The Legal Aid Forum
Working Together For Equitable Access to Justice.

Thomson Foundation

COMPARATIVE ANALYSIS OF MEDIA LAWS AND POLICIES IN EAST AFRICA

British
High commision
Kigali

UKaid
from the British people

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EXECUTIVE SUMMARY

The media sector plays a key role in safeguarding democracy, good governance, and realisation of fundamental human rights. Further, the media, legacy and new, have a critical function in creating direct and indirect employment to many citizens and foreigners working in the sector. The media is thus a key driver in the developmental journey of each of the East African Community member states.

It thus important that each of the EAC member states seek to develop media laws and policies that must ensure the growth of an independent, professional, and sustainable media the sector. There is also need that such policies are reviewed to ensure they accord with the ever-changing media ecosystem given the transformative effects of digitization and the resultant media convergence.

This comparative report highlights the relevant international and regional human rights standards and compares how each of the four East African Community member states fair on eight key media regulatory issues of pluralism; diversity; independence of regulatory bodies; regulation of journalists; regulation of print media; regulation of broadcasting media; public service media/broadcasting; and regulation of film.

The report acknowledges that have the four countries have ratified key human rights instruments and their Constitution's guarantee media freedom and welcomes the positive policy changes that have been witnessed in the media sector in the four countries in the past decade or two. Such changes have included digital switchover, review of various laws that criminalised freedom of expression and establishing regulatory mechanisms for the media sector.

The report does not prescribe a different set of standards for online /new media regulation. It recommends that same standards that apply to legacy media apply to online news media outlets plus those that are relevant in managing the cyber space like cybersecurity laws. However, it cautions that adoption of cybercrime laws must not lead to establishment of a retinue of content-based offences. This is because most the so-called cyber offences are cyber-enabled and not cyber-dependent.

We raise 57 recommendations which if well considered and incorporated in any ongoing or future policy reviews are likely to make tangible and transformative contributions to the media sector in the four countries.

In Section 1 on the general applicable international and regional standards, the countries under study have done very well. They have ratified most of the relevant international and regional human rights instruments that guarantee media freedom. has the least recommendations as the four countries have done quite well. We highlight that a good media policy must foreground relevant international and

regional human rights instruments and ensure they are well domesticated to guarantee the protection, promotion, and fulfilment of media freedom.

In Section 2 on media regulation, we address eight key issues namely pluralism; diversity; independence of regulatory bodies; regulation of journalists; regulation of broadcast media; public service media; and regulation of film and make 33 specific recommendations.

The four countries are quite similar in terms of media policy positions on pluralism, diversity, regulation of broadcast media. They differ on the other five issues.

The four countries still have the national broadcasters largely operating as state-broadcasters as opposed to being public service media. Rwanda is different to Kenya, Uganda, and Tanzania in terms of the position and support accorded the public service media. Rwanda Broadcasting Authority commands a big audience and market share and receives near exclusive advertising from the state and agencies co-operating with the state. The public service media in Kenya, Uganda, and Tanzania used to enjoy such near-monopolistic positions before airwaves liberalization in the late 1990s. We recommend that media policies and laws must state clearly and unequivocally that public broadcasters shall be render media services as public media services and not state broadcasters and boards of management of each public broadcaster shall be made more independent in law and in operations.

We recommend that while each country may be informed by its political, social, economic and cultural contexts, media regulation across the board must be informed by ten key principles: freedom of the media; independent media; diversity and pluralism in the media; professional media; protecting journalists' sources; access to information; commitment to transparency and accountability; commitment to public debate and discussion; availability of local content; and ensuring states do not use their advertising power to influence content.

In section 3, we address criminal and civil restrictions and the place of access to information laws. We make 13 specific recommendations. The four countries seem to apply the same regulatory approach when dealing with issues of public order, public health, and public morality in general. They all criminalise publication of false news. Three-Rwanda, Uganda, and Tanzania- still criminalise sedition and defamation but the sanctions are heavier in Uganda and Tanzania. They all have also passed access to information laws and at varied levels of implementation. However, they are remarkably different in how they address the issue of defamation and incitement to hatred, discrimination, and violence. In Kenya, defamation has been decriminalised unlike in the other three countries (Rwanda, Uganda, and Tanzania) and the country has a comprehensive Defamation Act albeit it requires review. Rwanda, Uganda, and Tanzania use common law in dealing with civil defamation but have retained old penal provisions that criminalise defamation. We

recommend decriminalisation of defamation, publication of false news and sedition and that comprehensive defamation laws are enacted to allow for only civil suits for those who claim that their reputations have been damaged.

Finally in Section 4 we discuss the issue of media viability and offer some recommendations on how different models of funding including development and implementation clear state advertising policies that ensure equity, transparency, and efficiency in allocation of state advertising. We also propose the development of media diversity funds that can be used to spur media sectors especially at times when there is a slump down in revenues.

1.0. INTRODUCTION

Media industries in East African Community must navigate through more and more complex media ecologies because of digitisation, fast production cycles, shrinking political and economic spaces. Their operations are further affected by the way people consume news and the emerging new distribution channels for news.

Once the gatekeeper of information-today journalists and legacy media (newspapers, radio, and television) – struggle for attention in increasingly complex media landscapes. Many news organisations, if not all, strive to cover their communities and build sustainable business models.

As such, independent media, serving public interest, deserve no less than a revolution. The changes in the media sector and in the journalism, profession have their implications on media policy and the law. New policies and laws must be enacted to address emerging new media and the changing legacy media. Such policies must replace those that sought liberalisation of the media sector and those that ushered in the convergence.

This research paper seeks to highlight emerging comparative media policy trends in the East African region while reiterating the best international standards that remain necessary in safeguarding the media as a critical player for sustainable development. While there are seven countries in East African Community, this research will look at the policies of four countries due to language barriers and time constraints. Democratic Republic of Congo and Burundi are largely Francophone and therefore a deeper understanding of their media policies and laws would require more time and financial resources.

The report is organised in four main sections namely: General International and Regional Standards; Media Regulation; Other Rules; and media viability. Each of the four sections, addresses itself to several salient media policy issues.

