

**WHO IS WATCHING WHO? REGULATION OF MEDIA AND
FREEDOM OF EXPRESSION IN UGANDA: A CRITICAL ANALYSIS
OF THE PRESS AND JOURNALISTS ACT 1995**

Dissertation submitted in partial fulfillment of the requirements of LLM degree (Human Rights and Democratisation in Africa) Faculty of Law, Centre for Human Rights, University of Pretoria

By

ITUMELENG PASCALINA SHALE

STUDENT NO. 28532148

UNDER THE SUPERVISION OF PROFESSOR FW JJUUKO

FACULTY OF LAW MAKERERE UNIVERSITY UGANDA

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DECLARATION

I, ITUMELENG PASCALINA SHALE, do hereby declare that this research is my original work and that to the best of my knowledge and belief; it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

Prof FREDERICK JJUUKO

Faculty of Law Makerere University Uganda

Date:.....

Dedication

To my BEST MEN: My husband Shale Patrick Shale and my son Mokhali Shale

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Without God's Grace this work could not have been what it is. For that reason, I thank you father for being my strength in my weakest moments.

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Mokhali one day you will understand how you have contributed to Mummy's work This work is submitted in partial fulfilment of the journey to the good times we are going to have together.

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LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
AHRLR	African Human Rights Law Reports
African Charter	African Charter on Human and Peoples' Rights
American Convention	American Convention on Human Rights
ANC	African National Congress
AMARC	World Association of Community Radio Broadcasters
CERD	International Convention on Elimination of Racial Discrimination
DPFEA	Declaration of Principles on Freedom of Expression in Africa
European Convention	European Convention on Human Rights
European Court	European Court of Human Rights
FHRI	Foundation for Human Rights Initiative
ICCPR	International Convention on Civil and Political Rights
IFJ	International Federation of Journalists
IMCU	Independent Media Council of Uganda
IMS	International Media Support
INSI	International News Safety Institute
ICASA	Independent Communications Authority of South Africa
Johannesburg Principles	Johannesburg Principles on National Security, freedom of expression and access to information
MDDA	Media Development and Diversity Agency
NMC	National Media Commission
NRM	National Resistance Movement
OAS	Organisation of American States
OSCE	Organisation for Security and Co-operation in Europe
OSI	Open Society Institute
PCSA	Press Council of South Africa
Siracusa Principles	Siracusa Principles on Limitation and Derogation of provisions in the ICCPR
UN	United Nations
Universal Declaration	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organisation

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CHAPTER 1

INTRODUCTION

1.1 Background to the study

Freedom of expression is defined as a three-pronged right to seek, receive and impart information and ideas without hindrance.¹ It is provided for in virtually all human rights instruments at both international² and domestic levels.³ Various arguments have been advanced justifying the significance of freedom of expression.⁴ Foremost amongst these are the arguments of truth, self-fulfillment and democracy.⁵

The argument of truth is famously associated with John Stuart Mill's argument that the pursuit of truth is of overriding importance for the development of society and that the best way to arrive at the truth is to allow freedom of discussion and debate.⁶ The argument based on self-fulfillment asserts that freedom of expression is a vital part of each individual's right to self-development and fulfillment in that people will only be able to maximise their potential as human beings if they are free to express and receive, ideas, beliefs and arguments.⁷

The argument that seems to have prevailed over the others is that freedom of expression is essential for democracy.⁸ Its origin is historically associated with Alexander Meiklejohn, who argued that in order for citizens in a democracy to be able to effectively exercise their democratic responsibilities they must have free access to information about politicians and their policies.⁹ It is supported by the argument that it is only the freedom to criticise government that makes it effectively accountable to the electorate.¹⁰ This view has

¹ Art 19 Universal Declaration of Human Rights 1948 (Universal Declaration).

² Art 19 Universal Declaration, art 19 International Convention on Civil and Political rights 1966 (ICCPR), art 9 African Charter on Human and Peoples' Rights 1981 (African Charter), Art 10 European Convention on Human Rights 1950 (European Convention) and art 13 Inter-American Convention on Human Rights 1978 (American Convention).

³ Art 29 Constitution of the Republic of Uganda, 1995.

⁴ T Lewis, 'Democracy, free speech and TV: The case of BBC and the Prolife alliance' (2004) 5 *Web Journal of Current Legal Issues* <http://webjcli.ncl.ac.uk/2004/issues5/tlewis> (accessed 15 August 2008).

⁵ F Schauer *Free Speech: A philosophical Enquiry* (1982) 29.

⁶ Lewis (n 4 above).

⁷ Schauer (n 5 above).

⁸ Lewis (n 4 above).

⁹ A Meiklejohn *Free speech and its relations to self-government* (1965) 28.

¹⁰ According to Lewis (n 4 above), this argument found favour in the United States of America in *New York Times v Sullivan* 376 US 254 (1964) and *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534. The African Commission on Human and Peoples' Rights also reasoned in the same way in *Media rights Agenda and others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

been upheld in the Ugandan case of *Obbo and another v Attorney General* in which Mulenga JSC held that 'meaningful participation of the governed in their governance, which is a hallmark of democracy, is only assured through optimal exercise of freedom of expression.'¹¹

At the international and regional levels, human rights conventions and declarations have underlined the significance of freedom of expression as a core human right. The same is reflected at the national level in that where freedom of expression is guaranteed, it is protected as a fundamental human right.¹² However, apart from being a *conditio sine qua non* for democracy, freedom of the press has other important roles such as providing entertainment, promoting the arts, fostering interest and participation in sports.¹³ For purposes of regulation of the media, the most important functions of the press may be summarized as being to inform, to investigate, to expose abuse, and to educate.¹⁴ All these functions are of crucial importance to society but can only be fulfilled by a press that is free from unnecessary restraint.¹⁵ For this reason, it is argued that unfettered exercise of freedom of expression leads to the transformation of societies and helps to create connectivity with the global world.¹⁶

The significance of freedom of expression as a core element essential in democracy does not however leave out the possibility of the same freedom being abused to the detriment of democracy. For instance, in South Africa, the media is alleged to have been used to perpetuate racism during apartheid and xenophobia post apartheid.¹⁷ In Rwanda it was used to spread hatred that led to the 1994 genocide.¹⁸ Hence, while jealously guarding against infringement of this right, the human rights instruments also place duties and responsibility on the beneficiaries of the freedom. The duties which are commonly placed on the recipients of freedom of expression are in the form of limitation of this right for: (a) protection and respect of others (b) national security and (c) public health and morals.¹⁹ The American Convention elaborates on this limitation by providing that the right of expression

¹¹ Constitutional appeal no 2 of 2002 [2004] UGCA 1.

¹² For instance, the Constitutions of Uganda, Lesotho, Kenya, South Africa, Botswana, Ghana, Nigeria, Swaziland, Zimbabwe to mention but a few.

¹³ AJ Jeffery 'Free speech and Press: an absolute right?' (1986) 8 *Human Rights Quarterly* 197. See also 'Development governance and the media: the role of media in developing African society' on <http://go.worldbank.org/EK1FPOOPZP> (accessed 11 October 2008).

¹⁴ Jeffery (n 13 above).

¹⁵ As above.

¹⁶ R Punjabi & C Galez 'Human rights, freedom of expression and terrorism' *South Asia Regional expert meeting report, contributing to the UN working group on terrorism* April 2006.

¹⁷ R Danso & DA McDonald 'Writing xenophobia: Immigration and print media in post-apartheid South Africa' (2001) 48 *Africa Today* 1.

¹⁸ CL Kellow & HL Steeves 'The role of radio in the Rwandan genocide' (2006) 48 3 *Journal of Communication* 107.

¹⁹ Art 19(2) ICCPR, art 10(2) European Convention, art 13(2) American Convention.

may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.²⁰

The African Charter on the other hand guarantees the right subject to 'limitations within the law,'²¹ without specifying the law referred to. In interpreting this Article, the African Commission on Human and Peoples Rights (African Commission) indicated that the limitation in Article 9 of the African Charter should be read with Article 27(2) of the African Charter which refers to limitations of the rights of individuals on grounds similar to those found in Article 9(2) of the ICCPR discussed above.²²

The limitations on freedom of expression together with the need for diversity and pluralism have been cited as reasons for regulation of ownership of the media, content of information to be disseminated through the media, certification of journalists and many other forms of media regulation.²³ Like most countries, Uganda has laws that directly and indirectly regulate all media. The laws that are directed at the media include the Constitution which provides for freedom of the press and the media,²⁴ the Press and Journalists Act,²⁵ Electronic Media Act,²⁶ and the Communications Act.²⁷ There are other laws such as the Penal Code of 1950, Presidential Elections Act of 2005 and Anti- Terrorism Act of 2002, which though not enacted purely for regulation of the media have provisions aimed at regulating the media. The focus of this study is however, the Press and Journalists Act (the Act).²⁸

The Act has been commended for repealing its predecessors which were blatantly repressive of the media. However, it has also met a lot of criticism concerning establishment of the Media Council and the National Institute of Journalists of Uganda (NIJU). The Media Council has been criticised for not being independent and being a mere cathartic strategy by the government calculated to pacify those challenging the government's stronghold on the media industry.²⁹ NIJU has been criticised for being a government institution aimed at

²⁰ Art 13(3) American Convention.

²¹ Art 9(2) African Charter.

²² *Media Rights Agenda and others v Nigeria* (n above 10) para 68.

²³ PM Napoli *Media diversity and localism: Meanings and Metrics* (2007)

²⁴ Art 29.

²⁵ Chapter 105 of 1995.

²⁶ Chapter 104 of 1996.

²⁷ Chapter 106 of 2000.

²⁸ n 25 above.

²⁹ GL Nassanga The new press bills in Uganda: Implication for national communication policy and press freedom' (1997)11 2 *Africa Media Review* 79.

indoctrinating journalists towards government propaganda and thereby killing diversity of opinion. It has also been criticised for restricting the right to freedom of expression to professionals in violation of other citizens' right to freedom of expression.³⁰ In reaction to this perceived violation of freedom of expression, the journalists' Associations in Uganda have formed an Independent Media Council of Uganda (IMCU). The IMCU's objectives are ensuring freedom of journalist, enhancing high standards in journalism and challenging any attempts by the government to repress the media or to hinder its freedom of expression.³¹

1.2 Statement of the research problem

The expectation is that the media should watch-over the government, inform the public of its policies and activities and expose any malpractices such as corruption. The government on the other hand is expected to watch-over the media to ensure that in exercising its freedom of expression, it acts within limits in Article 19(2) of ICCPR. The government of Uganda seems determined to enforce professionalism and responsibility in the media through punitive measure as provided in the Press and Journalists Act. On the other hand, the IMCU is determined to challenge any attempt by the government to repress the media. The problem is that the Press and Journalists Act is regarded by journalists as a government's attempt to silence the media and inhibit its freedom of expression. On the other hand the government's view is that the Act is intended to enhance freedom of the press and ensure professionalism in the media.

1.3 Research Questions and Objectives of the study

The problem indicated above raises the following questions which this study attempts to respond to:

1. What are the theories underlying regulation of the media?
2. Does the Press and Journalists Act enhance or hinder freedom of expression?
3. How best can media be regulated to enhance freedom of expression?

The broad objectives of the study are:

- To analyze theories of media regulation vis-a vis protection of freedom of expression as a fundamental human right.

³⁰ An interview with Haruna Kannaabi, Secretary of the Independent Media Council of Uganda (IMCU) (8 October 2008).

