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1 INTRODUCTION

While the Kingdom of Lesotho has been an independent country since 1966, it has had limited experience of being a democracy since its independence from the United Kingdom. Lesotho became a formal constitutional democracy in 1993, but undemocratic political upheavals continued to haunt the country. In 1998, an army mutiny resulted in Southern African Development Community troops (from South Africa and Botswana) being asked by the government to assist in protecting it and putting down a would-be military coup. As recently as 2009, there was an unsuccessful assassination attempt on the prime minister.

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

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

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

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

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

2 THE MEDIA AND THE CONSTITUTION

In this section you will learn:

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

2.1 Definition of a constitution

A constitution is a set of rules that are foundational to the country, institution or organisation to which they relate. For example, you can have a constitution for a soccer club or a professional association, such as a press council. Such constitutions set out the rules by which members of the organisation agree to operate. However, constitutions can also govern much larger entities, indeed, entire nations.

The Lesotho Constitution, for example, sets out the foundational rules of the Kingdom of Lesotho. These are the rules upon which the entire country operates. A key constitutional provision in this regard is section 1(1), which states that ‘Lesotho shall be a sovereign democratic Kingdom.’

2.2 Definition of constitutional supremacy

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

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

2.3 Definition of a limitations clause

It is clear that rights are not absolute as society would not be able to function. For example, if the right to freedom of movement were absolute, society would not be able to imprison convicted criminals. Similarly, if the right to freedom of expression were absolute, the state would not be able to protect its citizens from hate speech or false defamatory statements made with reckless disregard for the truth. Clearly, governments require the ability to limit rights in order to serve important societal interests; however, owing to the supremacy of the constitution this can only be done in accordance with the constitution.

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

It is therefore clear that the rights contained in Chapter II of the Constitution of Lesotho are subject to the limitations contained within the provisions of the right itself. The limitations in respect of each right are dealt with below.

2.4 Constitutional provisions that protect the media

The Constitution of Lesotho contains a number of important provisions in Chapter II, ‘Protection of fundamental human rights and freedoms’, which directly protect the media, including publishers, broadcasters, journalists, editors and producers.

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

2.4.1 Freedom of expression

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

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

This provision needs some explanation.

- The freedom applies to ‘everyone’ and not just to certain people, for example, citizens. Hence everybody enjoys this fundamental right.
- The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many examples of this, including physical expression (such as mime or dance), photography or art.
- Section 14(1) specifies that the right to freedom of expression includes the ‘freedom to hold opinions without interference’, thereby protecting the media’s right to write opinion pieces and commentary on important issues of the day.
- Section 14(1) specifies that the right to freedom of expression includes the ‘freedom to receive information and ideas without interference’. This freedom of everyone’s to receive information is a fundamental aspect of freedom of

expression, and this subsection effectively enshrines the right to this free flow of information. Thus, the information rights of audiences, for example, as well as the expression rights of the media are protected. This right is important because it also protects organisations that foster media development. These organisations facilitate public access to different sources and types of information, particularly in rural areas which traditionally have little access to the media.

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

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

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

- Is in the interests of defence, public safety, public order, public morality or public health
- Protects the reputations and rights of others or the private lives of people involved in legal proceedings

- Prevents the disclosure of confidential information
- Maintains the authority and independence of the courts
- Regulates the technical administration or operation of matters such as telephony and broadcasting
- Imposes restrictions upon public officers
- Is practically necessary in a democratic society

2.4.2 Freedom from arbitrary search or entry

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

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

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

2.4.3 Freedom of conscience

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

- Is in the interests of defence, public safety, public order, public morality or public health
- Protects the rights of others
- Is practically necessary in a democratic society

2.4.4 Freedom of association

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

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

- Is in the interests of defence, public safety, public order, public morality or public health
- Protects the rights of others
- Imposes restrictions on public officers
- Is practically necessary in a democratic society

2.4.5 Right to a fair trial

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

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

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

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

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

2.5.1 Right to respect for private and family life

Section 11(1) of the Lesotho Constitution provides that ‘[e]very person shall be entitled to respect for his private and family life and home’. This privacy right is often raised in litigation involving the media, with subjects of press attention asserting their rights not to be photographed, written about or followed in public. The media does have to be careful in this regard and should be aware that there are always ‘boundaries’ in respect of privacy which need to be respected and which are dependent on the particular circumstances, including whether or not the person is a public figure or holds public office, as well as the nature of the issue being dealt with by the media.

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

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

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

There are a number of important institutions in relation to the media that are established under the Constitution of Lesotho, namely, the judiciary, the Judicial Service Commission (JSC) and the Ombudsman.

2.6.1 The judiciary

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

The judiciary is an important institution for the media because the two rely on each other to support and strengthen democratic practices in a country. The judiciary needs the media to inform the public about its judgments and its role as one of the branches of government, and the media is essential to building public trust and respect for the judiciary, which is the foundation of the rule of law in a society. The media needs the judiciary because of the courts’ ability to protect the media from unlawful action by the state and from unfair damages claims by litigants.

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

- The chief justice of the High Court and the president of the Appeal Court are appointed by the king, acting in accordance with the advice of the prime minister.
- The other High Court judges (called ‘puisne’ judges in the Constitution) are essentially appointed by the king, acting in accordance with the advice of the JSC. Note that the direct meaning of puisne is ‘of lower rank’.
- Justices of Appeal are essentially appointed by the king, acting in accordance with the advice of the JSC and after consultation with the president of the Appeal Court.