1.1 METHODOLOGY

The East African Community (EAC) comprises of seven countries. These are Burundi, Democratic Republic of Congo (DRC), Kenya, Rwanda, Uganda, South Sudan, and Tanzania. The seven formed the population for the comparative study.

The study adopted a comparative legal research design. Scholars like Van Hoecke have identified six methods of comparative research: "the functional method, the structural method, the analytical method, the law-in-context method, the historical method, the common-core method."[1] The comparative method employed in this

[1] For details about comparative legal research see among others, Van Hoecke, Mark (2015) "Methodology of Comparative Legal Research," Law and Method, DOI: 10.5553/REM/.000010. <available at

study was the common-core method. This was because it allowed the collection and analysis of primary legal texts and core media regulators literature across the four countries in the limited project period.

The study choice and approach were intricately determined by the project aims. The project aimed at enhancing the learning and building knowledge of local teams of media law advocates and human rights actors in Rwanda to engage and influence in media policy review discussions. The project beneficiaries were also keen to contribute to their own legal system including, but not limited to, understanding it better, knowing the subtilties of resistance of its traditions, improving it, and using it as a means of interpreting the Constitution and relevant international human rights law. The third aim of the study though not clearly stated was the harmonization of the law.

The selection of the four countries from a population of seven was informed by the (main) official language of the legal texts and the legal systems followed by each of the countries in the sub-region. The four countries in the sample are Kenya, Rwanda, Uganda, and Tanzania.

The study was to be in English. Burundi and Democratic Republic of Congo have their primary legal texts and courts decisions in French and the legal systems obtaining in the two countries differ from the common-law legal system in the other five. Further, the financial and human resources available and time allocated could not cater for collection of data and analysis in two languages.

This left the sample with five countries namely Kenya, Rwanda, Uganda, South Sudan, and Tanzania. South Sudan was left as it is a young nation which is still developing some of the primary legal texts and even media regulatory institutions. The regulatory institutions and the respective laws establishing them in the four countries selected are mature enough for comparative legal research. Similarly, Kenya, Rwanda, Uganda and Tanzania share similar socio-economic contexts.

1.2 LIMITATIONS

While its is critical to understand sources of differences in how each country under study applies and implements certain media laws in the way they do, a deeper legal-anthropological study would have been necessary, such an effort was outside the scope of the study.

Further, the project was designed to serve a given purpose with a limited set of resources. A different and broader research would have required more financial resources and longer periods to be undertaken. The findings and recommendations

https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001.pdf> Accessed in 10th Nov 2022.

of such a study may have been overtaken by events as the process of the development of a new media policy for Rwanda is fixed in time.

The study compared legislations, legal texts and structures of regulatory institutions but did little on laws in practice as there was no ready (uniform) set of data in all the four countries. Without uniform set of data on the implementation of the selected laws in the four countries an objective comparability would not have been possible as the text available lacked constructive equivalence.

A subsequent research could focus on detailed comparative study on any of the nine issues of media regulation.

2.0 GENERAL INTERNATIONAL AND REGIONAL STANDARDS

2.1 INTERNATIONAL STANDARDS

In its very first session in 1946 the United Nations (UN) General Assembly adopted Resolution 59 (1) which states:

> *Freedom of information is a fundamental human right and …the touchstone of all the freedoms to which the United Nations is consecrated.*

The right to freedom of expression is guaranteed in Article 19 of the *Universal Declaration on Human Rights* (UDHR),[2] as follows:

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

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.[3]

Freedom of expression is also guaranteed in Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR),[4] a treaty ratified by 173 States,[5] as follows:

> *[1] Everyone shall have the right to freedom of opinion.*
>
> *[2] Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.*

[2] UN General Assembly Resolution 217A (III), 10th December 1948.
[3] See for example, *Namibia Opinion*, International Court of Justice Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice).
[4] UN General Assembly Resolution 2200A (XXI), adopted 16th December 1966, in force 23rd March 1976.
[5] As of 3rd November 2022. These include all the East Africa Community countries except South Sudan. These include Burundi, Democratic Republic of Congo, Kenya, Rwanda, Uganda, and Tanzania.

The Convention on the Rights of Persons with Disabilities,[6] ratified by 185 State Parties,[7] specifically at Article 21 also guarantees freedom of expression and at Article 9 promotes accessibility including to information, communication, and technologies.

Through this convention countries are to promote access to information by providing information intended for the public in accessible formats and technologies, by facilitating the use of Braille, sign language and other forms of communication and by encouraging the media and internet service providers to make online information in accessible formats.

This convention has a clear implication on media policies on how broadcasting stations can ensure accessibility.

Further, the Convention of the Rights of the Child,[8] ratified by 196 State Parties,[9] specifically Article 13 and 17 also guarantees freedom of expression and the right to access information respectively.

2.2 REGIONAL STANDARDS

Freedom of expression is protected in all three regional human rights treaties, specifically at Article 9 of the African Charter on Human and People's Rights (the African Charter),[10] Article13 of the American Convention on Human Rights (the American Convention),[11] at Article 10 of the European Convention on Human Rights (the European Convention).[12]

The African Charter states in Article 9:

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

The African Charter is directly binding on most of the East Africa Community members, while the other treaties, and the way in which freedom of expression has been interpreted in these systems, provides an important source of understanding as to its scope and nature under international guarantees.

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[6] UN General Assembly Resolution A/Res/61/106, adopted on 13th December 2006, entered into force on 3rd May 2008.
[7] As of November 2022. These include all the East Africa Community countries except South Sudan. These include Burundi, Democratic Republic of Congo, Kenya, Rwanda, Uganda, and Tanzania.
[8] UN General Assembly Resolution 44/25, adopted on 20th November 1989, entered into force on 2nd September 1990.
[9] As of 14th Nov 2022. These include all East Africa Community member states These include Burundi, Democratic Republic of Congo, Kenya, Rwanda, South Sudan, Uganda, and Tanzania.
[10] Adopted at Nairobi, Kenya, 26 June 1981, entered into force on 21st October 1986. Ratified by 54 of the 55 AU member states (only Morocco has not ratified).
[11] Adopted at San Jose, Costa Rica, 22nd November 1969, entered into force on 18th July 1978.
[12] Adopted on 4th November 1950, entered into force 3rd September 1953.