³¹ IMCU Memorandum of Association para 4(b).

- To critically analyze the Press and Journalists Act of Uganda and assess whether it enhances or hinders freedom of expression in Uganda.
- To make a comparative analysis of different forms of media regulation in other jurisdictions and to draw best practices which might be useful for Uganda.

1.4 Scope and Limitations

The research is focused on regulation of media through the Press and Journalists Act which is aimed at regulating entry into journalism as a profession, licensing and discipline of journalists and arbitrating on disputes between the media and the public or the media and government.

1.5 Significance of the study

This study is intended to bring to the fore the challenges that face protection of the right to freedom of expression and how regulation of the media can both positively and negatively affect that protection. It will also contribute to the debate whether journalism can be professionalised like the legal and medical professions without violation of the right to freedom of expression.

1.6 Methodology

The bulk of the research is based on secondary sources such as books, journal Articles, and internet research. Interviews with journalists, editors and members of the Media Council will be relied upon.

1.7 Literature review

Literature on regulation of media has increased over the years. Different methods of regulation have been proposed by different scholars and different methods have been adopted by different countries. Abbott and Lipsky discuss the United States' cases on constitutionality of media regulation. They argue that in as much as the goals of free expression would be thoroughly frustrated by complete avoidance of government regulation of the media, the same will apply if there is complete government control.³² They propose a strict scrutiny test for laws regulate media for them to be considered constitutional.

³² B Abbott & JR Lipsky 'Reconciling red lion and tornillo: a consistent theory of media regulation' (1976) 28 *Stanford Law Review* 563,588.

Siebert, Peterson and Schnam in *Four theories of the Press* discuss the theories of media regulation.³³ They discuss how each of these theories developed, their chief purposes and ownership of the media during the time each theory developed. These factors explain why at a particular time media was regulated in the way that it was and thereby gives light as to the impact of media regulation on freedom of the press. However, these theories do not adequately cover the nature of media in Uganda in which not only the professionals take part but other members of the society actively participate in media.³⁴

Roger Kaplan's report compiled for the International Council on Human Rights Policy investigates journalism, media and the challenge of human rights reporting. It discusses the professional environment of media, its context, trends and constraints. It refers to the impact of technology on transformation of information and concludes that while technology can be used to reinforce injustice and unjust power structures, it can also be used to promote human rights such as freedom of expression.³⁵ Among others, the report discovers that unregulated media can lead to injustices such as racism. Although the report does not suggest ways in which media may be regulated, the investigations however reflect problems that may only be cured by regulation.

As regards regulation of media in Uganda, Nassanga discusses the Press and Journalistic Act as well as the Electronic Media Act. She commends the government of Uganda for repealing the laws that existed prior to 1995 which in her opinion were oppressive on the media. However, she questions the composition of the Media Council the process of appointment of its members which she says are 'hand-picked' by the Minister of Information. She critiques the fact that the Media Council has to rely on government for funding, a factor that may in the long run 'thoroughly compromise' its independence.³⁶

The works of Juuko³⁷ and Makubuya³⁸ are instructive in analysing the functions of the Media Council. However, these works are only limited to the Media Council's function in censoring plays and leaves out the other functions of the Media Council which this research seeks to explore.

³³ F Siebert, Peterson & Schrumm *Four theories of the press* (1963).

³⁴ As above.

³⁵ Journalism media and challenges of human rights reporting 2002 *International Council on Human Rights policy* 38.

³⁶ Nassanga (n 29 above) 75.

³⁷ FW Juuko 'To ban or not to ban? A critique of the media council's ruling' (2005) 11 *East African Journal of Peace and Human Rights* 172, 179.

³⁸ AN Makubuya 'The vagina monologues' saga and free expression in Uganda' (2005) 11 *East African Journal of Peace and Human Rights* 161, 170.

1.8 Overview of Chapters

This research is divided into five distinct chapters. Chapter 1 discusses background to the study, statement of the problem, research question, literature review as well as significant, limitations and scope of the study. The second chapter explores the normative and legal framework for regulation of the media. It explores the theories of the press and how they reflect in the international legal framework for protection of the right to freedom of expression. Chapter 3 is an enquiry into the legal system of Uganda. It examines the constitutional protection of freedom of expression and regulation of the media through the Press and Journalists Act. This Act is weighed against the standards discussed in chapter 2. Chapter 4 is a comparative analysis of media laws in other jurisdictions: South Africa, Ghana and Kenya so as to draw best practises that can be recommended for reformation of the Press and Journalists Act of Uganda. Chapter 5 consists of conclusions drawn from the preceding chapters and recommendations as to how the Press and Journalists Act can be reformed.

CHAPTER 2

Normative and legal framework for media regulation

2. Introduction

While the significance of freedom of expression and its centrality as a fundamental human right is agreed upon, it is also undisputed that to a certain extent unlimited freedom of the media is problematic.³⁹ Discovered problems include commercialism, concentration of media ownership, with the possibility of killing diversity of opinion,⁴⁰ decline in the quality of news leading to sensationalism, superficiality and fueling of hatred which has led to racism, genocide, xenophobia and other acts of hatred. Hence it becomes important that there be some form of media regulation.⁴¹ However regulation of the media should not defeat the very purpose of protecting freedom of expression.⁴² Determining the proper limits of media regulation is thus attempted by discussing the normative theories of media regulation and international human rights standards for limitation of the right to freedom of expression may be imposed.

2.1 Normative theories of media regulation

The first well-known attempt to clarify the link between mass media and the political society was introduced by Siebert et al in 1963.⁴³ Siebert explains the operation of media in terms of the political circumstances which prevailed in certain parts of the world during different periods. These theories are authoritarianism, libertarianism, soviet communist theory and social responsibility. Due to the difficulty that these four classical theories of the press were not fully applicable to the non-aligned countries of Asia, Africa and Latin America, they were later supplemented by McQuail with two other theories; media development theory and democratic participant theory.⁴⁴ Although criticized for being too simplistic, outdated and bias, what is undisputed is that these theories are normative in nature in the sense that they mainly express ideas of how the media ought to or can be expected to operate in a particular

³⁹ Abbott and Lipsky (n 32 above).

⁴⁰ M Feintuck & M Varney *Media regulation, public interest and the law* (2006) 2.

⁴¹ Stated Dr GL Nassanga, Chairperson of the Uganda Media Council in an interview with the author (1 October 2008).

⁴² African Commission in *Media Rights Agenda v Nigeria* (n 10 above).

⁴³ Siebert (n 33 above).

⁴⁴ TS Skjerdal *Siebert's four theories of the press: A critique* (1993) www.geocities.com/CapitolHill/2152 (access 27 September 2008).

set of conditions and values.⁴⁵ They can thus be utilized to understand philosophy behind media regulation.⁴⁶

2.1.1 Authoritarianism

This theory envisages a situation where the state has total control over both public and limited private media. It came into being in the authoritarian climate of the late Renaissance, soon after the invention of printing. In that society, truth was conceived to be not the product of the great mass of people but of a few wise men that were in a position to guide and direct their fellows. This truth was thought to be closer to the center of power. The press therefore functioned from top to bottom.⁴⁷

Only by special permission was private ownership of the press permitted and this permission could be withdrawn anytime the obligation to support the royal policy was considered to have been dishonored.⁴⁸ Publishing was thus a sort of agreement between power source and publisher in which the former granted a monopoly and the latter gave support. However, the power source kept the right to set and change policy, the right to license and in some cases the right to censor.⁴⁹

Similar media policies were adopted in Africa during the colonial period.⁵⁰ African-owned newspapers in the colonial period rivaled the colonial government. Those who conducted them reasoned that, in the absence of a democratically elected government, the press was the most effective constitutional weapon for ventilating grievances and influencing the trend of events.⁵¹ The government sought to control the newspapers by initiating prosecutions for seditious libels, and proposing or passing restrictive press laws, most of which were renovations and adaptations of obsolete eighteenth-century laws in England.⁵²

This theory of the press being a servant of the state was universally accepted in the 16th and most of the 17th centuries.⁵³ It eliminated one of the functions of today's press, to

⁴⁵ As above.

⁴⁶ McLeod & Blurmer 'The macrosocial level of communication science' in Berger and Chaffee (eds) *Handbook of communication science* (1987) 272.

⁴⁷ Siebert (n 33 above) 2.

⁴⁸ Siebert (n 33 above) 3.

⁴⁹ As above.

⁵⁰ FA Omu 'The dilemma of press freedom in colonial Africa: the West-African Example' (1969) 9 *Journal of African History* 279.

⁵¹ As above.

⁵² Omu (n 50 above) 280.

⁵³ Siebert (n 33 above) 3.

check on government.⁵⁴ This concept set the original pattern for most of national press systems of the world and still persists.⁵⁵

2.1.2 Libertarianism

This theory evolved in the late 17th Century with the growth of political democracy and religious freedoms, the expansion of free trade and the acceptance of laissez-faire economics, all of which undermined authoritarianism.⁵⁶ It introduced the notion of *free market place of ideas*. Libertarianism is based on the right of an individual, and advocates absence of restraint.⁵⁷ Libertarians argue that the press should be seen as the *fourth estate* reflecting public opinion and the government should not regulate it at all.⁵⁸ In support of this theory, Milton in his celebrated *Areopagitica*,⁵⁹ eloquently pleads for the abolition of licensing restrictions on the printing of books. His confidence in the capacity of truth to triumph over falsity is unbounded, and is expressed in the following terms:⁶⁰

Though all the winds of doctrine were let loose to play upon the Earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever know Truth put to the worse, in a free and open encounter?

In support of this theory, Haiman, points out that, individuals are capable of free choice and are responsible for the behavior which they choose.⁶¹ Therefore the suppression of information precludes the autonomous decision-making of which man is capable thus violating his integrity.⁶² He acknowledges that some individuals may be more intelligent, more mature or better educated than others, but stresses that 'every informed person is ultimately the best judge of his or her own interests.'⁶³

2.1.3 Social Responsibility Theory

This theory came into being as a result of an American initiative in the late 1940's after an increasing prominence for commercialism values in broadcasting to the extent that public

⁵⁴ Omu (n 50 above) 279.

⁵⁵ Siebert (n 33 above) 3.

⁵⁶ Siebert (n 33 above) 4.

⁵⁷ K Suresh *Theories of communication* (2003).

⁵⁸ The concept 'fourth estate' has been attributed to Edmund Burke, a British politician (1729 – 1797). It comes from a quote in Thomas Carlyle's book *Heroes and hero worships in history* (1841).

⁵⁹ John Milton, *Areopagitica, A Speech for the Liberty of Unlicensed Printing*, ed. Noel Douglas (London: Humphries & Co. Ltd., 1927) quoted by Jeffery (n 13 above) 200.

⁶⁰ As above.

⁶¹ FS Haiman *Speech and Law in a free society* (1981) 7.

⁶² As above.

⁶³ As above.

service values were at the risk of marginalization.⁶⁴ Realizing that the market had failed to fulfill the promise that press freedom would reveal the truth, that there had been a decline in market economy, and that the media was monopolized by a privileged few, the Commission on Freedom of the Press provided a model in which the media had certain obligations to society. These obligations were expressed in the words 'informativeness, truth, accuracy, objectivity, and balance.'⁶⁵

The goal of the social responsibility system therefore, is that media as a whole is pluralized, indicating 'a reflection of the diversity of society as well as access to various points of view.'⁶⁶ As opposed to the libertarianism, the principle in social responsibility is to provide an entrance to different mass media to minority groups. The journalist is accountable to his audience as well as to the government.⁶⁷ In illustration, the theory puts the mass media and the government at the same level, signifying an interaction where both parties are allowed to criticize each other.⁶⁸ Although against total freedom of the media, unlike authoritarianism, social responsibility theory advocates for media self-regulation as opposed to state-regulation.