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

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

2.6.2 The Judicial Service Commission

The JSC is a constitutional body that is established to:

- Participate in the appointment of puisne and Appeal Court judges
- Be responsible for exercising disciplinary control over registrars, magistrates and members of subordinate courts

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

2.6.3 The Ombudsman

The Ombudsman is an important office for the media because it, too, is aimed at holding public power accountable. In terms of section 134(1) of the Lesotho Constitution, the Ombudsman is appointed by the king, acting in accordance with the advice of the prime minister. The main power of the Ombudsman is to investigate action taken by an officer in any government department, local government authority or statutory corporation, which has resulted in an alleged injustice.

2.7 Enforcing rights under the Constitution

A right is only as effective as its enforcement. All too often rights are enshrined in documents such as a constitution or a bill of rights, and yet remain empty of substance because they cannot be enforced.

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

Perhaps one of the most effective ways in which rights are protected under the Constitution of Lesotho is through the provisions of the Constitution which entrench most of the provisions of Chapter II, headed 'Protection of fundamental human rights and freedoms'.

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

2.8 The three branches of government and separation of powers

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

2.8.1 Branches of government

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

THE EXECUTIVE

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

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

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

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

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

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

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

THE LEGISLATURE

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

In terms of section 54 of the Constitution of Lesotho, Parliament consists of the king, a senate and a national assembly.

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

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

THE JUDICIARY

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

2.8.2 Separation of powers

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

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

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

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

2.9.1 Remove internal constitutional qualifiers to certain rights

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

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

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

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

2.9.2 Strengthen procedural consultation provisions

On the face of it, the Constitution of Lesotho makes provisions for close consultation by various state actors. For example, the king often is required to act in accordance with the advice of the prime minister or the Council of State. However, section 91 of the Constitution deals with the exercise of the king’s functions and subsection (5) specifically states that ‘where the King is required by this Constitution to act in accordance with the advice of any person or authority, the question whether he has received or acted in accordance with such advice shall not be enquired into by any court’.

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

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

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

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

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

3 THE MEDIA AND LEGISLATION

In this section you will learn:

- What legislation is and how it comes into being
- Key legislative provisions governing the publication of print media
- Key legislative provisions governing the broadcasting media in general
- Key legislative provisions governing the state broadcasting sector and the state news agency
- Key legislative provisions governing broadcasting signal distribution
- Generally applicable statutes that threaten a journalist’s duty to protect sources
- Generally applicable statutes that prohibit the publication of certain kinds of information
- Generally applicable statutes that specifically assist the media in performing its functions

3.1 Legislation: An introduction

3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed by Parliament, the legislative authority. As we know, legislative authority in Lesotho vests in Parliament,

which, in terms of the Constitution, is made up of the king, the National Assembly and the Senate. Consequently, both houses of Parliament and the king are ordinarily involved in passing legislation.

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

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

- Legislation that amends the Constitution – the procedures and/or applicable rules are set out in section 85 of the Constitution
- Ordinary legislation – the procedures and/or applicable rules are set out in sections 78 and 80 of the Constitution
- Legislation that deals with financial measures – the procedures and/or applicable rules are set out in section 79 of the Constitution

3.1.2 The difference between a bill and an act

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

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

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

3.2 Statutes governing the print media

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

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

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

- Section 7 of the Printing and Publishing Act prohibits a person from printing or publishing a newspaper without having previously obtained a certificate of registration from the registrar-general and paying the prescribed fee therefor. If a person does print or publish a newspaper without a certificate of registration, this is an offence and the person can be sentenced to a fine, a period of imprisonment or both, under section 15 of the Printing and Publishing Act.
- Furthermore, section 8 of the Printing and Publishing Act requires that notice of any intention to print and publish a newspaper in Lesotho must be given to the registrar-general, including full details of the newspaper's name, the name and address of each proprietor, publisher, printer, manager and responsible editor. The provision of any false information is an offence and the person concerned can be sentenced to a fine, a period of imprisonment or both, under section 15 of the Printing and Publishing Act.
- Section 9 requires any changes in the above registered information to be provided by the proprietor and by the publisher to the registrar-general. Failure to do so is an offence and the person concerned can be sentenced to a fine, a period of imprisonment or both, under section 15 of the Printing and Publishing Act.
- Besides the newspaper registration requirements set out above, section 6 of the Printing and Publishing Act also requires all printed matter (extremely broadly defined) to have printed legibly on its first or last sheet the address at which the printed matter is published, and the name and address of the proprietor, publisher and printer thereof. Failure to do so is an offence and the person concerned can be sentenced to a fine, a period of imprisonment or both, under section 15 of the Printing and Publishing Act.

3.3 Statutes governing the broadcast media generally

3.3.1 Statutes that regulate broadcasting generally

Broadcasting in Lesotho is regulated in terms of the Lesotho Communications Authority (LCA) Act, Act 5 of 2000, which has been amended a number of times.

3.3.2 Establishment of the LCA

The LCA Act provides, in section 4, that the LCA is established as a body corporate. The 2006 Amendment Act specifically deleted the words ‘autonomous and independent’ from the description of the LCA, severely undermining its former position as an independent authority. Section 5 of the LCA Act provides that the LCA operates through a board, which is responsible for the exercise of the powers and performance of the duties of the LCA.