In 2002, the African Commission on Human and People's Rights adopted the Declaration of Principles on Freedom of Expression in Africa.

This provides member states with a detailed interpretation of the rights to freedom of expression outlined in the African Charter. Clause 1 of the Declaration states:

> *1. Freedom of expression and information, including the right to seek, receive, and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and indispensable component of democracy.*
> *2. Everyone shall have an equal opportunity to exercise the right to freedom of expression and access to information without discrimination.*

And in Clause II it states:

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

The above provisions of the 2002 Declaration were also reiterated in the 2019 Revised Declaration of Principles on Freedom of Expression and Access to Information by the African Commission on Human and People's Rights.[13] Principle 10 states:

> *Freedom of expression, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art or through any other form of communication or medium, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.*[14]

Burundi, Democratic Republic of Congo, Kenya, Rwanda, South Sudan, Uganda, and Tanzania are members of the East African Community. The Treaty for the Establishment of the East African Community (EAC Treaty) while not having a clear provision for human rights, it has several provisions that may be relevant. For example, Article 6 (d) states that:

> *The fundamental principles that shall government the achievement of the objectives of the community by the partner states shall include good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion, protection of human and*

[13] Adopted by the African Commission on Human and People's Rights during its 65th Ordinary Session, 21 Oct-10th Nov 2019, Banjul, the Gambia, available at < https://www.achpr.org/legalinstruments/detail?id=69> Accessed on 14th Nov 2022.
[14] Ibid

people's rights in accordance with provisions of the African Charter on Human and People's Rights.

Article 7 (2) of the EAC Treaty provides that:

The partner states undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice, and the maintenance of universally accepted standards of human rights.

All the seven East African Community member states are also members of the International Conference in the Great Lakes Region. Their heads of state agreed in 2006 on a protocol on Management of Information and Communication which enjoins member states, among others, to:

1. *Promote freedom of opinion and expression and the free exchange of ideas in the Great Lakes Region.*
2. *Promote freedom of the media to receive and to impart information and ideas in the Great Lakes Region…*[15]

Countries are bound by such international and regional conventions that they have signed or are party to-whether these originate from the UN, the African Union, or sub-regional bodies. It is important therefore that the provisions they contain be recognised and adhered to any new media laws or policies to be drafted. Where necessary, amendments must be made to existing laws and policies in line with these mutually agreed upon general standards.

These standards, as discussed above, should also be used as a reference in interpreting legislation and in court rulings and judgments.

So, one may ask how do East African Countries fair in terms of incorporating the above international and regional standards into their constitutions, legislations, and policies? Some countries have written the need to abide by such agreements into their constitutions, legislations, and policies.

Member states to the above instruments can choose to be monists or dualists or a hybrid. In case they choose the former, then as monists, international law does not need to be translated into national law. It is simply incorporated and has effect automatically in national or domestic law. This means that international law and domestic law belong to the same legal system.

[15] The International Conference of the Great Lakes Region is a regional body that comprises 12 member states namely: Angola, Burundi, Central Africa Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Uganda, Rwanda, Republic of South Sudan, Sudan, Tanzania and Zambia. For more details see ICGLR Website <https://www.icglr.org > Accessed on 23rd Nov 2022.

When they choose to be dualist, member states then seek to treat international law and domestic law as independent legal systems which can only apply if there is translation and domestication.

For example, in Kenya, the Constitution of Kenya, 2010 states in Article 2 (5) and (6):

> *5. The general rules of international law shall form part of the law of Kenya.*
> *6. Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.*

That of Uganda states in XXVIII on Foreign policy Objectives that:

> *The foreign policy of Uganda shall be based on the principles of :*
> *…*
> *(b) respect for international law and treaty obligations.*

Freedom of expression is protected in literally all the constitutions of the East African countries. Here are some examples:

The 2010 Constitution of Kenya in its Article 33 states:

1. *Every person has the right to freedom of expression which includes:*
   a)freedom to seek, receive or impart information or ideas;
   b) freedom of artistic creativity; and
   c) academic freedom and freedom of scientific research.

2. *The right to freedom of expression does not extend to –*
   a) propaganda for war;
   b) incitement to violence;
   c) hate speech; or
   d) advocacy of hatred that-
      i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or
      ii) is based on any ground of discrimination specified or contemplated in Article 27 (4).
3. *In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.*

Article 34 states inter alia "freedom and independence of electronic, print and all other types of media is guaranteed…"

The Constitution of the Republic of Rwanda of 2003 Revised in 2015 in its Article 38 on freedom of press, of expression and of access to information states:

> *Freedom of press, of expression and access to information are recognised and guaranteed by the state.*

Freedom of expression and freedom of access to information shall not prejudice public order, good morals, the protection of youth and children, the right of every citizen to honour and dignity and protection of personal and family privacy.

Conditions for exercising and respect of these freedoms are determined by law.

The 1995 Constitution of Uganda in Article 29 states:

1.Every person shall have a right to: -

a) Freedom of speech and expression, which shall include freedom of the press and other media.

b) Freedom of thought, conscience, and belief which shall include academic freedom in institutions of learning.

The 1984 Constitution of Tanzania in Article 18 states that *every person:*

a) has freedom of opinion and expression of his ideas;

b) has the right to seek, receive, and/or, disseminate information regardless of boundaries

c) has freedom to communicate and freedom with protection from interference from his communication;

d) *has a right to be informed at all times of various important events of life and activities of people and also issues of importance to the society.*

All the four countries considered in this study have ratified the ICCPR and CRPD and reiterate in their media laws and policies the centrality of international human rights law.

While there are many other policy documents that may be considered in this research, we focus on a select few to gain some understanding of the media policies in each of the four countries.

In Kenya, we look at the Constitution of Kenya, 2010; the Media Council Act, 2013; the Kenya Information and Communication Act, 1998; the Film and Stage Plays Act; the Copyright Act, the Penal Code; Broadcasting Policy, 2009, and the Media Policy Guideline, 2009. We note that there are draft Kenya Media Policy guidelines, 2022 but they are not in force.