The advocates of this argue that media regulatory bodies should be set up by the media practitioners themselves, they should adhere to their own codes of ethics and professional standards in journalism. The arguments for self-regulation include among others, efficiency, flexibility, increased incentive for compliance and low cost.⁶⁹

However critiques of self-regulation question whether the expertise possessed by those in the profession will be used for the benefit of the public or to maximize media industry's profits.⁷⁰ The other argument is that the private nature of self-regulation may fail to give adequate attention to the needs of the public or the views of affected parties outside the industry.⁷¹ It is also criticized for its potential to bring about anti-competitive conduct.⁷²

⁶⁴ M Feintuck (n 40 above)

⁶⁵ Recommendation of the United States Commission on freedom of the press (1942-1947) known as the Hutchin's Commission.

⁶⁶ Siebert (n 33 above) 102.

⁶⁷ Skjerdal (n 44 above).

⁶⁸ As above.

⁶⁹ AJ Campbell, 'Self-regulation and the media' (1999) 51 *Federal communications Law Journal* 715

⁷⁰ PP Swire 'Markets, self-regulation and government protection of personal information' in L Irving (eds) *Privacy and self-regulation in information age*, (1997) 13.

⁷¹ Campbell (n 70 above) 718.

⁷² As above.

2.1.4 Soviet Communist Theory

This theory is derived from the ideologies of Marx and Engel that ‘the ideas of the ruling classes are the ruling ideas.’⁷³ Lenin thought of private ownership as being incompatible with freedom of press and that modern technological means of information must be controlled for enjoying effective freedom of press.⁷⁴ This theory lost relevance when the Soviet Union collapsed. It however influenced to some extent in the drafting of the limitations of freedom of expression in Article 19 (2) of the ICCPR. This influence is discussed under limitations of the right to freedom of expression in this chapter.

2.1.5 Development communication Theory

The underlying factor behind the genesis of this theory was that there can be no development without communication.⁷⁵ In view of the limited natural resources, this theory advocates for regulation of the media and journalistic freedoms by the state.⁷⁶ It lays more emphasis on the journalistic responsibilities and less on freedom of expression. As a result, the media in terms of this theory subordinate itself to political, economic, social and cultural needs.⁷⁷ According to this theory, regulation of media is done in the public interest in order to ensure pluralism, to avoid sectarianism, to accommodate diversity, and for nation-building.

The main criticism against this theory is that there is no distinct definition of public interest. As a result, ‘development,’ especially in states with little or no democratic experience is often equated with government propaganda.⁷⁸ Involvement of the state as a regulator also poses problems in that the state becomes both the judge and the party to many disputes that may arise.⁷⁹ An example of this is the case of Rwanda in which the media was state controlled or supported and yet it was used to spread hatred and sectarianism which led to the 1994 genocide.⁸⁰

⁷³ Siebert (n 33 above) 6.

⁷⁴ Skjerdal (n 44 above).

⁷⁵ As above.

⁷⁶ As above.

⁷⁷ As above.

⁷⁸ JM Katamali ‘Freedom of expression and its limitations: the case of Rwanda genocide’ (2002) 38 *Stanford Journal of International Law* 71.

⁷⁹ As above.

⁸⁰ RTLM, a radio station that was used to spread the genocide ideology and to provide step by step instructions during the genocide was owned by Hutu extremists most of whom were government officials and enjoyed full support of the state and Kangura a propagandist newspaper was owned by and enjoyed full support of the state.

2.1.6 Democratic Participation Theory

Having emerged in the 1970's out of a critique of domination of the main media by both the public and private monopolies, this theory opposes the commercialization of modern media and its top-down non-participant character.⁸¹ Hence it is also referred to as an alternative grassroots media theory.⁸² The need for access and right to communicate is stressed. Bureaucratic control of media is decried.⁸³ It challenges uniform central settings, whether regulated by states or by private professionals and recognizes the right to use media for social interaction and social action in small settings.

This theory set a trend for foundation of many non-institutionalized community radios.⁸⁴ Media set up in terms of this theory requires no prior licensing by any authority and there are no set professional codes of ethics. With the help of new broadcasting technology there is a rapid and large expansion of grassroots media though licensing is still a prerequisite.

2.2 International legal framework for protection of freedom of expression

At the international level, the right to freedom of expression is guaranteed in Article 19 of the Universal Declaration and Article 19 of the ICCPR. At the regional levels it is provided for in Article 9 of the African Charter, Article 10 of the European Convention and Article 13 of the American Convention.

Although the concept of human rights had long been there before the adoption of these international human rights instruments, the expression 'human rights' came into everyday parlance only since World War II with the founding of the United Nations and the adoption of the Universal Declaration.⁸⁵ Freedom of expression was included in these instruments not only because of its significance to democracy but also because the media had played a big role in aiding the warfare as it was used to spread war propaganda.⁸⁶

Prior to the adoption of the Universal Declaration, the first multilateral attempt to regulate cross-border propaganda in peace times was the League of Nations International

⁸¹ Skjerdal (n 44 above).

⁸² As above.

⁸³ As above.

⁸⁴ For instance, Mama FM (A community radio set up by Uganda Media Women Association aiming at broadcasting gender sensitive educational programmes and offering training for female journalists).

⁸⁵ Encyclopedia Britannica on www.britannica.com (accessed 15 September 2008).

⁸⁶ The media was used to incite racial hatred in Nazi Germany.

Convention Concerning the use of Broadcasting in the Cause of Peace of 1936,⁸⁷ which was all but ignored during the World War II. This led to the adoption the Telecommunication Convention by the United Nations in 1947. The inclusion of the right to freedom of expression and its limitations in the subsequent human rights instruments followed in 1948 with the adoption of the Universal Declaration of Human Rights.

The main aim of recognition and codification of human rights was to avoid the recurrence of the atrocities that took place during World War II such as the holocaust.⁸⁸ The idea of freedom of expression as a human right played a key role in the 18th and early 19th century struggle against political absolutism.⁸⁹ The struggle was against authoritarianism and asserted that the state has a negative duty in relation to certain rights including freedom of expression. That is, the state has a duty to refrain from tempering with individuals' freedom to express their opinions even if the said opinions are against the state itself. The development came into being due to the rulers' failure to respect the principles of freedom and equality.⁹⁰

The concept of human rights was greatly influenced by John Locke's philosophy of natural rights and Emmanuel Kant's idea of universality of rights and moral principles. Protection of the right to freedom of expression by almost all international, regional and national human rights instruments reinforces Kant's universality principle. The agreement that the state has a duty to refrain from interference with the individual's exercise of the right to freedom of expression reinforces Locke's philosophy of natural rights.

According to Locke, individuals possess natural rights independently of the political recognition given to them by states. For him, the government's sole purpose is to protect rights of the citizens. This thus established a precedent for establishing a legitimate political authority for protection of human rights and had an impact on limitation of freedom of expression for the protection of the rights others.⁹¹

2.2.1 Limitations on the right to freedom of expression

The right to freedom of expression is guaranteed with special duties and responsibilities and is subject to certain restrictions. These restrictions are reflected in Article 19 (2) of the

⁸⁷ Adopted by the League of Nations in Geneva on 23 September 1936.

⁸⁸ Preamble Universal Declaration.

⁸⁹ Encyclopedia Britannica (n 85 above).

⁹⁰ As above.

⁹¹ Art 19(2)(a) Universal Declaration and art 19 ICCPR.

ICCPR which provides that the limitations shall only be such as are provided by law and are necessary, for respect and reputation of others, for protection of national security or public order, and for public health or morals.

This limitation of the right to freedom of expression was mainly influenced by Soviet Union and the United States of America's proposals during the negotiations of the ICCPR.⁹² The Soviet's proposal was that Article 19 be subject to restriction 'for prevention of war propaganda, incitement of enmity among nations, racial discrimination and the dissemination of slanderous rumors.'⁹³ The United States, with the fear that this would be used by totalitarian states to impose limitations on freedom of speech, proposed that Article 19 should not be subjected to any restrictions except those that are provided by law and are necessary to protect national security, public order, public health or morals or the rights and freedom of others. The proposal was also that the limitations should not be deemed to justify the imposition by any state of prior censorship of the news or political opinions and should not be used to restrict the right of citizens to criticize the government.⁹⁴

Although none of the two proposals was adopted as it was, the current restrictions under Article 19(2) ICCPR that the limitations should be those that are provided by law and are necessary, for respect and reputation of others, for protection of national security or public order, and for public health or morals coupled with prohibition of speech that spreads war propaganda by Article 20 of the ICCPR seems to be a compromise between the two.

Despite these clear limitations, many states hide behind Article 19(2) and promulgate laws that regulate media, some of which have the effect of limiting the right more than is authorized by Article 19 (2). For this reason, there has been elaboration of Article 19(2) by the Siracusa Principles on Limitation and Derogation Provisions in the ICCPR (Siracusa Principles),⁹⁵ Johannesburg Principles on National Security, Freedom of expression and Access to Information (Johannesburg Principles),⁹⁶ the Declaration of Principles of Freedom of Expression in Africa (DPFEA)⁹⁷ and by case law at the international, regional and national levels.

⁹² JF Mrtzl 'Rwanda Genocide and the International law of radio jamming' (1997) 91 *American Journal of International Law* 6.

⁹³ UN Doc. A/C.3/L.921 (1961).

⁹⁴ UN Doc. A/C.3/L.925 (1961).

⁹⁵ Adopted in 1984 at the meeting of experts convened by United Nations Center for Human Rights.

⁹⁶ Adopted 1 October 1995.

⁹⁷ Resolution Adopted by the African Commission on Human and Peoples' Rights in its 32nd session 17-23 October 2002 in Banjul, The Gambia.

In terms of the Siracusa principles no limitation on the exercise of human rights is allowed unless provided for by law of general application which is consistent with the ICCPR,⁹⁸ non-arbitrary, reasonable, clear and accessible to everyone.⁹⁹

Limitation of freedom of expression for respect and protection of others has been interpreted to exclude from protection the speech that has the effect of violating other people's rights such as the right to privacy or dignity. It also excludes speech which is discriminatory based on grounds set in Article 2 of the ICCPR.¹⁰⁰ As far as discrimination is concerned, the mandatory provisions of Article 4 of the International Convention on the Elimination of All Forms of all forms of Racial Discrimination (ICERD)¹⁰¹ are of instructive value. These provisions enjoin States Parties to the Convention, inter alia, to 'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin...'¹⁰²

However, the State Parties are expected to fulfill this obligation with due regard to the principles embodied in the Universal Declaration which include among others the right to freedom of opinion and expression.¹⁰³ That is, where free speech is limited to protect other people from racial discrimination, such limitation should be clearly and narrowly defined by law and must be necessary to achieve the protection aimed at.

In terms of the Johannesburg Principles, restriction on freedom of expression on the basis of national security should meet strict tests of legitimacy.¹⁰⁴ Its genuine purpose should be protection of a country's existence or its territorial integrity against the use or threat of force.¹⁰⁵ The principle declares illegitimate, a law whose genuine purpose and demonstrable effect is to protect interests unrelated to national security, including for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.¹⁰⁶

⁹⁸ Siracusa Principle 15.