3.3.3 Main functions of the LCA

In terms of section 15(1) of the LCA Act, the LCA’s general duties are to promote, develop and supervise the provision of efficient national, regional and international communication services in Lesotho. In section 2 of the LCA Act, communication is defined as ‘any domestic or international transmission of information by wire, radio waves, optical media or other electromagnetic systems, between or among the points of the user’s choosing’ – this definition clearly includes broadcasting. Section 15(2) gives some examples of the LCA’s duties that impact upon broadcasting matters. These include promoting universal service and access, ensuring the efficient and effective use of the radio frequency spectrum, promoting the range and quality of communication services, and promoting private ownership and sustainable and fair competition.

3.3.4 Appointment of LCA board members

In terms of section 5(2) of the LCA Act, the LCA Board consists of seven members, including the chief executive, all of whom are appointed by the minister (who is defined in section 2 as the minister responsible for communication services, currently the minister for communications, science and technology).

Section 5(4) of the LCA Act sets out criteria for appointment, and these are all essentially technical competencies. Section 6 of the LCA Act sets out grounds for the disqualification of LCA board members. These include being an unrehabilitated insolvent, having a conviction of an offence involving dishonest conflicts of interest (directly or through a family member) and being a member of Parliament.

3.3.5 Funding for the LCA

In terms of section 19(1) of the LCA Act, the LCA is funded from:

- Money appropriated by Parliament – in other words, funding for the LCA must be provided for in the national budget
- Service, licence and administration fees
- Fines imposed by the LCA
- Grants, contributions or endowments
- Loans

3.3.6 Making broadcasting regulations

Under the LCA Act, there are two kinds of subordinate legislation – namely, regulations and rules. The LCA Act, at section 64(a), provides that the minister, in consultation with the LCA (which means that the LCA must agree) may by notice published in the Government Gazette make regulations for carrying into effect the provisions of the LCA Act. Effectively, this means that the minister (albeit with LCA consent) makes broadcasting regulations.

Furthermore, the LCA Act, at section 16(2), provides that the LCA shall issue administrative orders and rules as are necessary for the exercise of its power and performing its duties in the implementation of policies under the LCA Act. However, it is critical to note that since the 2006 Amendment Act, the minister acts alone in formulating government policies for the communications sector and no longer does this in consultation with the LCA, as was previously the case. In addition, the minister is entitled to give directives to the LCA, after consultation with it, in relation to a number of matters, including the imposition of licence conditions. This gives the minister a very direct role in broadcasting licensing matters.

3.3.7 Licensing regime for broadcasters in Lesotho

BROADCASTING LICENCE REQUIREMENT

Section 27(1) of the LCA Act prohibits any person from establishing or providing a communication service (which includes a broadcasting service) in Lesotho, except under, and in accordance with, a licence issued pursuant to the LCA Act.

CLASSES OF BROADCASTING LICENCES

Section 26 of the LCA Act authorises the LCA to prescribe classes of communication services, including public and private communication services. The different classes of broadcasting communication licences that relate to broadcasting are set out later on in this chapter under the section dealing with regulations.

BROADCASTING LICENSING PROCESS

Prior to the 2006 Amendment Act, the LCA (or its forerunner authority) was solely responsible for licensing private and public communication services (including broadcasting). However, the 2006 Amendment Act introduced a ministerial approval requirement for the licensing of communication service providers. As it currently reads, section 27(2) of the LCA Act provides: ‘The [LCA] shall, upon approval by the Minister, issue licences or amend such licences issued, to private and public communication service providers as market conditions and the public interest may warrant.’

FREQUENCY SPECTRUM LICENSING

Prior to the 2006 Amendment Act, the LCA (or its forerunner authority) was solely responsible for allocating (this means determining how particular parts of the radio frequency spectrum may be used) and assigning (this means granting the exclusive right to use a particular frequency to a particular user) radio frequency spectrum to, among others, sound and television broadcasting operations. However, the 2006 Amendment Act introduced a ministerial approval requirement for the allocation and assignment of radio frequency spectrum.

As it currently reads, the relevant part of section 51(4) of the LCA Act provides: ‘The [LCA] shall, with the approval of the Minister, allocate and assign radio frequency spectrum to– (a) ... sound and television broadcasting operations.’ The effect of this is that the LCA is not able to allocate and assign radio frequency spectrum without the agreement of the minister.

3.3.8 Responsibilities of broadcasters under the LCA Act

ADHERENCE TO LICENCE CONDITIONS

Prior to the 2006 Amendment Act, the LCA (or its forerunner authority) was solely responsible for the imposition of licence conditions. However, the 2006 Amendment Act effectively made the minister responsible for the imposition of licence conditions.

As it currently reads, the relevant part of section 30(1) of the LCA Act provides: ‘The [LCA] shall ... impose such conditions on licences as the Minister may, from time to time, direct.’

In terms of section 30(2) of the LCA Act:

- [a] licensee who fails to comply with the conditions of a licence may be subject to the following penalties:
- (a) revocation of the licence by the [LCA] upon approval by the Minister, or where necessary, in terms of this Act, by the Minister;
 - (b) suspension of the licence by the [LCA] upon approval by the Minister, or where necessary, in terms of this Act, by the Minister;
 - or
 - (c) any other penalty that may be appropriate in the circumstances.

Clearly, the minister now has a key role in broadcasting regulatory matters, including with regard to the revocation or suspension of a licence for non-compliance with licence conditions.