In Rwanda, we assess the media policy provisions as captured by the Constitution of the Republic of Rwanda, 2015; the law Regulating the Media Law No 2/2013; the Law N° 04/2013 of 08/02/2013 relating to Access to Information in Rwanda; the Rwanda Utilities Regulatory Authority (RURA) Law No 9/2013; the Penal Code (the law on offences and penalties in general); and 2011 Media Policy, and 2011 Broadcasting Policy.

For Tanzania, we assess the 1984 Constitution of Tanzania: The Media Services Act,2016; the Access to Information Act, 2016; the Electronic and Postal Communications Act, 2010; the Tanzania Communications Regulatory Authority Act,2003; the Penal Code; and, the Electronic and Postal communications (Online Content) Regulations, 2016.

In Uganda, we assess the Constitution of the Republic of Uganda, 1995; the Electronic Media Act (Cap 104), 2000; the Penal Code; the Broadcasting Policy, 2006.

2.3 IMPORTANCE OF FREEDOM OF EXPRESSION

It is difficult to overstate the importance of freedom of expression. Where this fundamental right is denied, and the free flow of information and ideas is constrained, other human rights, as well as democracy itself, are at risk. Democratic participation depends on the free flow of information and ideas, since the substantive engagement of citizens in decision-making processes can only be achieved if people are both informed and have access to the possibility of voicing their views. Other social values-including good governance, public accountability, development, individual fulfilment and combating corruption-also depend on respect for freedom of expression.

International bodies and courts have repeatedly emphasised the fundamental importance of the right to freedom of expression. At its very first session, in 1946, the UN General Assembly adopted Resolution 59 (1),[16] which refers to freedom of information in its widest sense:

> *Freedom of information is a fundamental human right and …the touchstone of all the freedoms to which the UN is consecrated.*

As this resolution notes, freedom of expression is fundamentally important both as an individual rights and as indispensable to the exercise of all other rights. The idea of freedom of expression as an underpinning of democracy and other human rights has also been stressed by international human rights bodies. The UN Human Rights Committee, the body established to monitor implementation of the ICCPR, has held:

> *The right to freedom of expression is of paramount importance in any democratic society.*[17]

2.3.1 THE IMPORTANCE OF MEDIA FREEDOM

The right to freedom of expression is of particular importance in relation to the media, given its role in making the free flow of information and ideas a reality. In

[16] Adopted 14 December 1946.
[17] Tae-Hoon Park v. Republic of Korea, 20 October 1998, Communication No 628/1995, Para 10.3.

most countries, the media remain the main vehicle for promoting and sustaining public discussion.

In its *Declaration of Principles on Freedom of Expression in Africa* (the African Declaration), adopted in 2002, the African Commission on Human and People's Rights stressed "the key role of the media and other means of communication in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy."[18]

The 2019 Revised Declaration in Principle 1 (1) provides that:
"Freedom of expression and access to information are fundamental rights protected under the African Charter and other international human rights laws and standards. The respect, protection and fulfilment of these rights is crucial and indispensable for the free development of the human person, the creation and nurturing of democratic societies and for enabling the exercise of other rights."

The media play a very important role in underpinning democracy, including during elections. The UN Human Rights Committee has stressed the importance of free media to the political process:

> *[T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.*[19]

The media polices of the four countries in East African Community reiterate the importance of freedom of expression in general and media freedom to their socio-economic development and the centrality of international and regional law, albeit not as explicit except the Uganda Broadcasting Policy, 2006 as will be exemplified below.

For example, the *2011 Media Policy* of Rwanda states that:

> *…The Government of Rwanda acknowledges the centrality of an independent, professional media and ease of access to information as essential comments of good governance and a sustainable social, economic, and political development. The Government thus commits to rapidly reform the media sector to promote accountability and to foster public engagement and participation.*[20]

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[18] Adopted by the African Commission on Human and People's Rights at its 32nd Session, 17-23 October 2002.
[19] UN Human Rights Committee General Comment No 25, CCPR/C/21/Rev.1/Add.7, 12th July 1996.
[20] Government of Rwanda, Revised Media Policy, 2011, Page 2.

The Uganda *Broadcasting policy, 2006* is perhaps the most explicit in citing the relevant international and regional obligations. It lists the East African Community Treaty, the Common Market for Eastern and Southern Africa (COMESA) Treaty, the African Charter on Broadcasting, 2000; and the International Telecommunications Union (ITU) Principles agreed under GE 89.[21]

2.3.2 THE RIGHT TO SEEK AND RECEIVE

Under international law, freedom of expression protects not only the right of the speaker (to 'impart' information and ideas) but also the right of the listener (to 'seek and receive' information and ideas). The implications of the right to seek and receive information and ideas, a key aspect of the right to freedom of expression have been elaborated upon clearly and forcefully by the Inter-American Court of Human Rights. The Court recognised early on the important implications of the dual nature of the right to freedom of expression.

> *[W]hen an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to "receive" information and ideas. The right protected by Article 13 consequently has a special scope and character, which are evidenced by the dual aspect of freedom of expression. It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to everyone. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others…In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication.*[22]

The second aspect of the right rules out arbitrary interferences by the State that prevent individuals from receiving information that another wish to impart to them. However, the rights of the listener also place a positive obligation on the State to take measures to promote an environment in which a diversity of information and ideas are available to the public. International law recognises generally that States must take positive measures to ensure rights. Article 2 of the ICCPR, for example, places an obligation on States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant. The specific need for positive measures to ensure respect for freedom of expression has been widely recognised.[23]

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[21].Government of Uganda, Broadcasting Policy, 2006, available at https://www.ucc.co.ug/files/downloads/BROADCASTING_POLICY_SEPT_08.pdf Accessed on 22 Nov 2022.

[22] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 of 13th November 1985, Series A, No.5, Para 30-2.

[23] See for example Miranda v Mexico, 13 April 1999, Report No. 5/99, Case No. 11.739 (Inter-American Commission on Human Rights).

