups where such exist).

APPENDIX 3:

DECLARATION ON PRINCIPLES OF FREEDOM OF EXPRESSION IN AFRICA

Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia.

The African Commission on Human and Peoples' Rights, meeting at its 32nd Ordinary Session, in Banjul, The Gambia, from 17th to 23rd October 2002;

Reaffirming the fundamental importance of freedom of expression and information as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms;

Concerned at violations of these rights by States Party to the Charter;

Taking into consideration the 1991 Windhoek Declaration on Promoting an Independent and Pluralistic African Press, the Final Report of the African Conference of "The Journalist and Human Rights in Africa" held in Tunis, Tunisia from 31st October to 1st November 1992, the Resolution on Freedom of Expression adopted by the African Commission on Human and Peoples' Rights in Tripoli on 7th May 2001, the Statement of the Seminar on "Freedom of Expression and the African Charter" held from 23rd to 25th November 2000 in Johannesburg, South Africa and the first and second meetings of the Commission's Working Group on Freedom of Expression held in Cape town, South Africa from 10th to 11th February 2002 and in Pretoria, South Africa on 1st May 2002 respectively;

Decides to adopt and to recommend to African States the Declaration of Principles on Freedom of Expression in Africa annexed hereto;

Decides to follow up on the implementation of this Declaration.

Preamble

- Reaffirming the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms;
- Reaffirming Article 9 of the African Charter on Human and Peoples' Rights;
- Desiring to promote the free flow of information and ideas and greater respect for freedom of expression;
- Convinced that respect for freedom of expression, as well as the right of access to information held by public bodies and companies, will lead to greater public transparency and accountability, as well as to good governance and the strengthening of democracy;
- Convinced that laws and customs that repress freedom of expression are a disservice to society;
- Recalling that freedom of expression is a fundamental human right guaranteed by the African Charter on Human and Peoples' Rights, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as other international documents and national constitutions;

- Considering the key role of the media and other means of communication in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy;
- Aware of the particular importance of the broadcast media in Africa, given its capacity to reach a wide audience due to the comparatively low cost of receiving transmissions and its ability to overcome barriers of illiteracy;
- Noting that oral traditions, which are rooted in African cultures, lend themselves particularly well to radio broadcasting;
- Noting the important contribution that can be made to the realisation of the right to freedom of expression by new information and communication technologies;
- Mindful of the evolving human rights and human development environment in Africa, especially in light of the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights, the principles of the Constitutive Act of the African Union, 2000, as well as the significance of the human rights and good governance provisions in the New Partnership for Africa's Development (NEPAD); and
- Recognising the need to ensure the right of freedom of expression in Africa, the African Commission on Human and Peoples' Rights declares that:

I

The Guarantee of Freedom of Expression

Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.

Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination.

II

Interference with Freedom of Expression

No one shall be subject to arbitrary interference with his or her freedom of expression.

Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society.

III

Diversity

Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity, which include among other things:-

- availability and promotion of a range of information and ideas to the public;
- pluralistic access to the media and other means of communication, including by vulnerable or marginalised groups, such as women, children and refugees, as well as linguistic and cultural groups;
- the promotion and protection of African voices, including through media in local languages; and
- the promotion of the use of local languages in public affairs, including in the courts.

IV

Freedom of Information

Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

The right to information shall be guaranteed by law in accordance with the following principles:

- everyone has the right to access information held by public bodies;
- everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
- any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
- public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
- no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
- secrecy laws shall be amended as necessary to comply with freedom of information principles.

Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

V

Private Broadcasting

States shall encourage a diverse, independent private broadcasting sector. A State monopoly over broadcasting is not compatible with the right to freedom of expression.

The broadcast regulatory system shall encourage private and community broadcasting in accordance with the following principles:

- there shall be equitable allocation of frequencies between private broadcasting uses, both commercial and community;
- an independent regulatory body shall be responsible for issuing broadcasting licences and for ensuring observance of licence conditions;
- licensing processes shall be fair and transparent, and shall seek to promote diversity in broadcasting; and
- community broadcasting shall be promoted given its potential to broaden access by poor and rural communities to the airwaves.