⁹⁹ Principles 16 and 17.

¹⁰⁰ These grounds are sex, religion, political or other opinion

¹⁰¹ Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965

¹⁰² Art 4 (a) CERD.

¹⁰³ Art 5 CERD.

¹⁰⁴ Johannesburg Principle 1.

¹⁰⁵ As above.

¹⁰⁶ Principle 2.

When determining the validity of laws that regulate media in *Media Rights Agenda v Nigeria*, the African Commission reiterated that national law that purports to limit freedom of expression on the basis of national security must be consistent with the set international human rights standards.¹⁰⁷ The Commission indicated that limitation of freedom of expression through laws inconsistent with the international conventions such as the African Charter would defeat the same purpose of protecting the right in the first place.¹⁰⁸

The European Court of Human Rights on the other hand operates on the doctrine of margin of appreciation in terms of which a state is given a degree of latitude to determine on the degree of limitations to impose on freedom of expression under Article 10(2) of the European Convention. In *Handyside v the United Kingdom*,¹⁰⁹ the European Court stated that this doctrine is based upon the premise that:

by reason of their continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.¹¹⁰

However, due to the significance of political speech to democracy, the scope of margin of appreciation gets narrower when it comes to laws that limit or regulate political speech.

2.2.2 Theoretical underpinnings of limitation of freedom of speech at the international level

The fact that the human rights instruments place a duty on the states to protect the right to freedom of expression and at the same time grant the state power to limit the right in given circumstance, rejects both authoritarianism and libertarianism. The theory that comes closer to this scenario are the social responsibility theory. The placement of duties on the beneficiaries of the right to freedom of expression can be explained in terms of the social responsibility theory on the basis of which the media does not only have the right to freedom of expression but also the duty towards the society to exercise that freedom for the benefit of society.¹¹¹ This is also reflected by that the right is afforded 'every person' and is not limited to qualifying professionals as is advocated for by social responsibility theory.¹¹²

¹⁰⁷ *Media Rights Agenda v Nigeria* (n 10 above) Para 66.

¹⁰⁸ *Media Rights Agenda v Nigeria* (n 10 above) Para 67-68.

¹⁰⁹ *Handyside v United Kingdom* European Court of Human Rights appeal no 5493/72.

¹¹⁰ As above, Para 48.

¹¹¹ Feintuck (n 40 above) 2.

¹¹² Skjerdal (n 44 above).

Having determined the extent to which limitations on freedom of expression may be stretched, it becomes important to determine competent authorities that may be bestowed with power to oversee the limitations through regulation of the media.

2.3 Establishment of Media Regulatory Bodies

Neither the ICCPR nor the African Charter has provisions for setting up media regulatory bodies. However, most human rights tribunals have ruled that establishment of such bodies should be in accordance with the theories that support human rights. These theories include governments' non- interference with the right to freedom of expression by having control over the media. When dealing with the question as to what type of bodies can best regulate the media, Abbot and Lipsky state:

... it should be recognized that different legal and political institutions are subject to different degrees of political control, and if it is a valid assertion that the media perform their function best when government involvement is minimal, this concern can be reflected by administering whatever regulatory strategy is adopted by means of legal institutions *posing the least danger of political control of the media.*¹¹³ (emphasis mine.)

The following recommendations were made by the International Press Freedom and Freedom of Expression to the High Level of Media Council in its report about freedom of expression in Nepal:

- Media regulatory bodies should be established by law as independent bodies, operating outside of the framework of government and having a mandate to serve the public interest.
- Independence of the board should be protected, among other things, through the appointments process, which should provide for public input, by protecting the tenure of members and by prohibiting individuals with strong political connections from being appointed as members.
- Any public funding should be provided in a manner that is protected against interference and in accordance with a clear and pre-established framework.
- Their mandate, including the public interest goals which they are expected to serve, should be clearly set out in law.

¹¹³ Abbot and Lipsky (n 32 above) 582 discussing Humphrey's *Executor v. United States*, 295 U.S. 602 (1935). (discussing the purpose and importance of regulatory agency autonomy from executive branch control); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) A similar approach adopted by the African Commission in adoption of the Declaration of Principles of Freedom of Expression in Africa (n 94 above).

- Accountability should be achieved, among other things, through reporting to Parliament, not to a minister.¹¹⁴

A similar trend has been taken by the African Commission. The African Commission's DPFEA provide that any public authority that exercises power in the areas of broadcast or telecommunications should be independent and adequately protected against interference, particularly of a political or economic nature.¹¹⁵ The principles provide further that the appointment process should be open and transparent, involve the participation of civil society and should not be controlled by any particular political party.

In their recent Joint Statement on Racism and the Media, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, insisted that:

Any civil, criminal or administrative law measures that constitute an interference with freedom of expression must be provided by law, serve a legitimate aim as set out in international law and be necessary to achieve that aim. This implies that any such measures are clearly and narrowly defined, are *applied by a body which is independent of political, commercial or other unwarranted influences* and in a manner which is neither arbitrary nor discriminatory, and are subject to adequate standards against abuse, including the right of access to an independent court or tribunal.¹¹⁶

2.4 Conclusion

From the foregoing, it follows that protection of freedom of expression as a fundamental human right and its limitation on the grounds in Article 19(2) ICCPR is very much informed by the social responsibility theory of media regulation. That is, for media to be useful in democracy there has to be some form of limitation which may be in the form of regulation. However, for regulation to be in line with the very essence of protection of freedom of expression, such regulation should not limit freedom of expression more than is envisaged by Article 19(2) of the ICCPR. Furthermore, to avoid misuse of the media, the body overseeing the regulation should be independent and free from control or influence of a political, economic or whatever nature so that the media may be used for the benefit of the society including all minority groups.

¹¹⁴ The report was prepared with the participation of seven other international organizations, Article 19, Global Campaign for Free Expression (Article 19), International Federation of Journalists (IFJ), International Media Support (IMS), International News Safety Institute (INSI), Open Society Institute (OSI), United Nations Educational, Scientific and Cultural Organization (UNESCO) and World Association of Community Radio Broadcasters (AMARC).

¹¹⁵ DPFEA Principle 7.

¹¹⁶ Joint Statement on Racism and the Media by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 27 February 2001, available at: <http://www.article19.org/docimages/950.htm>.

CHAPTER 3

Freedom of Expression and Regulation of media in Uganda

3. INTRODUCTION

With a population of almost 30 million, there are 52 languages spoken by four major people groups in Uganda.¹¹⁷ A former British colony, Uganda gained independence in 1962. During colonial times the government enacted laws against the press and trade unions, with the aim of suppressing nationalist intelligentsia.¹¹⁸ The post independence government deployed with slight modifications, the draconian laws used by the Colonial government against the press. For instance, the Newspaper Act of 1963 which created a censorship board. The situation became worse when Idi Amin issued a decree in 1972. It stated, among others, that a Minister may, if he is satisfied that it is in the public interest to do so, by statutory order, prohibit a publication of any newspaper for a specified or indefinite period of time.¹¹⁹ The decree remained in force until 1995 and was used by subsequent regimes to ban numerous newspapers.¹²⁰

At independence and throughout the 1970's and 80's Uganda had only one television station (Uganda Television) and one radio station (Radio Uganda). Both of them were state owned and committed to propagating and sustaining government propaganda.¹²¹ However, after media liberalization in 1993 the media grew tremendously.¹²² Presently there are over 150 FM stations privately owned and some community based. There are about 30 local television stations and a number of newspapers and magazines, both public and private.¹²³

As the number of radio stations, television channels and newspapers increased the culture of media in Uganda changed. The media no longer operates as a source of information from above providing information to passive recipients. Rather the public has become active in participating in media and setting the agenda. This is reflected by among others, radio talk shows and phone-in programmes such as the *Ekimeeza* and *Spectrum* of Radio one, *Capital Gang* of Capital Radio, *Hard talk* of Monitor FM and similar

¹¹⁷ www.pressreference.com (accessed 3 September 2008).

¹¹⁸ RD Kayanja 'The current state of media reform in Uganda' in ME Price & B Rozumilowiz (eds) *Media reform* (2002) 156.

¹¹⁹ Kaynja (n 117 above) 157.

¹²⁰ As above.

¹²¹ Oweyegha-Afunaduula 'The media in Uganda for environmental activism' department of zoology Makerere University (June 2007) unpublished (accessed on www.afuna.org on 24 October 2008).

¹²² www.pressreference.com (accessed 3 September 2008).

¹²³ As above.

programmes.¹²⁴ A change is also reflected in television broadcasting and newspaper publications with the participation of panellists in television programmes and newspaper columnists. This new culture of media can thus be explained in terms of McQuail's democratic participant theory.

Uganda is a state party to the ICCPR and the African Charter both of which protect the right to freedom of expression.¹²⁵ However, as a dualist state, human rights treaties do not become part of the domestic law merely by ratification until such time that they are incorporated by an Act of parliament or are incorporated indirectly into the legal system by way of transformation or reception.¹²⁶ Reception takes place if the provisions of an international agreement are reflected in parts of national legislation usually without explicit reference to the international instrument in question.¹²⁷ Article 29 of the Constitution of Uganda protects the right to freedom of expression as the ICCPR does. Therefore it can be concluded that the ICCPR has been incorporated into the legal system of Uganda by way of reception. Based on this conclusion, this chapter analyses the Press and Journalists Act against the international standards on freedom of expression as discussed in the previous chapter.

3.1 Constitutional protection of the right to freedom of expression

The Constitution provides that 'every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media.'¹²⁸ There are several other Articles in the Constitution such as a provision on the right to access to information which relate to the exercise of the right to freedom of expression.¹²⁹ The rights in the Constitution are subject to limitations in Article 43 of the Constitution which are: prejudice of the fundamental or other human rights and freedoms of others or public interest. The Article proceeds further that public interest shall not permit:

- (a) Political persecution,
- (b) Detention without trial,
- (c) Any limitation of the enjoyment of the rights and freedoms prescribed beyond what is acceptable and demonstrably justifiable in a free and democratic society or what is provided for in the constitution.

¹²⁴ GL Nassanga 'Journalism ethics and emerging new media culture of talk shows and public debates (ekimeeza) in Uganda' Published by SAGE available at <http://jou.sagepub.com/cgi/reprint/9/5/646> (2008) 654.

¹²⁵ She ratified the ICCPR in 1995 and the African Charter in 1986.

¹²⁶ F Viljoen *International Human Rights Law in Africa* (2007) 535.

¹²⁷ As above.

¹²⁸ Art 29(1).

¹²⁹ Art 41.

This limitation was interpreted by the Supreme Court in *Obbo and Another v Attorney General*,¹³⁰ when determining the constitutionality of Section 50 of the Penal Code which criminalized publication of false news. The Court used the two-test approach developed in the Canadian case of *R v Oakes*.¹³¹ The first test is that the Crown must establish that the limitation of a right serves a pressing and substantial objective. Secondly, the Crown must show that the provision minimally impairs the right concerned and that its effects are proportional to the underlying objective.¹³²

The Court in *Obbo's* case went a step further than *Oake's* test by indicating that Article 43(2)(c) provides for 'a limitation upon limitation.' Mulenga JSC noted that the framers of the Constitution provided clause (c) as a yardstick through which any limitation of rights should be gauged.¹³³ Although the Court did not elaborate on what is 'acceptable and demonstrably justifiable in a free and democratic society,' it held that to criminalise publication of false news is not an acceptable limitation on the right to freedom of expression and declared Section 50 of the Penal Code unconstitutional. The standards set by the Supreme Court together with the international standards discussed in the previous chapter are hereunder applied to analyze the Press and Journalists Act.