2.4 RESTRICTIONS ON FREEDOM OF EXPRESSION

The right to freedom of expression is not absolute. International law recognises and most national constitutions in the East African Community recognise that freedom of expression may be restricted.

However, international human rights law places strict conditions on any restrictions on the right. These must comply with the provisions of Article 19 (3) of the ICCPR, which states:

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

This imposes a strict three-part test for restrictions. In its most recent General Comment on Article 19 of the ICCPR, adopted in September 2009, the UN Human Rights Committee states:

> *Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of Paragraph 3; and they must conform to the strict tests of necessity and proportionality.*[24]

First, the restriction must be provided by law or imposed in conformity with the law. This implies not only that the restriction is based on a legal provision, but also that the law meets certain standards of clarity and accessibility. Where restrictions are vaguely drafted, they may be interpreted in a way that gives them a wide range of different meanings. This gives the authorities the discretion to apply them in situations which bear no relation to the original purpose of the law or to the legitimate aim sought to be protected. For those subject to the law, vague provisions fail to give adequate notice of exactly what conduct is prohibited. As a result, they exert an unacceptable chilling effect on freedom of expression as individuals steer well clear of the potential zone of application to avoid censure. As the Human Rights Committee has stated:

> *For the purposes of paragraph 3, a norm, to be characterised as a "law," must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be accessible to the public. A law may not confer unfettered discretion for the restrictions of freedom of*

[24] General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para.22. See also Mukong v. Cameroon, 21 July 1994, Communication No. 458/1991, para 9.7 (UN Human Rights Committee).

> *expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.*[25]

Second, the restriction must pursue one of the legitimate aims listed in Article 19 (3). It is quite clear from both the wording of the article and the views of the UN Human Rights Committee that this list is exclusive and that restrictions which do not serve one of the legitimate aims listed are not valid:

> *Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.*[26]

It is not sufficient, to satisfy this part of the test, for restrictions on freedom of expression to have a merely incidental effect on one of the legitimate aims listed. The measure in question must be primarily directed at that aim.[27]

Third, the restriction must be necessary to secure the aim. The necessity element of the test presents a high standard to be overcome by the State seeking to justify the interference, apparent from the following quotation, cited repeatedly by the European Court:

> *Freedom of expression, as enshrined in Article 10, is subject to several exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.*

Courts have identified three aspects of this part of the test. First, restrictions must be rationally connected to the objective they seek to promote, in the sense that they are carefully designed to achieve that objective and they are not arbitrary or unfair. Second, restrictions must impair the right as little as possible (breach of this condition is sometimes referred to as 'overbreadth'). Third, restrictions must be proportionate to the legitimate aim. The proportionality part of the test involves comparing two factors, namely the likely effect of the restriction on freedom of expression and its impact on the legitimate aim which is sought to be protected.

The UN Human Rights Committee has summarised these conditions as follows:

> *Restrictions must not be overbroad. The committee observed in general comment No 27 that " restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which*

[25] General Comment No. 34, Ibid, Para 25.
[26] Ibid. Para. 22
[27] See among others African Court on Human and People's Rights, Lohe Issa Konate v. The Republic of Burkina Faso, Applic No. 004/2013, December 5,2014.

might achieve their protective function; they must be proportionate to the interest to be protected…The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law." The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.

When a state party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, by establishing a direct and immediate connection between the expression and the threat.[28]

An assessment of the constitutions of the four countries reveals that some have overbroad limitations on the fundamental rights beyond what is permissible under international and regional standards. For instance, the provisions Article 30 (2) of the Tanzania Constitution provide that the right can be limited for several reasons among them:

To ensure the defence, public safety, public peace, public morality, public health, rural and urban development planning, the exploitation and utilisation of minerals, or the increase and development of any other interests for purposes of enhancing public benefit.[29]

Findings:

- ✓ The four countries have ratified most of the relevant international and regional instruments that guarantee freedom of expression.
- ✓ The four constitution indicates that the four countries guarantee freedom of expression, media freedom, artistic freedom, and academic freedom in broad terms.
- ✓ Three of the countries-Rwanda, Uganda, and Tanzania- are dualist in their approaches to applicability of international law in their domestic spaces while Kenya is a monist state.
- ✓ The Kenyan constitution is perhaps the most specific in terms of guaranteeing different elements of freedom of expression and thus all the expected scope.
- ✓ Some of the Constitutions have provided for limitations of fundamental rights in general and freedom of expression in broader terms than what is legitimate and permissible under international law.

[28] General Comment No. 34 note 21, Paras. 34 and 35.
[29] Article 30 (2), The Constitution of the United Republic of Tanzania, 1984.

Recommendations:

- **A good media policy must state clearly and unequivocally that international law is applicable.**
- **A good media policy must foreground relevant international and regional law (instruments) in the document.**
- **Where a county is a dualist state, the media legislation and policy must endeavour to domesticate international law appropriately.**

3.0 MEDIA REGULATION

What is meant by regulation in media regulation? Regulation generally balances rights with responsibilities in particular sectors; in the case of media, regulation ideally seeks to balance the right to freedom of expression of media producers and creatives with the rights of media users' or consumers. It acts as a check on unconstrained industry action that may threaten the consumers' rights.

There are three components of regulation: 1) rulemaking where the ground rules of the sector are established; 2) enforcement, where the action is initiated against parties who have broken the rules; and 3) adjudication, where decisions are taken about whether rules have been upheld or not.

This section of the research report looks at several critical issues in rulemaking in media regulation. We isolate and discuss seven key issues for consideration namely:

i. pluralism,
ii. diversity,
iii. independence of regulatory bodies,
iv. regulation of journalists,
v. regulation of print media,
vi. regulation of broadcast media,
vii. public service media/broadcasting, and
viii. Film regulation.

We end each section by highlighting what are the obtaining legal and policy position on each issue and make some few recommendations.

3.1 PLURALISM

Article 2 of the ICCPR places an obligation on States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant." This means that States are required not only to refrain from interfering with right but also to take positive steps to ensure that rights, including freedom of expression, are respected. In effect, governments are under an obligation to create an environment in which a diverse, independent media can flourish, thereby satisfying the public's right to know.