VI

Public Broadcasting

State and government controlled broadcasters should be transformed into public service broadcasters, accountable to the public through the legislature rather than the government, in accordance with the following principles:

- public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;
- the editorial independence of public service broadcasters should be guaranteed;
- public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets;

- public broadcasters should strive to ensure that their transmission system covers the whole territory of the country; and
- the public service ambit of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.

VII

Regulatory Bodies for Broadcast and Telecommunications

Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.

The appointments process for members of a regulatory body should be open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party.

Any public authority that exercises powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body.

VIII

Print Media

Any registration system for the print media shall not impose substantive restrictions on the right to freedom of expression.

Any print media published by a public authority should be protected adequately against undue political interference.

Efforts should be made to increase the scope of circulation of the print media, particularly to rural communities.

Media owners and media professionals shall be encouraged to reach agreements to guarantee editorial independence and to prevent commercial considerations from unduly influencing media content.

IX

Complaints

A public complaints system for print or broadcasting should be available in accordance with the following principles:

- complaints shall be determined in accordance with established rules and codes of conduct agreed between all stakeholders; and
- the complaints system shall be widely accessible.
- Any regulatory body established to hear complaints about media content, including media councils, shall be protected against political, economic or any other undue interference. Its powers shall be administrative in nature and it shall not seek to usurp the role of the courts.
- Effective self-regulation is the best system for promoting high standards in the media.

X

Promoting Professionalism

Media practitioners shall be free to organise themselves into unions and associations.

The right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions.

XI

Attacks on Media Practitioners

Attacks such as the murder, kidnapping, intimidation of and threats to media practitioners and others exercising their right to freedom of expression, as well as the material destruction of communications facilities, undermines independent journalism, freedom of expression and the free flow of information to the public.

States are under an obligation to take effective measures to prevent such attacks and, when they do occur, to investigate them, to punish perpetrators and to ensure that victims have access to effective remedies.

In times of conflict, States shall respect the status of media practitioners as non-combatants.

XII

Protecting Reputations

States should ensure that their laws relating to defamation conform to the following standards

- no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances;
- public figures shall be required to tolerate a greater degree of criticism; and
- sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.
- Privacy laws shall not inhibit the dissemination of information of public interest.

XIII

Criminal Measures

States shall review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society.

Freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.

XIV

Economic Measures

States shall promote a general economic environment in which the media can flourish.

States shall not use their power over the placement of public advertising as a means to interfere with media content.

States should adopt effective measures to avoid undue concentration of media ownership, although such measures shall not be so stringent that they inhibit the development of the media sector as a whole.

XV

Protection of Sources and other journalistic material

Media practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance with the following principles:

- the identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence;
- the information or similar information leading to the same result cannot be obtained elsewhere;

- the public interest in disclosure outweighs the harm to freedom of expression; and
- disclosure has been ordered by a court, after a full hearing.

XVI

Implementation

States Parties to the African Charter on Human and Peoples' Rights should make every effort to give practical effect to these principles.

Accessed from:

http://www.achpr.org/english/_doc_target/documentation.html?../resolutions/resolution67_en.html

APPENDIX 4:

COMPARATIVE TABLE OF SELECTED AREAS

	Senegal	Mali	SA	Mozambique	Zambia	Tanzania	Ethiopia	Ghana	Kenya	Nigeria
CONSTITUTION										
Mentions media freedom	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	No	Yes
Limitations reasonable for a democracy	Too vague	No	Yes	Yes	Partly	No	Yes	Yes	Yes	Yes
Specific institutions cited: eg. Regulator	No	Yes	Yes	Yes	No	No	No	Yes	No	No
Constitutionality test of media law by courts	Unknown	Yes	Yes	Yes	Yes	Mixed	Unclear	Yes	Partly	Unclear
International law is explicitly noted	Yes	Yes	Yes	Yes	No	No	Yes	No	No	No

MEDIA POLICY?	Yes	Yes	Yes	No	Out-dated	Yes	No	Yes	Yes	Unclear
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INTERNATIONAL LAW?										
ICCPR accession	1978	1974	1998	1993	1984	1976	1993	2000	1972	1993
African Charter	1982	1981	1996	1989	1984	1984	1988	1989	1992	1983
SADC/Ecowas accession	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Not applicable	Yes