3.2 The Press and Journalists Act

Enactment of the Press and Journalists Act had the effect of repealing the Newspaper and Publications Act and the Press Censorship and Correction Act. According to its preamble, the aim of the Act is to ensure freedom of the press, to establish a council responsible for the regulation of mass media and to establish an institute of journalists in Uganda all of which are analysed below.

3.2.1 Establishment of the Media Council

The Act establishes the Media Council as the primary regulatory body, tasked with regulating the conduct, ethical standards, discipline and licensing of journalists and the media at large.¹³⁴ The Council is responsible for registration of editors, television and radio stations, their owners and producers, certification of Ugandan journalists and accreditation of foreign

¹³⁰ n 10 above.

¹³¹ [1986] 1 S.C.R 103.

¹³² The same test was applied by the European Court on Human Rights in *Handyside's case* (n above).

¹³³ Judgment of Mulenga JSC in *Obbo* (n 10 above) 16.

¹³⁴ Sec 9(1).

journalists and free-lancers.¹³⁵ It is also empowered to arbitrate disputes between the media and the state or between the public and media.¹³⁶ The Media Council may also censor films, video tapes, plays and other apparatus for public consumption wherein it may refuse that a film video tape or play be played on grounds of public morality.¹³⁷ According to Kayanja, establishment of the Media Council reflects a view that prior to its enactment, journalists were acting irresponsibly, outside a code of ethics and required an oversight.¹³⁸

3.2.1.1 *Composition of the Media Council*

The Media Council is composed of thirteen members:¹³⁹ the director of information or a senior officer from the Ministry of information who is the Council's secretary; two distinguished mass communication scholars appointed by the Minister, one representative of the newspaper editors and proprietors Association, two representatives of the electronic media, two representatives of the National Institute of Journalists in Uganda (NIJU), four members of the public, two of whom are appointed by the Minister, one by newspaper editors and proprietors association and one by journalists. The last member is a practicing advocate appointed by the Uganda Law society.

Apart from the two scholars of mass communication, the rest of the members of the Media Council are not necessarily professionals in the media sector as the Act does not set that as a requirement for membership of the Council. This provision departs from the argument for self-regulation in terms of which it is proposed that the media professionals be the ones who enforce the ethical standards of journalism. At the same time it contradicts the African Commission's DPFEA, which provides that the media regulatory body should have representation of all parties likely to be affected by the acts of the media. It further contradicts the DPFEA's provision in that the appointment process is not open and transparent and does not involve participation of civil society¹⁴⁰ The thirteen members of the Media Council are nominated by the bodies they represent but are all appointed by the Minister.¹⁴¹ This is contrary to the principle that media regulatory bodies should not be controlled by any political party and should be free from government.¹⁴²

¹³⁵ Sec 5.

¹³⁶ Sec 9.

¹³⁷ As above.

¹³⁸ n 108 above, 161.

¹³⁹ Sec 8.

¹⁴⁰ Principle 7 DPFEA.

¹⁴¹ Sec 8(3).

¹⁴² Principle 7 DPFEA.

The Act is silent as to finances and funding of the Media Council. However as regards members of the Council, the Act provides that remuneration and allowances of the members of the Council is subject to the Minister's approval.¹⁴³

The mode of appointment of the members of the Media Council and remuneration of its members thus make it answerable to the Minister and does not guarantee any accountability to the public or the journalists. Hence Jjuuko's contention that because of its composition, the Media Council is a species of media regulation that is generally not accepted under contemporary systems of constitutional governance. He convincingly argues that the Media Council's composition and mode of appointment tends to represent the authoritarian normative theory of media regulation which was declared unconstitutional in Zambia.¹⁴⁴ Ojambo in his assessment of the contradictions of freedom of expression in Uganda's democratisation process agrees with Jjuuko as to the negative consequences of the composition of the Media Council.¹⁴⁵ Both arguments are in line with the DPFEA as previously discussed.

It thus becomes imperative to look into the functions of the Media Council and determine whether its functions as provided by the Act are in accordance with the ICCPR and the Constitution and to assess whether despite its composition it is competent and impartial.

3.2.2 Functions of the Media Council

(i) Regulation of conduct, ethical standards and discipline of journalists¹⁴⁶

In exercise of this function, the Media Council forms a Disciplinary Committee (the Committee) established in terms of Section 30 of the Act. The Committee is made up of six members of the Media Council and is enjoined to appoint an Advocate to advise it during disciplinary hearings. There is no provision that members of the Committee be media professionals who would in my opinion be in a better position to enforce professional standards being members of the same profession whose standards are being enforced.

¹⁴³ Sec 11.

¹⁴⁴ *Press Association of Zambia (ZAPA) v The Attorney General* (1997) unreported, cited by Juuko (n 37above).

¹⁴⁵ H.O. Ojambo 'The contradictions of freedom of expression in Uganda's fledgling democratization process: Sedition, pornography and hate speech' *HURIPPEC Working Paper* (unpublished).

¹⁴⁶ Sec 9(1) (a) Press and Journalists Act.

The Committee is guided by the Professional Code of Ethics (Code of Ethics) provided for in terms of Section 40 of the Act. The Code of Ethics catalogues how journalists should conduct their work. Such includes among others, prohibition of dissemination of information or an allegation without establishing its truth or correctness; non disclosure of sources of information and duty to correct a damaging report that has been made about an individual or organisation.¹⁴⁷ The Act provides further that failure to adhere to the Code of Ethics is a professional misconduct for which a journalist may be punished by the Disciplinary Committee.

The requirement that a journalist has to confirm the correctness of a story before publication is made absolute in the code and does not leave room for publication of a correction where the allegation is later proved to be false or incorrect. The effect of strict adherence to this provision is that journalists may refrain from publishing issues of public concern because of lack of sufficient information to prove with certainty the truthfulness of the allegation. Publication of allegations can be useful in that it may trigger establishment of an enquiry into the truth or otherwise of the matter. For instance, establishment of a Commission of Enquiry into the investigation of the procurement of a piece of land by the National Social Security Fund (NSSF) board in violation of the procurement law was established after publication of the allegation by the media that the Member of Parliament had sold the land without proper procurement procedures. Initially the concerned parties denied the allegation. However, because of its publication, the parliament established a Commission of Enquiry, the findings of which among others, is that the allegation is true. Furthermore, Punishment of a journalist for publication of unconfirmed or false stories contradicts the decision of the Supreme Court in *Obbo's* case.¹⁴⁸ The Court declared criminalisation of false news unconstitutional.

Where a journalist is alleged to have acted in violation of the Code, having heard the complaint against the journalist, the Committee may dismiss the complaint, admonish the journalist and/or require an apology to the aggrieved party or require that the media outlet responsible for publishing the material complained of, compensate the aggrieved person. The Committee may also suspend the journalist for a period of up to six months, during which the journalist may not practice.¹⁴⁹

¹⁴⁷ Professional Code of Ethics Schedule 4 of the Press and Journalists Act.
¹⁴⁸ n 10 above.
¹⁴⁹ Secs 30-33.

The Act gives the Disciplinary Committee power to make a decision to be implemented by a newspaper but does not make provision for a newspaper to be heard as a party to the disciplinary proceedings.¹⁵⁰ An argument can be made that inclusion of a newspaper in the disciplinary proceedings is unnecessary as its case stands or falls with the case of the journalist complained against. However, taking into account that the newspaper will be expected to comply with the decision of the Committee either for publication of an apology or for payment of compensation, affording the newspaper audience before such decision is made, is essential as the rules of natural justice dictate that one cannot be punished without hearing. The exclusion of newspapers or other media institutions is also reflected in the appeals procedure in that Section 33 gives 'a journalist or complainant' who is not satisfied with the decision of the Committee an opportunity to lodge an appeal in the High Court but no similar opportunity is given the newspaper which is burdened with implementing the decisions of the Committee.

In a disciplinary case of *Pastor Martin Sempa v The Red Pepper*,¹⁵¹ the Committee held that by publishing the complainant's telephone number in the newspaper without his consent and claiming that the complainant is looking for a relationship, the respondent newspaper has violated provisions 1 and 8 of the Code of ethics which require that the journalist must verify the correctness of allegation or information before publishing it. It ordered the respondent to publish a prominent unequivocal apology to the complainant and to pay damages and costs of proceedings for having infringed upon his privacy. The Committee ruled that though not a natural person, a newspaper or publication company is subject to the Code of Ethics and can be held liable for its violation.¹⁵² The apology was accordingly published.

The committee erred and misdirected itself in contravention of Section 40 (2) of the Act in that the Code of Ethics clearly places the duty to confirm truthfulness of information on individual journalists and not on media institutions. Furthermore, the Act gives the Disciplinary Committee power to discipline journalists and not newspapers. In terms of Section 9 of the Act, the Media Council and not the Disciplinary Committee is bestowed with power to adjudicate over disputes between the public and the media – which includes newspapers.

¹⁵⁰150 Secs 31 & 32 provide for procedures to be followed for lodging a complaint against a journalist and not a newspaper.

¹⁵¹151 Disciplinary Committee of the Media Council Complaint no 6 of 2004.

¹⁵²152 As above.

The committee's confusion and misdirection is attributable to two factors. First, the Act's silence in relation to procedures and possible remedies to be applied by the Media Council in arbitration of disputes between the public and the media or the government and the media. Second, the fact that while the Disciplinary Committee is not given power to deal with newspapers, the Act nonetheless gives it discretion to order such newspaper to publish apologies or to pay compensation. The Disciplinary Committee on this basis wrongly assumed that it has jurisdiction over newspapers.

Being a creature of the statute, the Code of Ethics is susceptible to amendment like any other Act of parliament. This means therefore that even where the Media Council wants to vary some of the provisions, it cannot do so as the powers of amendment of Act lie specifically with parliament. Therefore the Code will have to go through the long enactment procedures for any of its provisions to be altered regardless of how small the alteration might be.

(ii) Certification of Journalists and accreditation of foreign journalists

Designed to professionalise the media, the Act sets minimum standards for editors and journalists¹⁵³ and empowers the Media Council to oversee the licensure and certification of journalists.¹⁵⁴ It provides that a person who practices journalism¹⁵⁵ without such certification commits an offence punishable by a fine of up to 300,000 Ugandan Shillings or a term of imprisonment not exceeding three months.¹⁵⁶ For one to be given this practicing certificate he must have enrolled with NIJU. The practicing certificate is renewable annually upon payment of a specified fee.¹⁵⁷

The effect of this provision is that no person is allowed to practice journalism without being a member of NIJU. Terms of membership of NIJU which include a degree in journalism are discussed later. Compulsory membership into an association of journalists through certification without which one cannot freely express or impart information and ideas was declared a violation of the right to freedom of expression by the Inter-American court of human rights in the *Advisory opinion to Costa Rica*.¹⁵⁸ The Court explicitly stated that due to its connection to the fundamental right to freedom of expression, which is essential for

¹⁵³ Secs 7 & 17.

¹⁵⁴ Secs 26 & 27.

¹⁵⁵ Sec 27 (5) provides that a person practices journalism if he or she is paid for gathering, publication or dissemination of information.

¹⁵⁶ Sec 27(4).

¹⁵⁷ Sec 27 (3).