An important aspect of the States' positive obligations to promote freedom of expression and of the media is the need to promote pluralism within and ensure equal access of all to the media. This implies that there be no individuals or groups that are excluded from access to the media.

However, media pluralism as a concept is still not defined globally leave alone in most of the East African countries, nor at the African level.[30] Therefore, media pluralism is used by policy analysts and commentators interchangeably with pluralism of the press, pluralism in the press, pluralism of information, and pluralism of expression of ideas.[31]

Therefore, media pluralism is a concept that embraces several aspects, such as diversity of ownership, variety in the sources of information and in the range of contents available in different geographical areas.

Pluralism, therefore, means that there is a variety of different types of media and different owners.

So, what is the situation of media pluralism in each of the four countries? There is no reliable data across the four countries, but we can discuss the numbers in the ecosystem.

Kenya is assessed to have one of the most complex and vibrant media sectors in the sub-region.[32] It has over 180 FM radio stations, 80 TV, 4 signal distributors, 19 newspapers, 13 online news sites and an estimated 19000 blogs. Among the 19 newspapers are six daily newspapers, one regional weekly newspaper-The East African. However, the sector is dominated by five private media houses namely the Nation Media Group, Royal Media Services, the Standard Group, MediaMax Media Services, and the Radio Africa Group. Nation Media Group operates in Kenya, Rwanda, Uganda, and Tanzania.

It is evident that ownership of the nation's news media is highly concentrated, with five media corporations controlling 95 per cent of both audience and advertising market share. The public broadcaster, Kenya Broadcasting Corporation (KBC), is equally big but does not control a big audience share as it did pre-liberalisation days.

Since 2013, the media sector in Rwanda has experienced growth. However, most of the media house are relatively young with only Rwanda Broadcasting Authority existing beyond two decades. According to data from RURA, Rwanda has 39 FM radio stations, 20TV stations, with 48 registered newspapers which largely publish online but rarely have hard copies on the streets and market stalls.[33] The Rwanda

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[30] For the ongoing debates on the concept see Danielle R. et at, "Media, Pluralism, and Democracy: What's in a Name?"; ***Media, Culture and Society***, Vol 37, Issue 7

[31] This conceptualization is borrowed from Losifides (1997) P. 86

[32] Mwita Chaacha, The Kenya Media Assessment 2021, Internews, available at < https://internews.org/wp-content/uploads/legacy/2021-03/KMAReport_Final_20210325.pdf> Accessed on 31st Nov 2022.

[33] For challenges facing newspapers see Hategekimana, JB & Barore, C. "Challenges and Opportunities of Print Media Practice in Rwanda in Digital Era," International Journal of Science and Research, Vol 10, Issue 9, Sept 2021. Available at < https://www.ijsr.net/archive/v10i9/SR21914094911.pdf> Accessed on 20th Nov 2022.

Media Barometer, 2021, indicates that media pluralism is at 86.4 per cent. It assessed the ease to starting a media house and the lessening entry tariffs for community media which are exempted from paying Value-added Tax (VAT) and their licence fees are subsidised.[34]

According to statistics from Uganda Communication Commission (UCC), Uganda has over 202 accredited and licenced radio stations, 40 operational TV stations and eight Pay TV service providers.

A media landscape mapping conducted by Media Futures research team identified 23 digital native News Media Organisations in Uganda by May 2020. The government's Uganda Broadcasting Corporation (UBC) operates 10 radio stations. Over half of the radio stations are classified as small FM stations, which are often hybrids of community type but not always with a community label.

The biggest media conglomerates in Uganda, Vision Group and the Nation Media Group, own media outlets across platforms. The Vision Group publishes at least 10 newspaper titles, operates three television stations and six radio stations. The Vision Group publishes its newspapers in English and the local languages. The Nation Media Group publishes Daily Monitor and operates the NTV-Uganda.

Though print circulation numbers have continued to decline in Uganda, Bukedde and the New Vision daily newspapers continue to take lead while Daily Monitor comes third. Circulation estimates for the last quarter of 2019 by the Audit Bureau of Circulation of South Africa that Bukedde had an average of 33,289, the New Vision had an average of 23,636 and Daily Monitor had an average of 16169 print copies.

Tanzania mainland media landscape has over 210 FM radio stations, 56 TV and 284 newspapers and magazines. According to Zanzibar Broadcasting Commission, there are more than 50 registered broadcasting and online media services in Zanzibar. The newspaper market is dominated by four state-owned media in the Tanzania mainland. One private newspaper is circulating in Zanzibar, an e-paper, *Fumba Times*.[35]

The digital switchover processes in Kenya, Uganda and Tanzania started in 2015 and is nearly complete. In Rwanda, the digital switchover is incomplete.

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[34] RGB, (2021), Rwanda Media Barometer, 2021, P21. Available at < https://www.rgb.rw/fileadmin/user_upload/RGB/Publications/RWANDA_MEDIA_BAROMETER-RMB/RWANDA_MEDIA_BAROMETER_2021.pdf> Accessed on 20th Nov 2022.

[35] Africa Centre for Media Excellence, A Portrait of Tanzanian Journalists: A Survey Report, 2022, Pg 2, available at < https://acme-ug.org/wp-content/uploads/A-PORTRAIT-OF-TANZANIAN-JOURNALISTS-SURVEY-REPORT-2022-2.pdf> Accessed on 30th Nov 2022.

Findings:

- ✓ The 2011 media policy make a passing reference to media pluralism in Chapter 2 especially in the vision and policy goal. However, it fails to elaborate on the key principle in the implementing strategies and key priorities.
- ✓ The Kenyan media laws, especially the Kenya Information and Communication Act, the Media policy, a broadcast licensing regulation clearly provide for media pluralism by providing for public broadcasting, private/commercial broadcasting, and community broadcasters.
- ✓ Relative to the four countries, Rwanda has a young, small, and fledgling, but pluralistic media and Tanzania is the largest.
- ✓ In Rwanda, the decisions to licence community media are largely informed by the executive's discretions and administrative guidelines. Community media are given subsidized licences and exempted from VAT payments as a measure to encourage media pluralism and diversity.