REPORTING OBLIGATIONS

Section 46 of the LCA Act requires any person who provides a public communication service to file with the LCA annual reports and any occasional reports that it may issue from time to time, as well as any reports that the LCA may require.

ADHERENCE TO BROADCASTING RULES AND REGULATIONS

Broadcasters will be subject to rules and regulations made in terms of the LCA Act, which are dealt with later on in this chapter.

3.3.9 Is the LCA an independent regulator?

The LCA can no longer be said to have any real vestiges of independence. As pointed out above, even the statutory description of the LCA as ‘autonomous and independent’ has been repealed. The various amendments to the LCA Act over the years have stripped the LCA of any substantive independence. Effectively, the LCA operates as an arm of the minister in the following ways:

- All of the LCA’s board members are appointed by the minister.
- The minister’s approval is required in relation to the issuing, amendment,

revocation and suspension of communications licences, including sound and television broadcasting licences.

- The minister's approval is required for the allocation and assignment of radio frequency spectrum to broadcasting operations.
- All of the LCA's former powers in relation to international matters have been repealed.
- The minister is responsible for making communications regulations, albeit in consultation with the LCA.

Perhaps the most clear-cut evidence of the lack of independence or real authority of the LCA is found in subsection 30(3) – a new subsection introduced by the 2008 Amendment Act – which provides that:

... the Minister shall have power, in substantial, exceptional and compelling circumstances, to revoke a licence and close or cause to be closed the communications services authorised under the licence without a prior hearing if he or she has reason to believe that the communications services to which the licence relates may prejudice or endanger public interest unless urgent action taken by him as contemplated in this subsection is taken.

Unfortunately, the LCA Act does not specify what these 'substantial, exceptional and compelling' circumstances are, creating the scope for a great deal of ministerial interference in, among others, broadcasting operations, without the operator being afforded a prior hearing.

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

3.3.10 Amending the legislation to strengthen the broadcast media generally

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

- First, Lesotho ought to introduce legislation to establish a genuinely independent broadcasting regulatory authority to act in the public interest, free from executive interference. The mandate of such an independent broadcasting authority should be to ensure that the citizens of Lesotho have access to a diverse range of high-quality public, commercial and community broadcasting services, as well as to

ensure that freedom of expression is appropriately protected from commercial and governmental interference.

The 2008 Lesotho Communications Policy released by the Ministry of Communications, Science and Technology in advance of the Lesotho Communications Authority Amendment Act, 2008, promised that the LCA would serve as an independent regulator, that the National Assembly would be involved in approving ministerial board appointments, and that removals of any LCA board member would require a two-thirds vote of the National Assembly. Sadly, none of these policy proposals made it into the LCA Amendment Act, which in fact left the LCA with even less independence than it had under the 2006 Amendment Act. Consequently, the LCA remains a body whose level of independence does not comply with internationally accepted standards.

- Second, it is clear that the LCA Act started out as purely telecommunications-related legislation, and broadcasting has been dealt with merely as a subset of telecommunications through rules and regulations. Regulating broadcasting effectively through subordinate legislation such as rules and regulations is clearly not ideal. Lesotho ought to introduce appropriate broadcasting legislation, with the broad aim of ensuring that the citizens of Lesotho have access to a diverse range of high-quality public, commercial and community broadcasting services, as well as ensuring that freedom of expression is appropriately protected from commercial and governmental interference.

3.4 Statutes that regulate the state broadcast media and the state news agency

3.4.1 State broadcast media

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

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

A Lesotho Broadcasting Corporation Bill was published in 2004, which bill aimed to

transform the state broadcaster (the LNBS) into a public broadcaster; however, the bill was never enacted.

In the 2008 Lesotho Communications Policy, the Ministry of Communications, Science and Technology promised that the Lesotho government would undertake a number of regulatory reforms, including transforming the LNBS from ‘a state broadcaster into a public service broadcaster’. In terms of the 2008 Communications Policy, this would ‘entail corporatizing the LNBS and making it accountable to an independent board with the goal of serving the public interest’. Furthermore, the 2008 Communications Policy promised that the public service broadcaster ‘will have editorial independence and any content restrictions or requirements will be contained in its charter, along with a clear source of funding for operations and expansion’. To date, this has not happened.

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

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

3.4.2 State news agency

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

3.5 Statutes governing broadcasting signal distribution or transmission

The Lesotho Communications Authority (LCA) Act, 2000, is relevant to broadcasting signal distribution or transmission, which is the technical process of ensuring that the content-carrying signal of a broadcaster is distributed such that it can be heard and/or viewed by its intended audience. The LCA Act makes it clear that broadcasting signal distribution or transmission is a form of communications network service which would need to be licensed under the LCA Act and would need to comply with all relevant statutory provisions, including in relation to tariffs and other matters. The LNBS, the state broadcaster, operates terrestrial broadcasting transmission infrastructure in Lesotho, which is used by its competitors too.

3.6 Statutes that undermine a journalist's duty to protect his or her sources

A journalist's sources are the lifeblood of his or her profession. Without trusted sources, a journalist cannot obtain information that is not already in the public domain. However, sources will often be prepared to provide critical information only if they are confident that their identities will remain confidential and will be respected and protected by a journalist. This is particularly true of so-called whistleblowers – inside sources that are able to provide journalists with information regarding illegal activities, whether by company or government personnel. Consequently, democratic countries often provide special protection for journalists' sources. It is recognised that without such protection, information that the public needs to know would not be given to journalists.