¹⁵⁸ *Compulsory membership in an association prescribed by law for the practice of journalism (art 13 & 29 American Convention on Human Rights)* Advisory opinion OC-5/85 [1985] IACHR 2.

democracy, journalism cannot in any way be equated to the legal and medical professions, and therefore its regulation cannot be by way of compulsory licensing.¹⁵⁹

The Court emphasised that any justifiable limitation of freedom of expression should be linked with Article 19(2) of the ICCPR. Membership of NIJU does not with certainty guarantee that a journalist's reporting will not violate the rights of others, nor endanger national security, nor that it will be in the public interest. Therefore this requirement violates the ICCPR.

A study by the Foundation for Human Rights Initiative (FHRI) found that, out of the hundreds of practicing journalists in Uganda, there are only forty-six journalists in the register, all of whom are in the electronic media.¹⁶⁰ FHRI further found out that several media houses employ people without the requirements prescribed by the Act.¹⁶¹ The report discovers that this notwithstanding, many of these people have done tremendous work in the media industry and have received international awards for this work.¹⁶² It follows therefore that lack of formal education in journalism does not bar one from practicing journalism in a commendable manner.

As regards foreign media, the Act provides that no person being an employer of a foreign mass media or working as a free-lancer is entitled to practice journalism in Uganda without an accreditation card issued by the Media Council.¹⁶³ The Act does not provide for any other body with which the Media Council has to liaise in performance of this function. However, in terms of its mandate reflected on its website, the Media Centre is mandated to assist in the research of a particular journalist's accreditation in foreign countries and to make recommendations to the Media Council.¹⁶⁴

Due to the fact that there is no statutory relationship between the Media Council and the Media Centre, there seems to be a confusion or overlap of functions between the two. In some instances, the Media Centre does not only recommend but makes final decisions as to whether or not a foreign journalist may be accredited. This confusion showed face in the expulsion of Blake Lambert, a Canadian correspondent for *The Economist* and *The Christian*

¹⁵⁹ As above.

¹⁶⁰ A non-statutory body established by government in 2005.

¹⁶¹ FHRI 'Freedom of Expression: In defense of media freedom in Uganda' (1 June - 30 November 2007)

21.

¹⁶² For instance Kavuma of *The Weekly Observer* who does not have these qualifications and yet won CNN African Journalist of the year award on his series on Uganda's progress on the millennium development goals.

¹⁶³ Sec 29.

¹⁶⁴ www.mediacentre.go.ug (accessed 4 September 2008) There is no indication as to where this mandate flows from. However, the Media centre is an office in the office of the President.

Science Monitor. He was declared '*persona non grata*' and denied entry into the country and his accreditation card was not renewed without any explanation.

The Media Council encouraged the government to lodge with it, a formal complaint regarding Lambert's alleged misbehaviour. The government took heed of the advice and upon hearing the complaint, the Media Council concluded that Lambert had adhered to the Code of Ethics. However, despite the Council's recommendation, alternative avenues such as publishing the government's side to counter Lambert's reports were not explored and Lambert was, with the advice of the Media Centre denied entry into Uganda.¹⁶⁵

When asked about the seemingly overlapping functions between the Media Council and the Media Centre, the Chairperson of the Media Council stated that the Media Centre is a government body tasked with enhancing the flow of information from the government to the media. However, because it has a strong financial backing from the government, it often usurps powers of the Media Council on the grounds of national security. She indicated that due to lack of resources, often times the Media Council is not able to carry out research about foreign journalists' accreditation and as a result cannot counter the usurpation of its powers by the Media Centre.

(iii) Arbitration of disputes

From the time of its establishment to the present, the disputes that came before the Media Council were dealt with by the Disciplinary Committee for discipline of journalist as discussed above. However, the *Sempa v Redpepper* case is one that ought to have been dealt with in terms of this provision but the Media Council missed that opportunity. This function of the Media Council notwithstanding, cases against journalists are still being filed in the courts of law in the form of criminal or civil claims by the government and the members of the public. The Media Council views this as a display of lack of trust in the institution by the stakeholders.¹⁶⁶

(iv) Censorship of films, video tapes and plays

This function is bestowed on the Media Council by Section 9(1) (e) of the Act. The recorded event in which the Council used this section was banning of the play *Vagina Monologues*, a

¹⁶⁵ FHRI report (n 162 above) interview with Paul Mukasa, Secretary, Media Council 28 June 2007 confirmed by author in an interview with the Chairperson of the Media Council 1 October 2008.

¹⁶⁶ FHRI report (n 162 above) 22.

play written by an American scriptwriter Eve Ensler. The organisers of the play argued that its purpose was to explore women's sexuality and bring to the fore issues relating to women sexual abuse. The Media Council however ruled that the play glorifies unnatural sex-masturbation, lesbianism and homosexuality in violation of the morals, culture and laws of Uganda.¹⁶⁷ On this basis it ordered the alteration of certain parts of the play failing which the play would be banned. The organisers however informed the Council that due to the copyright attached to the play, it was to be played as it is or not at all. As a result the play was cancelled.

The banning of the *Vagina Monologues* raised lots of debate amongst women's movements, churches and scholars. Among legal scholars, it was critiqued by Makubuya and Juuko. On the one hand, Makubuya's view is that the decision of the Council was proper, lawful and in accordance with Article 43(1) of the Constitution. The argument is based on the premise that every society has a threshold of acceptable standards, values or morals.¹⁶⁸ However, in his discussion, Makubuya does not provide any guidelines as to how the threshold of moral standards is to be determined. He does not link the censorship or banning with the last clause in Article 43 of the Constitution which provides that a justifiable limitation on any freedom must be demonstrably justifiable and acceptable in a free and democratic society.

On the other hand, Jjuuko is of the view that the Media Council's conclusion that the play glorified and promoted lesbianism and prostitution contrary to Uganda law and public morals is not only wrong but largely speculative.¹⁶⁹ He states that the Council's conclusion does not specify the laws and policies offended by the play and how they are affected.¹⁷⁰ He asserts that the Media Council had no power to make the decision that it did because Section 9 of the Press and Journalists Act, in terms of which it acted is vague and confers unlimited powers upon the Council. As a result the Council's decision is unmindful of the constitutional safeguards of freedom of the press. He argues that the Council substituted itself for the courts of law by convicting those who sought to stage the play without taking into account that by its composition it is not in a position to do so effectively.¹⁷¹

It is undisputed that freedom of expression can be limited on the basis of public morality. However, the danger of giving the discretion to decide what is moral and what is not to a body which is not free from political influence like the Media Council is that the

¹⁶⁷ *Vagina Monologue* Ruling of the Media Council accessed on (www.mediacouncil.ug/cases.php)

¹⁶⁸ Makubuya (n 38 above) 170.

¹⁶⁹ Juuko (n 37 above) 179.

¹⁷⁰ Juuko (n 37 above) 164.

¹⁷¹ Juuko (n 37 above) 179.

discretion may be abused for political motives. Even if we were to apply the margin of appreciation test applied by the European Court, such margin is given to an impartial independent judicial body. As discussed earlier, the Media Council is not independent. Therefore, it would not be in a position to impartially determine the issue. The play challenges the social and political order influenced by patriarchy and its impact on women and their sexuality. This thus makes is political and therefore determination of whether or not it should be staged, had to be done by a competent, independent, impartial court of law.

3.2.3 The National Institute of Journalists of Uganda

With the view that lack of professionalism has been the cause of failure of the media in Uganda, the Act establishes a National Institute of Journalists of Uganda (NIJU) designed among others to establish and maintain professional standards of journalists; to encourage the use of journalism that is not contrary to public morality and to ensure the maintenance of professional education for journalists.¹⁷²

Membership of the institute is based on three categories: full, associate and honorary membership. Requirements for full membership include that one be a holder of a University degree in Journalism or Mass Communication or if the degree is not in journalism or mass communication that in addition to a university degree the journalist has qualifications in journalism or mass communication; and has practiced journalism for at least one year.¹⁷³ Associate membership is acquired on conditions set by the general assembly of NIJU.

For one to be awarded full or associate membership of NIJU, he has to apply to the executive committee which may then advice the general assembly whether or not to approve the application and give a certificate of enrollment.¹⁷⁴ The same certificate of enrollment is a prerequisite for one to be granted a practicing certificate by the Media Council, without which one may not practice journalism.

The Act provides that the funds of NIJU shall consist among others of grants from the government,¹⁷⁵ and restricts its borrowing powers to such terms as may be agreed by government.¹⁷⁶ This restriction extends to investment. In terms of the Act NIJU may invest its funds on any securities issued or guaranteed by the government or in any projects approved

¹⁷² Sec 14.
¹⁷³ Sec 15.
¹⁷⁴ Sec 16.
¹⁷⁵ Sec 21.
¹⁷⁶ Sec 22.

by the government.¹⁷⁷ That is the financial life of NIJU is tied to the government and without the government NIJU cannot get involved in any financial activities. The Act treats NIJU like any typical government department or ministry in that Section 25 provides that the accounts of NIJU shall be audited by the government's Auditor General who shall report to the Minister and the Minister tables the report before parliament.

As Nassanga argues in her critique of the Act in relation to the Media Council, financial dependence on the government compromises an institution's independence.¹⁷⁸ That is NIJU cannot be expected to train journalists to watch over the affairs of the government and inform the public of any corruption by the same government on which its existence depends.

While the objective of NIJU to ensure maintenance of professional training for journalists may yield best results for Ugandan journalists, and enable pluralism, this is overshadowed by government's control of the institution. The Act makes it possible for the government to use NIJU as a sieve to determine who makes it into the profession. This possibility takes away NIJU's legitimacy despite the good purpose which it would serve if independent.

The Act has not been fully implemented and after one year, NIJU ceased to operate. Below is a discussion of how the journalists have organized themselves despite the harshness of the Act.

3.3 Journalists' reaction towards the Press and Journalists Act

Many journalists who were interviewed during this research regard the Act as a government's attempt to silence the media. In an interview with one of the journalists, Haruna Kanaabi, he indicated that despite the protection of the right to freedom of expression in the Constitution of Uganda, the government is very unfriendly to the media and the existing legal framework, including the Press and Journalists Act, does not create space for the media to perform its duties.¹⁷⁹ He stated that one good thing about the Press and Journalists Act is that despite having been enacted in 1995, it has failed to get into full operation.

¹⁷⁷ Sec 23.

¹⁷⁸ n 29 above.

¹⁷⁹ Kanaabi (n 30 above).

In relation to NIJU, the journalists with whom the author interacted, stipulated that NIJU is a government institute established to indoctrinate the media practitioners into government's own opinions and to kill diversity of opinion; the very basis for democracy. The restraints in the Press and Journalists Act notwithstanding, journalists have managed to carve out their own space. Publications such as the *Confidential*, *the Independent* and television stations such as *NTV* have widened the scope of press freedom and reported on corruption involving government officials and members of parliament.¹⁸⁰

The journalists established the Independent Media Council of Uganda (IMCU). The IMCU is an independent, voluntary, non-statutory media self-regulation mechanism. Its objectives include among others, promotion of growth of a responsible, free and responsible media that adheres to the highest standards of journalism.¹⁸¹ The other key object is to keep under review and where appropriate, to challenge developments, political, legislative or otherwise that restrict dissemination of information. Kanaabi, stated that the IMCU sees it as its obligation to inform and explain to the government the importance of establishing best media standards without applying punitive measures provided for by the Act.¹⁸²

Membership of the IMCU ranges from media houses, journalists Associations and training institutions. It is open to independent electronic and print media, journalists associations and journalists' trade unions as well as government or government-related media organizations. It has five principal organs: National Convention, Governing Board, Ethics Committee, Finance and administration Committee and the Secretariat. The National Convention comprises all members and is the highest decision making body. The Governing Board is made up of fourteen members five of whom represent the public. The Ethics Committee is made up of seven members drawn from the Governing Board members. It deals with complaints about the conduct of the media and has power to make decisions that are binding on the parties within the rules of procedures of the IMCU.