Recommendations:

- **In addition to its negative duty of non-interference, a good and progressive media policy must reiterate that the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism.**
- **A good media policy should clearly speak to the issue of media pluralism and spell out measures for a differentiated treatment in terms of licensing fees and other related matters between commercial, public and community media.**
- **To protect and actively promote the pluralistic expressions of ideas and opinions as well as cultural diversity, East African Community member states should adopt any regulatory and financial measures necessary to guarantee media transparency and structural pluralism as well as diversity of content distributed.**

3.2 Diversity

The concept of media diversity is more defined in media studies. Van der Wurff and Cuilenburg define media diversity as the 'extent to which the media content differs according to one or more criteria.'[36]

The principle of diversity is key to objective for any media regulation. The principle derives from the multidimensional nature of the right which, as noted in Section 1, protects not only the right of the speaker (to 'impart' information and ideas) but also the right of the listener (to 'seek and receive' information and ideas). This prevents States from interfering with the right of listeners to seek and receive information from others. However, it also places a positive obligation on the State to take measures to promote an environment in which a diversity of information and ideas are available to the public.

It is not enough for the state simply to take a laissez faire approach to media regulation, at least in the broadcasting sector, where externalities and rigidities like scarce frequencies -at least before digital switchover- and the high cost of entry into the sector have traditionally, in the absence of countervailing regulation, prevented the emergence of truly diverse media.

Diversity has received extremely broad endorsement as a key aspect of the right to freedom of expression. The 2007 Joint Declaration on Diversity in Broadcasting of the four special international mandates on freedom of expression focused on the issue stressing its importance as an aspect of freedom of expression and as an underpinning of democracy.[37]

The Joint Declaration identified three distinct aspects of media diversity: content, outlet, and source. Diversity of content is construed in the sense of provision of a wide range of content that serves the needs and interests of different members of society. It is the obvious and ultimately the most important form of diversity. The absence of source diversity reflects itself in the growing phenomenon of concentration of media ownership. On the other hand, outlet diversity speaks to the issue where the State create an environment in which different types of broadcasters-including public service, commercial and community broadcasters-which reflect different points of view and provide different types of programming,

[36] Van der Wurff, R. and Cuilenburg, J. Van (2001) Impact of moderate and ruinous competition on diversity: The Dutch television market. *Journal of Media Economics*, 14 (4),213-219. See similar discussions Napoli, P. M. (1999) Deconstructing the diversity principle. *Journal of Communication*, 49 (4), 7-34

[37] Adopted 12 December 2007. Available at < https://eos.cartercenter.org/uploads/document_file/path/234/jointdec2007.pdf> Accessed on 14th Nov 2022.

can flourish. Similar positions are reflected in their 2013 Declaration, which is about the transition to digital terrestrial broadcasting.[38]

Further, the UN Human Rights Committee has stated:

> *As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, State parties should take particular care to encourage an independent and diverse media.*[39]

Wigston in Fourie, Nel & Wigston 2006, indicates that community broadcasting implies that community station must be fully controlled by a non-profit entity and carried on for non-profit purposes, must serve a clearly defined community, encourage members of the community to participate in the provision of programmes, promote the interests of community, and may be funded by donations, grants, sponsorship, advertising, or membership fees or any combination of those.

Wigston describes two broad types of community broadcasters:

- Stations serving a specific geographic community.
- Stations serving a community of interests where three sub-sectors can be distinguished:
  - ✓ Institutional communities, such as universities and large organisations.
  - ✓ Religious communities
  - ✓ Cultural communities such as for senior citizens, specific language groups

The UN Human Rights Committee reinforces diversity of source to prevent undue concentration of media ownership by stating that:

> The committee reiterates its observation in general comment No. 10 that "because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression." The State should not have monopoly control over the media and should promote plurality of the media. State parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.[40]

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[38] Adopted on 3rd May 2013 at San Jose, Costa Rica. Available at < https://www.article19.org/data/files/medialibrary/3738/13-05-03-JOINT-STATEMENT-DIGI-2013-ENG.pdf

[39] General Comment No 34, 12th Sept 2011, CCPR/C/GC/34, Para. 14.

[40] General Comment No 34, Para 40.

Similarly, the African Declaration states:

> *Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity.*[41]

The African Declaration similarly calls for effective measures to prevent undue concentration of media ownership.[42] The Revised Declaration in Principle 11(3) reiterates that:

> *States shall take positive measures to promote a diverse and pluralistic media, which shall facilitate:*
>
> *a. the promotion of free flow of information and ideas*
> *b. access to media and other means of communication, including by marginalised groups, linguistic and cultural minorities;*
> *c. access to non-discriminatory and non-stereotyped information;*
> *d. access to the media by poor and rural communities, including by subsidising household costs associated with digital migration;*
> *e. the promotion of transparency and diversity in media ownership;*
> *f. the promotion of local and African languages, content, and voices; and*
> *g. the promotion of the use of local language in public affairs, including by the executive, legislature, and the judiciary.*

In assessing diversity, we can also look at the representation of male, female and others within the media. There is no gender balance and diversity in news across the sub-region as per the table below:[43]

Country	Print, Radio& TV Men /Women	Internet Men/women
Kenya	81-19	80-20
Rwanda	76-24[44]	-
Uganda	76-24	-
Tanzania	70-30	70-30
South Sudan	82-18	-
DRC	80-20	-

Source: Global Media Monitoring Project 2020.

[41] Principle III
[42] Principle XIV (3). The African Declaration also rules out public broadcasting monopolies. See Principle V (1).
[43] Global Media Monitoring Project (2020) Who Makes the News, page 80 available at < https://whomakesthenews.org/wp-content/uploads/2021/07/GMMP2020.ENG_.FINAL20210713.pdf > Accessed on 28th Nov 2022.
[44].https://gmo.gov.rw/fileadmin/user_upload/Researches%20and%20Assessments/State%20of%20Gender%20Equality%20in%20Rwanda.pdf> Accessed on 4th Dec 2022.