3.6.1 Criminal Procedure and Evidence Act, 1981

PREPARATORY EXAMINATIONS

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

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

Furthermore, in terms of section 68 of the CPEA, any person who attends a preparatory examination in response to a subpoena but then refuses to answer questions or to produce any required document, without offering a 'just excuse' for

such refusal, can be sentenced to successive periods of imprisonment for eight days at a time ‘until the person consents to do what is required of him’ – see section 68(2) of the CPEA.

CRIMINAL TRIAL PROCEEDINGS

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

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

3.6.2 Internal Security (General) Act, 1984

Section 9(1) of the Internal Security (General) Act makes it an offence to fail to disclose any information to a member of the police force that might be of material assistance in preventing ‘subversive activity’ or in securing the apprehension, prosecution or conviction of a person for an offence involving subversive activity. Anyone found guilty is liable to a fine or to a period of imprisonment (section 12). Clearly, this provision might well conflict with a journalist’s ethical obligation to protect his or her sources.

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

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

- To prevent serious injury to persons or property
- For the investigation or prosecution of a serious crime
- For the defence of a person accused of a criminal offence

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

3.7 Statutes that prohibit the publication of certain kinds of information

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

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

- Identities of minors in court proceedings
- Certain kinds of information regarding legal proceedings
- State security-related information regarding defence, security, prisons, the administration of justice, public safety and public order
- Obscene materials
- Materials which threaten fundamental rights
- Information regarding certain financial institutions

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

It is important to note that some of the laws outlined below constitute subordinate pieces of legislation – that is, they are regulations or orders (which are dealt with more specifically in section 4 of this chapter). They are included in this section because they seem more relevant here and affect the media generally and not just the broadcast media.

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

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

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

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

SEXUAL OFFENCES ACT, 2003

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

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

- Where a court has directed, in terms of section 23, that a person or class of persons not be present during sexual offences proceedings, no person may publish any information ‘which may reveal the identity of a complainant or accused in the proceedings’.
- Section 25(2), however, allows a court to authorise the publication of information about proceedings (where a court has directed that a person or class of persons not be present), where publication is just and equitable, and where the complainant or the accused is 18 years or older.
- Section 25(3) prohibits the publication of any information which may reveal the identity of a complainant in a sexual offences case until the accused has pleaded to the charge.
- Section 25(4) makes it an offence to publish any information in contravention of section 25 and, upon conviction, a person may be sentenced to a fine, a period of imprisonment of not less than three months, or to both such fine and imprisonment.

CRIMINAL PROCEDURE AND EVIDENCE ACT, 1981

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

- Indecent assault or
- Extortion

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

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

3.7.3 Prohibition on the publication of state security–related information

PRINTING AND PUBLISHING ACT OF 1967

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

OFFICIAL SECRETS ACT, 1967

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

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

INTERNAL SECURITY (GENERAL) ACT, 1984

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

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

POLICE SERVICE ACT, 1998

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

PRISONS PROCLAMATION OF 1957

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

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

SEDITION PROCLAMATION 44 OF 1938

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

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

These terms are so broad that they could be used, for example, to hinder reporting on industrial disputes. However, two recent cases have clearly dealt with sedition, and the courts therefore had no need to enquire more deeply into whether or not the

definitions are overbroad in a constitutional democracy. In *R v Thakalekoala (unreported)*, a Lesotho radio journalist was found guilty by the High Court of sedition under the Sedition Proclamation for claiming on air that the prime minister was not a Lesotho citizen, and calling upon the commissioner of police and the commander of the Lesotho Defence Force to arrest him.

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

NATIONAL SECURITY REGULATIONS, 2000

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

3.7.4 Prohibition on expression that is obscene

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

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

3.7.5 Prohibition on expression that violates fundamental rights

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

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

3.7.6 Prohibition on expression relating to financial institutions

The Financial Institutions Act, 1999, regulates financial institutions in Lesotho. While none of its provisions relate to the media directly, it is important to note that there are a number of secrecy-related provisions that may indirectly affect the media, in particular the following:

- Section 26 imposes a secrecy obligation upon anyone working at the Central Bank of Lesotho, prohibiting them from disclosing any information ‘of a non-public nature’ relating to their positions.
- Section 27 does allow the Central Bank of Lesotho to disclose basic licensing-related information in respect of institutions licensed under the Financial Institutions Act.
- Section 55, furthermore, allows the Central Bank of Lesotho to publish any information or data collected under the Financial Institutions Act, provided that no information that would disclose the particular affairs of a particular customer of a licensed financial institution may be published without that customer’s prior written consent.

3.8 Legislation that specifically assists the media in performing its functions

3.8.1 Introduction

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

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

3.8.2 Local Government Elections Act, 1998

The 2004 Amendment to the Local Government Elections Act, 1998, introduced an Electoral Code of Conduct, which contains a number of provisions aimed at

protecting the media so that it is able to fulfil its functions during election periods. Section 8 of the Electoral Code, headed 'Role of the media', provides that:

Every registered party and candidate shall –

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

3.8.3 National Assembly Election Order (No. 10) 1992

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

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

3.8.4 Parliamentary Powers and Privileges Act, 1994

The Parliamentary Powers and Privileges Act makes provision for certain privileges and immunities that are given to Parliament. A number of these are important for the media and assist it to perform its function of providing the public with news and information.