At the time of research, IMCU had not yet opened doors for use of this procedure. The Ethics Committee also has power to initiate investigations on its own, conduct a hearing and take appropriate action against any media malpractices. Its powers include dismissal or rejection of the complaint, amicable settlement or reconciliation between the parties, ordering publication of an apology, temporary suspension of membership or payment of damages and costs. However the procedure for filing of disputes is not yet in force. The

¹⁸⁰ The recent being the reports on the Member of Parliament Amama Mbabazi's sale of the Temangalo land to the NSSF without proper procurement procedures as provided by the law.

¹⁸¹ Clause 4 IMCU Memorandum of Association.

¹⁸² Kanaabi (n 30 above).

Code of Conduct enforced by the Ethics Committee provides a guide for journalists in terms of professional integrity, conflict of interest, accuracy fairness and balance, social responsibility, respect for privacy and human dignity, plagiarism, non disclosure of sources, covering conflict and protection of children to mention but a few.

3.4 Conclusion

Despite abolishment of laws that the government viewed as repressive of the media and its pledge to ensure freedom of the press, enactment of the Press and Journalists Act has not made freedom of the press any better than before. The Act imposes limitations on freedom of expression which are beyond the limitations in Article 19(2) of the ICCPR and Article 29 of the Constitution read with Article 43.

The structure of the Media Council which is given power to regulate the media, makes it totally under government control in violation of the African Commission's DPFEA. Therefore, because of the complexities of its composition, the Media Council is viewed as a government's strategy to pacify those who challenge its stronghold onto the media industry while the government tightens its grip to shut out dissident opinion.

The Act also ignores the fact that freedom of expression is not a professional right but the right of all citizens to ensure participatory democracy. It does not incorporate the emerging culture of participatory media in terms of which not only those employed by the media houses are taking part in dissemination of information. While the culture of media in Uganda seems to be shaped by the democratic participant theory, the Act is attempting to regulate the media by authoritarian means. This is reflected by imposition of punitive sanctions against those who fail to adhere to the Code of Ethics.

Although the Act stipulates its objective as ensuring freedom of the press, the provision relating to NIJU are a complete opposite of this objective. The Act kills freedom of the media by enabling the government to maintain control over the media through NIJU. As a government institution without membership of which one cannot freely express his opinions through any media, NIJU can be used by the government to determine who can practice journalism and who cannot. The government therefore has an opportunity to weed out those journalists likely to disseminate dissenting opinion. Because dissemination of different and opposing opinions is the basis for participatory democracy, the government's potential through NIJU to disallow opposing opinion is a threat to Uganda's democracy. As Kyanja observes, the provision in the Act requiring annual licensing of journalists the need

for qualifications to practice journalism and the threat of partisan Media Council all run counter to the traditions of free media society.¹⁸³ Hence the need to explore alternatives of how the media in Uganda can be regulated without violation of freedom of expression.

¹⁸³ Kayanja (n 117 above) 174.

CHAPTER 4

Comparative Analysis

4 Is there a need for uniform regulation of the media?

What determines the shape and content of media policy is not the level of protection a particular state's constitution affords the press or the country's degree of technological development...Media regulation...is informed more by recent history on the ground than long standing tradition or common themes.¹⁸⁴

It follows therefore that the degree of limitation of media in a particular country depends largely on the history of that country. Most media and human rights scholars agree that regulation of the press always takes the form and coloration of the social and political structures within which the press operates.¹⁸⁵ This explains the different approaches adopted by different countries in their regulation of media.¹⁸⁶ However, all modes of regulation are subject to the provisions of the Article 19 of the ICCPR and the regional human rights instruments ratified by each state.

This chapter discusses regulation of the media in South Africa, Ghana and Kenya comparatively and seeks to find out best practices that can be recommended for Uganda taking into account the history of Uganda and its current media culture. These three countries represent a wide diversity in approach to media regulation: self-regulation, statutory regulation, and constitutional regulation. The diversity also extends to regions: South, West and East Africa.

4.1 South Africa

The media history of South Africa can be divided into two phases: the apartheid era and the post-apartheid era. These two categories define the fundamental changes that have reshaped the country and its media laws in particular. During apartheid, the media operated in a minefield of laws designed to make it almost impossible to publish any information without authorization from the government especially on political and national security issues. Newspapers were prevented from publishing the names of banned people, which

¹⁸⁴ E Armijo 'Building open societies: Freedom of the press in Jordan and Rwanda' (2008)12 *Journal of media and entertainment law* 106.

¹⁸⁵ Seibert (n 33 above) 1.

¹⁸⁶ Armijo (n 185 above) 117 gives a practical example in that, while the regulation of the media in South Africa is influenced by the country's history of apartheid, Rwanda on the other hand has a unique challenge of ensuring that media could never reprise the direct role it played in the 1994 genocide.

included almost all the anti-apartheid leaders. At the end of apartheid, South Africa adopted a new Constitution which protects freedom of expression and the press and enacted new media laws in order to ensure freedom of the press. These laws have been heavily influenced by the country's history of apartheid. The challenge that faced the new legal regime was how liberalization of the media could be made consistent with promotion of nation-building, reconciliation, democratisation and cultural diversity.¹⁸⁷

4.1.2 Media Regulation

The present laws that regulate media include the Independent Communications Authority of South Africa Act,¹⁸⁸ which establishes the Independent Communications Authority of South Africa (ICASA) as a sector-specific regulator for broadcasting and telecommunications; the Media Development and Diversity Agency Act,¹⁸⁹ which aims to promote media development and diversity in South Africa and establishes the Media Development and Diversity Agency (MDDA). There are other laws which are not specifically enacted for regulation of the media but which have an impact on media operations.

Section 3 (3) of the ICASA Act enshrines the independence of ICASA from political and commercial interference. Although Section 5 empowers the Minister to appoint seven of the councilors of ICASA, he does so with the recommendation of the National Assembly following a public hearing with all the candidates. The MDDA Act applies broadly to all mass media.¹⁹⁰ One of the key functions of the MDDA is to enable historically disadvantaged communities and individuals who were not adequately served by the media to gain access to the media.¹⁹¹ The other objectives of the Act are to encourage ownership and control of the media by historically disadvantaged communities and to encourage human resource development and capacity building in the media industry.¹⁹²

Apart from the MDDA Act, print media is also regulated by the Press Council of South Africa (PCSA). The PCSA is a non-statutory body composed of twelve members, six of whom represent the press associations and six represent the public.¹⁹³ Objectives of the

¹⁸⁷ C Barnette 'The limits of media democratization in South Africa: politics, privatization and regulation' (1999) 29 *Media culture and society* (1999) 649 on <http://www.mcs.sagepub.com> (accessed August 24 2008).

¹⁸⁸ Act 13 of 2000.

¹⁸⁹ Act 14 of 2002.

¹⁹⁰ Sec 1 MDDA Act.

¹⁹¹ Para 2 preamble MDDA Act.

¹⁹² Sec 3(b) (1) MDDA Act.

¹⁹³ Clause 4 PCSA Constitution 2007.

PCSA are detailed in its Constitution and include setting up the Press Ombudsman and the South African Press Appeals Panel.

The Press Ombudsman is tasked with settling disputes between members of the public and the journalists or publications that are members of the PCSA.¹⁹⁴ In the event of a complaint against any publication which is not a member, the Ombudsman may attempt to approach that publication and enquire whether it accepts jurisdiction of the Ombudsman. If the publication accepts the jurisdiction, the Ombudsman may handle the case in terms of the Code of Ethics of the PCSA.¹⁹⁵ The decision of the Ombudsman may be challenged in the South African Press Appeals Panel (Press Appeals Panel) an appellate body established by the PCSA.

According to press reference assessment, South Africa has moved from having one of the most oppressive media systems in the world to one where the media can publish almost anything without fear or punishment from the government.¹⁹⁶ However the media policies of the ruling party, the African National Congress (ANC) are against the present regulation of the media. ANC contends that the press self-regulation by the PCSA is inadequate and does not protect the individual citizens against violation of their rights to dignity and privacy against violation by the media.¹⁹⁷ Consequently it has proposed establishment of a statutory Media Appeals Tribunal (MAT) to complement the PCSA mechanisms.¹⁹⁸ The PCSA has however made a statement in which it shows its determination to fight the intended MAT as it is intended to give government control over the press and kill press freedom which has contributed to democratic South Africa.

4.2 Ghana

Ghana has been ruled by a series of military and democratic regimes since the late 1960's. In the midst of this political oscillation, the media has been subject to alternating policies of liberation tolerance and revolutionary control.¹⁹⁹ During Flight Lieutenant Jerry John Rawlings' times who seized power in 1981, the editorial staff of the state media were reshuffled or dismissed and the editorial policies of the state media were strategically

¹⁹⁴ Clause 9.2 PCSA Constitution 2007.

¹⁹⁵ Clause 3.3 PCSA Constitution 2007.

¹⁹⁶ <http://www.pressreference.com/sa-sw/south-africa.html> (accessed 17 October 2008).

¹⁹⁷ ANC Resolution of 'Communication and battle of ideas' adopted at the ANC 52nd National Conference held at Polokwane on 16 – 20 December 2007 para 93.

¹⁹⁸ As above para 126.

¹⁹⁹ <http://www.pressreference.com/Fa-Gu/Ghana.html> (accessed 17 October 2008).

shaped to suit the interests of the new regime.²⁰⁰ Throughout the 1980's, the state media apparatus applied a variety of techniques of official and unofficial censorship, including repressive laws, public intimidation and harassment, bans on oppositional publications and arrest and detention of dissident journalists.²⁰¹

In 1992, Ghana returned to democratic rule and adopted a new Constitution. The Constitution protects freedom of expression in Article 21(1)(a). However to ensure total freedom and non interference with the press by the government as had happened during the previous regimes, the Constitution has a whole chapter detailing and guaranteeing freedom and independence of the press.²⁰² It takes away all impediments to the establishment of private and public media. In particular, it provides that there shall be no law requiring any person to obtain a license as a prerequisite to establishment or operation of a newspaper, journal or any other media.²⁰³

The government has no control or interference on the editors and publishers of newspapers and other institutions of mass media.²⁰⁴ They are protected from any harassment or penalization for their editorial opinions, views or any content of their publication.²⁰⁵ The Constitution places an obligation on all agencies of mass media to publish a rejoinder where a member of the public is aggrieved by information that has been published.²⁰⁶ The right to freedom of expression is subject to limitation by an Act of parliament that is reasonably required in the interest of national security, public order, public morality and for the purpose of protecting the reputation, right and freedoms of other persons.²⁰⁷

The body entrusted with regulation of the media is the National Media Commission (NMC) established in terms of an Act of Parliament with mandate derived from Article 166 of the Constitution.²⁰⁸ The NMC is charged with promotion of freedom and independence of the media for mass communication, establishment of journalistic standards, investigation, mediation and settlement of complaints made against or by the press or other mass media.

²⁰⁰ As above.

²⁰¹ As above.

²⁰² Chapter 12 Constitution of the republic of Ghana 1992.

²⁰³ Article 162 (3).

²⁰⁴ Art 162 (4).