	Senegal	Mali	SA	Mozambique	Zambia	Tanzania	Ethiopia	Ghana	Kenya	Nigeria
LICENSING										
Journalists	Condi- tional registration	Condi- tional registration	No	No	Notification	Pending "Yes"	Yes	No	Pending	Registra- tion, some exclusion
Print media	Notification	Condi- tional registration	No	Notification	Registration	Licensing	Licensing	Notification	Yes	Licensing
Law ensures inde- pendent broadcast regulator	No	No	Yes	No	No	No	No	No	No	No
3 tier broadcast licenses regime	Yes	No	Yes	No	No	No	No	Policy only	Pending	No
Private TV licensed?	Partly	No	Yes	Yes	Yes	Yes	Partly	Yes	Yes	yes
Public media has in- dependent board?	No	No	Yes	No	No	No	No	Yes	No	No
Only state-owned get national licence, or can oth- ers too?	No	?	partly	No	No	No	No	No	No	No

ACCESS TO INFO										
Constitutional right?	Yes	No	Yes	Yes	No	Vague	Partly	Yes	Yes	No
Elaborated ena- bling law?	No	Partly	Yes	Stalled	Stalled	Pending	Draft	Stalled	Stalled	Stalled

OWNERSHIP										
Limits on foreign owners	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No
Limits on concentration	Yes	No	Yes	No	Yes	Yes	No	No	Pending	Yes

	Senegal	Mali	SA	Mozambique	Zambia	Tanzania	Ethiopia	Ghana	Kenya	Nigeria
CONTENT										
"Harmful" content laws	Yes	Yes	Yes	Yes	Yes	Various	Various	No	Yes	In broadcast licences
Local content law/regulations	Yes	No	Yes	No	No	No	No	No	Policy	Yes
Criminal defamation	Yes	Yes	No	Yes	Yes	Yes	Yes	No	Yes	Yes
Insult laws/provisions	Yes	Yes	No	Yes	Yes	Pending "No"	No	No	No	Yes
Constitutional right to reply	No	No	No	Yes	No	No	No	Yes	No	No
Legal right to reply	Yes	Yes	No	Yes	No	No	Yes	Yes	No	No
Confidentiality of sources protected	Yes	No	No	Yes	No	No	Partly	No	No	No
Free reporting of courts	No	Partly	Mixed	Pending "No"	No	Unclear	Unclear	Partly	Partly	No
Other laws that are or can be used against media	Yes	Yes	Yes	Yes	Yes, eg. citizenship	Yes, eg. citizenship	Yes, eg. penal code	No	Yes, eg. official secrets	Various

	Senegal	Mali	SA	Mozambique	Zambia	Tanzania	Ethiopia	Ghana	Kenya	Nigeria
MISCELLANEOUS:										
Law on govt funding for private media?	Yes	Yes	Yes	No	No	No	No	Policy doc	No	No
Statutory policing of ethics	Yes, + bdcast licences	Yes, + bdcast licences	Bdcasting	Bdcasting	Bdcasting	Yes, + bdcast licences	Yes	No	Pending	Yes
Non-statutory bodies	Yes	Yes, licence	Yes	Yes	Yes	Yes (pending "No")	Yes	Yes	Yes	Yes
Media in elections laws?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes
Do authorities respect communications freedoms through law?	Heavy-handed	Light-touch	Yes	Yes	Partly	Partly	Partly	Yes	Yes	Partly
Do media respect communications freedoms through law?	Yes	Yes	No	Yes	Partly	Partly	Partly	Yes	Partly	Yes

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General Web Resources on African media:

African International Courts and Tribunals Website: www.aict-ctia.org
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Konrad Adenauer Stiftung: www.kasmedia.org
Media Institute of Southern Africa: www.misa.org
Media Foundation for West Africa: <http://www.mfwaonline.org>
Media Rights Agenda: www.mediarightsagenda.org

Network of Freedom of Information Advocates: <http://www.freedominfo.org/>

Panos West Africa: <http://www.panos.sn/>

Reporters without Borders: <http://www.rsf.org/>

The African Editors Forum: www.theafricaneditorsforum.org

United States Country Reports on Human Rights Practices: <http://www.state.gov/g/drl/rls/hrrpt/>