- Section 3 provides that no civil or criminal proceedings may be instituted against a senator or member (of the National Assembly) for words spoken before, or written in a report to, the Senate or National Assembly or to a committee thereof. However, this only applies to words that are:
 - Relevant and reasonably appropriate to the proceedings
 - Not spoken or written maliciously or with the object of exposing another person to hatred, contempt or undue ridicule
- Section 23 provides that in any proceedings instituted for publishing a report or summary or extract or abstract of anything done in the Senate or National Assembly, a defence is that this was done in good faith and without malice. Although this provision is somewhat unclear, it allows the media to report (in good faith) on the activities of the Senate or National Assembly without the fear of litigation as a result.

3.8.5 National Assembly Standing Orders, 2008

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

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

access to the committee and can order the refusal of entry to, or the removal of, the media ‘where appropriate’

3.8.6 High Court Act, 1978

The High Court Act contains provisions that are useful for the media, namely section 13, which provides that the pleadings (the documents that cases are based on: notices of motion, summons, affidavits, heads of argument, etc.) and proceedings (the actual trial or motion proceedings taking place before a judge) of the High Court ‘shall be carried on and the sentences, decrees, judgments and orders thereof, pronounced and declared in open court’. This is important because it guarantees the media (like every other person) the right to be present in court during important hearings and to have access to the court documents. This is subject, as is normal, to the judge having the right to ‘clear the court’ or otherwise remove anyone from court if the judge sees fit at any time during the proceedings.

3.8.7 Subordinate Courts Order, 1988

Like the High Court Act, the Subordinate Courts Order provides at section 7 that subordinate court proceedings (in both civil and criminal cases) shall be carried on in open court, subject to certain exceptions, which are dealt with elsewhere in this chapter. Furthermore, section 8 of the Subordinate Courts Order provides that the records and proceedings of the court shall in all cases be accessible to the public.

4 REGULATIONS AND RULES AFFECTING THE BROADCAST MEDIA

In this section you will learn:

- What regulations or rules are
- Key regulatory provisions governing broadcasting content
- Other key aspects of broadcasting-related regulations

4.1 Definition of regulations and rules

Regulations and rules are subordinate legislation. They are legal rules that are made in terms of a statute. Broadcasting regulations and rules are legal mechanisms that allow the minister responsible for communications or the LCA to make legally binding rules governing an industry or sector, without needing Parliament to pass a specific statute thereon. As is more fully set out elsewhere in this chapter, the empowering statute (in this case the Lesotho Communications Authority Act, 2000) empowers the:

- Minister to make regulations to bring into effect the provisions of the LCA Act (section 64)
- LCA to make administrative orders and rules for exercising its powers and performing its duties in the implementation of policy under the LCA Act (section 16(2))

4.2 Key regulations governing broadcasting

4.2.1 Broadcasting Rules 2004

The Broadcasting Rules were made by the Lesotho Telecommunications Authority (the forerunner to the Lesotho Communications Authority) and are contained in Notice No. 7 published in the Lesotho Extraordinary Government Gazette No. 38 (Vol. XLIX) dated 14 April 2004. This is the key set of rules governing broadcasting in Lesotho. We focus on the main aspects of the Broadcasting Rules:

CODE OF PRACTICE

Part III of the Broadcasting Rules contains a Code of Practice with which all broadcasters are required to comply. The Code lays down content restrictions upon broadcasters. Key aspects of the Code of Practice include the following:

- **Community standards:** A licensee shall not broadcast content which, measured by contemporary community standards:
 - Offends against good taste and decency
 - Contains the gratuitous use of offensive language, including blasphemy
 - Presents sexual matters in a gratuitous, explicit and offensive manner
 - Glorifies violence
 - Is likely to incite crime or lead to disorder
 - Is likely to incite or perpetuate hatred or gratuitous vilification of a person or section of the community on account of race, ethnicity, nationality, gender, marital status, sexual preference, age, disability, religion or culture
- **Protection of children:** When broadcasting programmes where a large number of children may be expected to be listening (taking account of available audience research as well as the time of broadcast), a licensee shall exercise due care in avoiding content which may disturb or be harmful to children including:
 - Offensive language

- Explicit sexual or violent materials, including music with violent or sexually explicit lyrics
- **Fairness, accuracy and impartiality in news and information programming**
 - Licensees shall report news and information accurately, fairly and impartially.
 - News and information shall be presented in the correct context and in a balanced manner without intentional or negligent departure from the facts, including through:
 - Distortion, exaggeration or misinterpretation
 - Material omissions
 - Summarising or editing
 - A licensee may present as fact only matters which may reasonably be true, having regard to the source of the information.
 - Opinions must be clearly presented as such.
 - Where there is reason to doubt the correctness of a report, it shall be verified, and where this is not practical, this fact must be mentioned in the report.
 - Corrections of factual errors must be broadcast as soon as reasonably possible, and the degree of prominence and timing must be appropriate and fair and shall include an apology where appropriate.
- **News and information programmes on controversial issues**
 - When reporting on controversial political, industrial or public importance issues, an appropriate range of views must be reported – either within a single programme or a series of programmes. Similarly, phone-in programmes on these issues must allow for a wide range of opinions to be represented.
 - Any person or organisation whose views have been criticised in a programme on a controversial issue of public importance is entitled to a reasonable opportunity to reply.
- **Conduct of interviews**
 - Persons who are to be interviewed by a licensee must be given prior notice of the subject of the interview and whether or not it is to be recorded or broadcast live.
 - Written parental permission must be obtained before interviewing children.
 - Due sensitivity must be exercised when interviewing bereaved persons or witnesses of traumatic incidents.