²⁰⁵ As above.

²⁰⁶ Art 162 (6).

²⁰⁷ Art 164.

²⁰⁸ Art 166 provides that a National Media Commission shall be established within 6months of entry into force of the Constitution.

It is also tasked with insulation of public press from governmental control and regulation of registration of newspapers and other publications.²⁰⁹

The NMC is composed of fifteen members representing various interest groups including the Ghana Bar Association, publishers and owners of private press, representatives of religious denominations; Christians and Muslims, teachers, advertising association. Of all the fifteen members, only two are appointed by the President and three by Parliament.²¹⁰

In order to ensure NMC's financial independence, the Constitution provides that the administrative expenses of the NMC, including salaries, allowances and pensions payable to or in respect of any person serving the Commission shall be charged on the Consolidated Fund. The Constitution explicitly provides that except as otherwise provided for by the Constitution; the NMC shall not be subject to the direction or control of any person or authority in the performance of its functions.²¹¹

Press reference's findings are that Ghana has a vigorous press with a distinguished political history. Journalism plays a crucial role in contemporary processes of democracy in Ghana, providing a common sphere of dialogue among diverse political and economic interests as well as the voices of popular culture. Journalists have enjoyed more freedom, cooperation and respect in their dealings with the state. It found further that Ghanaian journalists are optimistic that the current political liberalism is a foundation of press freedom and professionalism in the future.

4.3 Kenya

The media in Kenya is regulated in terms of the Media Act of 2007.²¹² According to its preamble, the purpose of the Act is to provide for the establishment of the Media Council of Kenya, for the conduct and discipline of journalists and the media, and for self regulation of the media. The Media Council of Kenya is composed of thirteen members nominated by the journalists, media owners, the law society, editors, schools of journalism, correspondents, news agency and the institute of mass communication.²¹³

²⁰⁹ Art 167(d).

²¹⁰ Art 166.

²¹¹ Art 172.

²¹² Media Act Chapter 3 of 2007.

²¹³ Sec 3 Media Act.

The Act explicitly provides that the Council shall operate without political or other bias or interference and shall be wholly independent from the government, any political party or any nominating authority.²¹⁴ This is buttressed by a provision that a person shall not be appointed to the Media Council if at the relevant time he is an office bearer or employee of a political party or any body of a political nature.²¹⁵ In terms of the Act, only people with a degree from a recognized institution of learning in media policy and law, media regulation, business, finance or related social issues qualify to be appointed into the Media Council.²¹⁶

In order to secure funding of the Media Council, the Media Act provides that its funds and assets shall consist of monies or assets as may accrue to the or vest in the Media council in the course of exercise of its powers under the Media Act. It provides further that such funds may be donations gifts, endowments from lawful organizations or sources which shall not be from foreign governments or entities.²¹⁷

For arbitration of disputes, the Media Act establishes a Complaints Commission which is composed of five people appointed by the Media Council but who are not members of the Media Council.²¹⁸ It provides that the chairperson of the Complaints Commission shall be a person who holds or has held a judicial office in Kenya for not less than ten years.²¹⁹ Having heard a complaint against the media, the Complaints Commission has power to dismiss the complaint, to order publication of an apology and correction or to issue a reprimand to the journalists or media enterprise involved.²²⁰

The Act provides further that where within thirty days the decision of the Complaints Commission has not been appealed against, such shall be adopted and enforced as an order of court.²²¹ It makes it an offence punishable by a fine or a term of imprisonment for a person to refuse to comply with the requirements of the Complaints Commission, to obstruct the Complaints Commission in exercise of its duties, or to furnish it with false information. The Media Council is responsible for enforcement of the Code of Conduct for the practice of journalism.²²²

²¹⁴ Sec 5 Media Act.

²¹⁵ Sec 6(2)(b) Media Act.

²¹⁶ Sec 7 (1)(a) Media Act.

²¹⁷ Sec 18 (d) Media Act.

²¹⁸ Sec 23 Media Act.

²¹⁹ Sec 23(a) Media Act.

²²⁰ Sec 29 Media Act.

²²¹ Sec 33 Media Act.

²²² Sec 35(2) Media Act.

The code of conduct lays out guidelines for reporting. These guidelines include but are not limited to accuracy and fairness, independence of a journalist, integrity, accountability, confidentiality, covering ethnic, religious and sectarian conflicts, privacy, sex discrimination, protection of children, acts of violence and editors' responsibilities.²²³

4.4 Conclusion

Although media regulation in all the three countries has been influenced by each country's peculiar history, the following common best practices are drawn. Most importantly in all the three countries, there is absence of government control in the media regulatory bodies. This is reflected in the composition of such bodies and the mode of appointment of their members. In South Africa the ICASA's members are appointed by a Minister on recommendation by parliament and after a public interview of such members. This process does therefore guarantee transparency. The Ghanaian process is also inclusive and transparent in that members of civil society are given an opportunity to nominate their representative and their approval is not dependant on the Minister. In Kenya the government has no stake at all in appointment of the members of the Media Council.

In South Africa and Kenya the Code of Ethics is enforced by a separate body from the regulatory body. This thus guards against being biased and is consistent with the rule of natural justice that one cannot be a judge in his own cause. The difference in Ghana however, is that although the NMC is responsible for setting the journalistic standards and enforcing them, compliance therewith is not compulsory.

In South Africa and in Kenya's code of ethics, a journalist is expected to be fair in his reporting. The requirement of establishing correctness or truth of a publication is not absolute. Rather the journalist is expected to publish a correction where necessary and to afford a party aggrieved by a publication, an opportunity to correct the allegations. The right to a rejoinder in Ghana is guaranteed in the Constitution and the journalists have a duty to comply with it.

In all the three countries, the media regulatory bodies have financial independence from government except that in Kenya the Media Act specifically prohibits the Media Council from accepting funds from foreign governments or organizations. However, the Act does not give the government power to control the funds of the Media Council

²²³ 2nd schedule Media Act.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5 Conclusion

Whilst Uganda is commended for liberalisation of the media which has led to the growth of the media industry, this study has however found out that liberalisation of the media has yielded benefits only as far as the economic aspect of the media is concerned. That is more people can invest in the media industry as the Act does not place any impediments to ownership of the media. However, the same has not been achieved in terms of freedom of expression as a fundamental political right essential for democracy.

5.1 The press theory that best defines the Press and Journalists Act

Protection of freedom of expression as a fundamental human right and its limitation on the grounds in Article 19(2) ICCPR is very much informed by the social responsibility theory of media regulation. That is, for media to be useful in democracy there has to be some form of limitation which may be in the form of regulation to ensure that in its exercise of the freedom, the media is responsible to both the government and the public. However, for regulation to be in line with the very essence of protection of freedom of expression, such regulation should not limit freedom of expression beyond limitations envisaged and permitted by Article 19(2) of the ICCPR.

An analysis of the Press and Journalists Act has revealed that unlike the ICCPR and the Constitution of Uganda, the Act is informed more by the authoritarian theory of media regulation than the other theories. This is based on the fact that the Act seeks to enforce compliance with 'professional standards' through punitive measures. It compels journalists to become members of NIJU and gives the government total control of both the Media Council and NIJU.

5.2 Discrepancies in the Press and Journalists Act

Despite the government's pledge to ensure freedom of the press, the Act has left the status of the press in Uganda in the same position as it was before its enactment, if not worse. Discrepancies such as the threat of a partisan Media Council, the institute of journalists controlled by the government and the code of ethics that is against the principles in the

Constitution have been found to hurdle enjoyment of freedom of expression as a political right.

The African Commission through its DPFEA has laid down guidelines as to how media regulatory bodies should be composed to avoid violation of freedom of expression. The principles laid down include that the body should be independent and free from control or influence of a political, economic or whatever nature so that the media may be used for the benefit of the society. The Act consigns the Media Council to government control in that appointment of its members is dependent on the Minister's approval and it is accountable to the Minister to whom it has to submit annual reports. Therefore, because of the complexities of its composition, the Media Council wields little influence in its own right, if at all. Journalists view it with skepticism and are of the view that because of its composition, there is a real likelihood of bias.

Further, setting academic qualifications as a pre-requisite for obtaining a practicing certificate is contrary to Article 19 ICCPR and 29 of the Constitution which guarantee enjoyment of the right to all human beings without distinction. The Act ignores the fact that freedom of expression is not a professional right but the right of all citizens to ensure participatory democracy. This requirement does not incorporate the emerging culture of participatory media in terms of which not only those employed by the media houses are taking part in dissemination of information but also non-journalists.

Compulsory membership or enrolment with NIJU without which one cannot practice does not take into account freedom of expression of those people who do not wish to be members of NIJU or who do not qualify to be enrolled with NIJU. Because of its connection to the fundamental human right to freedom of expression which is the very basis of democracy, journalism cannot be regulated by compulsory certification such as the legal or medical profession.

This does not, however, suggest that journalists should not obtain professional training. The importance of professional standards in the media is undisputed, however, government's involvement in NIJU and the fact that it is used as the only gate through which one may enter into journalism reduces its credibility.

The rationale behind the Code of Ethics is to ensure that the press is diligent in its reporting and that it exercises its freedom of expression within limits. However, as the

Supreme Court held in *Obbo's case*²²⁴ such limitation should be in line with Article 19(2) and should be justifiable in a free and democratic society as Article 43 of the Constitution demands. Therefore, the provisions of the Code of Ethics ought to be in line with the Constitution. Punishment of journalists for failure to verify correctness of a story should not be punitive, rather, there should be alternatives such as correction of the information in question.

5.3 Reforming the Act

The conclusion that the Press and Journalists Act violates the right to freedom of expression does not however suggest that the media should be left unregulated. It is acknowledged that in order for all citizens to enjoy their rights meaningfully in a free and democratic society, there has to be in place, a form of regulation of the media to ensure order. However, regulation of the media has to be in compliance with the very basis of protection of the freedom of expression, which is to ensure participatory democracy.

On the basis of the conclusions made above, it is recommended that the Press and Journalists Act be repealed and it be replaced with a new media Act. the new Act should among others, provide for, the establishment of a regulatory body whose composition represents all sections of society as the actions of the media do not only impact those in professional practice. The government should have no control whatsoever in the said body. Rather it should be accountable to the society through parliament. This can be ensured by guaranteeing the body's independence in the Act as the Ghanaian's NMC, the South African MDDA and the Kenyan Media Council. There should be transparency in the appointment procedure. This can be done by involvement of the civil society in the appointment process. The Act should guarantee financial independence of the regulatory body.

The Code of Ethics should not be part of the principal Act. Rather, the discretion to set journalistic standards should be left to the regulatory body and the enforcement of the Code should be done by a body separate from the regulatory. Adherence to the Code should be voluntary and it should be set as a guideline on the basis on which journalists may conduct their work within limits. Where a journalist chooses not to comply with the code, the aggrieved party would have an opportunity to sue him/her in an ordinary court for damages if need be.

²²⁴ n 11 above.

As regards certification of journalists, it should be done for purposes of a common identification but not to prohibit a journalist from practicing when he does not have a certificate. Rather, the journalists should register, for no fee for purposes of keeping record of journalists practicing in the country in case there is a complaint against a journalist.

For purposes of professional standards in the media, such should not be incorporated in the Act, but should be left in the hands of professional bodies such as journalists associations. The journalists themselves should be given an opportunity to further their professional training but it should not be a prerequisite for practicing. Establishment of a public institution for this purpose would assist the journalists but membership in this institution should not be mandatory.

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