■ Comment

- Comment must be clearly indicated and must be an expression of opinion based on fact.

■ Privacy

- A licensee shall not present material which invades a person's privacy and family life unless there are identifiable public interest reasons for doing so.
- A licensee shall not use information acquired without a person's consent unless:
 - The information is essential to establish the credibility and authority of a source
 - The programme for which the information is acquired is clearly of important public interest
- The protection of confidential sources shall be respected, subject to the laws of Lesotho.
- The identity of a victim of a sexual offence must not be broadcast without his or her written consent, and the identities of child victims of sexual offences may not be broadcast under any circumstances.
- A licensee shall avoid gratuitous and repetitive detail in covering sexual offences.

■ Payment for information obtained from criminals

- A licensee shall not pay criminals for information unless there is a compelling public interest in doing so.

■ Party political broadcasts and advertisements

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

ADVERTISEMENT AND SPONSORSHIP CODE

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

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

- **Community standards, accuracy and fairness in advertising**
 - A licensee shall ensure that broadcast advertisements are decent and conform to the principles of fair competition in business.
 - A licensee shall ensure that advertisements do not contain any misleading descriptions or claims.
 - A licensee must be satisfied that the advertiser has substantiated all descriptions or claims prior to accepting the advertisement.
 - A licensee must ensure that advertisements do not unfairly attack or discredit other products or advertisements.
 - A licensee shall not unreasonably discriminate against or in favour of any particular advertiser.

- **Scheduling of advertisements**
 - Advertisements must be clearly distinguishable from programming.
 - A licensee must exercise reasonable judgment in the scheduling of advertisements that may be unsuitable for children when children may be expected to be listening.
 - Indirect broadcasting is not permitted during live or phone-in programmes.
 - Presenters shall refrain from commenting on advertisements.

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

- A licensee must not unreasonably discriminate against or in favour of any particular sponsor.
- **Record-keeping obligations:** Licensees are required to keep a range of records and produce these upon request by the LCA. Such records include:
 - Companies' incorporation documents and shareholders' agreements
 - Audited financial statements
 - Board resolutions
 - Employees' records
 - Weekly programme schedules
 - Daily programme logs showing categories of programming and timing thereof
 - Advertising and sponsorship logs
 - Music records detailing percentages of Sotho music and African music played
 - Complaints received and responses thereto
 - Retaining original recordings of all programmes broadcast for a period of three months.

COMPLIANCE ISSUES

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

4.2.2 Broadcasting Classification Regulations, 2007

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

- *A public broadcaster shall:*
 - Provide coverage for the whole country at all times
 - Provide services that realise the aspirations of the nation as regards democracy, development and nation building
 - Serve all sectors of society equally
 - Be accessible to all political parties and independent candidates on a fair and non-discriminatory basis, particularly during election campaigns
 - Contribute in bridging the digital divide by providing transmission access to other broadcasters where possible

- Be a platform for voter education
- Be funded by Parliament and other funds raised in the course of its business

- *A private broadcaster shall:*
 - Be owned and controlled by any individual or organisation so permitted by law
 - Operate on a non-profit-making basis
 - Have a right to provide coverage as they deem desirable provided there is available spectrum

- *A commercial broadcaster shall:*
 - Be owned and controlled by an individual or organisation
 - Operate to generate a profit
 - Have a right to provide coverage as they deem desirable, provided there is available spectrum

- *A community broadcaster shall:*
 - Be owned and controlled by a specific community
 - Transmit programmes that are determined by and realise the aspirations of that community
 - Operate on a non-profit-making basis
 - Provide coverage to enable access by members of the community

4.2.3 Licensing Fees Rules, 2008

The Licensing Fees Rules are contained in Notice No. 7 published in Supplement No. 1 to Gazette No. 7, dated 1 February 2008. The Licensing Fees Rules are issued by the LCA and set out the various fees payable in respect of new licence application fees, licence amendment fees, initial licence fees and annual licence fees. Annual licence fees are, for example:

- 20,000 Maloti for public, private and commercial television broadcasters
- 10,000 Maloti for public, private and commercial sound broadcasters
- 2,000 Maloti for community sound and television broadcasters

4.2.4 Administrative, Procedural and Service Provision Rules, 2000

The Administrative, Procedural and Service Provision Rules are contained in Notice No. 212 published in Extraordinary Gazette No. 103 (Vol. XLV), dated 13 December 2000. These administrative and procedural rules contain provisions:

- Governing the organisational and financial processes of the LCA, including with respect to complaint proceedings, other types of enquiries and conducting investigations, all of which are relevant to broadcasting
- Governing telecommunications-related issues including tariff issues, inter-connection and equipment

5 MEDIA SELF-REGULATION

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

The media has failed to develop industry-wide associations capable of developing and enforcing self-regulatory provisions for the attainment of appropriate professional standards for the media. This lack of self-regulation has led to disputes involving the media having to be settled in the courts.

6 COMMON LAW AND THE MEDIA

In this section you will learn about:

- Common law
- Defamation
- Invasion of privacy
- Contempt of court

6.1 Definition of common law

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

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

Elsewhere in this chapter we have already examined two cases dealing with seditious publications. This section focuses on three areas of common law of particular relevance to the media, namely: defamation; privacy; and contempt of court.

6.2 Defamation

6.2.1 Definition of defamation

Lesotho's common law is extremely influenced by South African law, and like South African law, defamation is part of the common law of Lesotho. As is the case in South Africa, defamation is essentially the unlawful publication of a statement about a person, which lowers his or her standing in the mind of an ordinary, reasonable and sensible person. An action for defamation 'seeks to protect one of the personal rights to which every person is entitled, that is, the right to a good name, unimpaired reputation and esteem by others'.¹

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

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

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

6.2.2 Defences to an action for defamation

There are several defences to a claim based on defamation, namely:²

- Truth in the public interest
- Absolute privilege – for example, a member of the National Assembly speaking in Parliament
- Statements made in the discharge of a duty – for example, the duty to provide information in connection with the investigation of a crime, enquiries as to the creditworthiness of a person, etc.
- Statements made in judicial or quasi-judicial proceedings
- Reporting on proceedings of a court, Parliament or certain public bodies
- Fair comment upon true facts and which are matters of public interest

- Self-defence (to defend one’s character, reputation or conduct)

- Consent

The most relevant here is the defence of truth in the public interest. Truth in the public interest is where an action for damages is defended by asserting that the defamatory statement was true and, furthermore, that it is in the public interest to publicise the information.

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

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

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

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

[t]he publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time. In considering the reasonableness of the publication, account must obviously be taken of the nature, extent and tone of the allegations. We know that greater latitude is usually allowed in respect of political discussion ... and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source as well as the steps taken to verify the information. Ultimately there can

be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper.

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

- Nature and tone of the allegations
- Nature of the information on which the allegations were based, for example, if the information related to an important political issue or not
- Reliability of the source of the allegations
- Steps taken to verify the allegations
- General standard of care adopted by the media in the particular circumstances

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

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

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

6.2.3 Remedies for defamation

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

- *The publication of a retraction and an apology by the media organisation concerned:* Where it has published a false defamatory statement, a newspaper or broadcaster often will publish a retraction of a story or allegation in a story, together with an apology. Whether or not this satisfies the person who has been defamed will depend on a number of factors, including: the seriousness of the defamation; how quickly the retraction and apology is published; and the prominence given to the retraction and apology (this is a combination of the size of the retraction, but also its positioning in the newspaper).
- *An action for damages:* This is where a person who has been defamed sues for monetary compensation. This takes place after the publication has occurred. Damages (money) are paid to compensate for the reputational damage caused by the defamation in circumstances where there are no defences to defamation. The amount to be paid in compensation will depend on a number of factors, including whether or not an apology or retraction was published, as well as the standing or position in society of the person being defamed.
- *An action for prior restraint:* This is where the alleged defamatory material is prevented from being published in the first place. Where a person is aware that defamatory material is going to be published, he or she may go to court to, for example, obtain an interdict prohibiting the publication, thereby preventing the defamation from occurring. Prior restraints are dangerous because they deny the public (such as readers of a publication or audiences of a broadcaster) the right to receive the information that would have been publicised had it not been for the interdict. Prior restraints are seen as being a last resort mechanism. The legal systems of countries that protect the right to freedom of expression usually prefer to allow publication and to deal with the matter through damages claims – in other words, using ‘after publication’ remedies.

6.3 Privacy

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

The facts of this case involved an action for damages arising out the release of certain

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

6.4 Contempt of Court

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

6.4.1 The sub-judice rule

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

In *MoAfrica Newspaper Re: RULE NISI (R v Mokhantso and Others)* 2003 (5) BCLR 534 (LesH), the High Court of Lesotho held that the ‘main purpose of the common law *sub-judice* rule is to protect the fair administration of justice against any statement that has the substantial effect of prejudicing the impartiality, dignity, or authority of the court which is seized with pending court proceedings’ [at paragraph 9].

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

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

Importantly, Judge Peete stressed that the *sub-judice* rule ‘is an important and useful process whereby the proper administration of justice is protected against ... statements [made outside of court] which have a substantial risk of prejudicing or interfering with pending court proceedings’ [at paragraph 28]. Judge Peete went on to elaborate on the respective responsibilities of courts and the media in this regard:

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

6.4.2 Scandalising the court

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

Again, there is a distinction between fair criticism and scandalising the court. In *MoAfrica Newspaper Re: RULE NISI (R v Mokhantso and Others)* 2003 (5) BCLR 534 (LesH) the High Court of Lesotho (per Justice Peete) made some important statements about the relationship between the freedom of expression provisions in the Lesotho Constitution and the judiciary: ‘I am a firm holder of the view ... that the freedom of press as a guaranteed right under our Constitution must be held in high regard and esteem more so by the courts of law themselves. This will serve to show that the courts do not exist in “an ivory tower” and are not unassailable or their decisions unimpugnable and above criticism.’

NOTES

- 1 See FDJ Brand, ‘Defamation’, *LAWSA*, 2nd ed., Volume 7, para 232 citing *Argus Printing & Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 (A) at 23D-I.
- 2 *Ibid*, paras 245ff.
- 3 See *Pakendorf en Andere v De Flamingh* 1982 (3) SA 146 (A).