Findings

- ✓ The four countries in the study have a diverse media ecosystem but it could be made better by clear funding strategies for media start-ups operating in the community broadcasting segment.
- ✓ Public Service Broadcasting is a media policy arrangement in the four countries studied. Rwanda has Rwanda Broadcasting Agency (RBA), Kenya-Kenya Broadcasting Corporation (KBC), UBC for Uganda and TBC for Tanzania. It is based on a political and socio-democratic set of beliefs that recognise the crucial function of the State in providing conditions for an effective social, cultural, and political participation in a democratic society.[45] All the four broadcasters are funded by the state and through advertising. There are several differences in the governance and programming of each the four. However, that is beyond the scope of this paper.
- ✓ Proliferation of commercial broadcasters in and of itself cannot guarantee diversity and pluralism unless their licensing is tweaked to ensure universal access and programming that caters for diverse communities in every Member state.
- ✓ Commercial /Private broadcasters are dominant in two countries namely Kenya and Uganda. In Uganda, government-owned media is the most dominant although there are several commercially owned news media organisations.
- ✓ In Rwanda, the state-owned Rwanda Broadcasting Authority is the dominant player in the television sub-sector. A few commercial radio stations compete for dominance in the radio sub-sector.
- ✓ Women are underrepresented both in the management of media outlets and also in the voices that are covered in media content in the four countries.

Recommendations:

- **East African Community member states must put in place specific rules that address the issue of concentration of media ownership by either state or private actors.**
- **Licensing of broadcasters and signal distributors is an important means for enforcing rules relating to ownership**
- **Media policies must require broadcasting licencees to report changes of ownership to the regulatory authority within a specified period.**

[45] See for example Republic of Rwanda, Broadcasting Policy of Rwanda, March 2011, section 5.4 and 6.5; Kenya Broadcasting Corporation Act, <available at http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20221 >

- **Media practitioners and media institutions must carry out their functions by maintaining the highest professional and ethical standards and ensuring gender balanced and sensitive content that treats men and women equally and fairly as news sources and subject.**
- **Media policies must speak to the issue of transparent frequency spectrum management and allocation with a view to safeguard media pluralism and media diversity.**
- **Community broadcasters may be licensed to ensure different communities have a platform that addresses their concerns. However, caution must be taken not to license political parties and their cronies as that may fan political tensions.**
- **The governments and the regulators must develop comprehensive anti-sexual harassment policies and seek to have them implemented by media entities.**
- **Media owners will ensure that governance and senior management structures in both public and private media afford equal representation to men and women and other segments of society.**

3.3 INDEPENDENT REGULATORY BODIES

The idea that bodies which exercise regulatory or administrative powers over both public and private media need to be independent of the government and protected against both political and commercial interference is well-rooted in international standards, as well as the comparative practice in democratic states. This ensures the media's role as a public watchdog and that the public has access to a wide range of opinions, especially on matters of public interest.

In the 2003 Joint Declaration, the UN, OSCE and OAS special mandates protecting freedom of expression state:

> *All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by a particular political party.*

The African Commission on Human and People's Rights has also made clear that the independence of regulatory authorities is fundamentally important. In the 2002 Declaration of Principles on Freedom of Expression in Africa, it states:

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

The 2019 Revised Declaration of Principles on Freedom of Expression and Access to Information in Africa in Principle 12 (3) states:

> *States shall develop regulatory environments that encourage media owners and media practitioners to reach agreements to guarantee editorial independence and to prevent commercial and other considerations from influencing media content.*

In September 2009, the UN Human Rights Committee made a General Comment on Article 19 of ICCPR on broadcast regulators:

> *It is recommended that State parties that have not already done so should establish an independent and public broadcasting licensing authority, with the power to examine broadcasting applications and to grant licences.*[46]

From the standards above, the rationale for this is evident: if regulators are controlled by the government, they are likely to make regulatory decisions which favour the government of the day, rather than the wider public interest. This will undermine the ability of the media to report critically, especially on political actors and thereby diminish respect for freedom of expression.

It is equally important that regulators are independent of the sectors they regulate. This is an emerging issue within East Africa. This type of 'regulatory capture' is an emerging problem in many democracies. The negative implications of this are equally evident and essentially the same: if industry controls the regulator, it will operate with a bias towards industry, rather than making decisions in the wider public interest.

It is worth noting that the principle of independence applies to the exercise of regulatory powers, and not to higher-level policy making, which normally remains the preserve of government. For instance, framework decisions about digital switchover-including what system will be used, the general timetable for the switchover and any general measures of public support for the process-are policy decisions which are made by the government. On the other hand, specific decisions about which companies should receive digital multiplexes are regulatory decisions. If these are left to government, the choices will be influenced by politics, to the detriment of freedom of expression.

[46] General Comment No 34, Para 39

Decisions about who may operate a broadcaster, launch a newspaper or even practice as a journalist must be determined based on professional criteria and not political allegiance or acquiescence. Similarly, sanctions of breach of the rules must be applied on an objective basis.

Recognising the principle of independent regulation is one thing, but guaranteeing it in practice is quite another, and experience in countries around the world shows that promoting independence is both institutionally complex and difficult to achieve in practice.

In practice, countries studied in the East African Community employ different media regulatory bodies.

In Kenya there are five media regulatory agencies: Media council of Kenya, Communications Authority; Kenya Film Classification Board; the Media Complaints Commission, and Kenya Copyright Board. The question of independence of the Media Council of Kenya and the Media Complaints Commission are addressed in Section 11 and Section 30 of the Media Council Act respectively. The appointment of members of the board of Communication Authority, the Media Council of Kenya, and commissioners of the Media Complaints Commission are appointed after a public interview and nomination process that involves a multi-party body. The two regulators can also make regulations albeit in consultation with the Minister. The senior officers are appointed by their boards and not the Minister. To that extent, the Communications Authority and the Media Council and may be adjudged to be somewhat independent. The other two are not independent.

Rwanda has two media regulatory agencies: Rwanda Media Commission (RMC); and Rwanda Utilities Regulatory Authority. RMC is established according to the Regulating Media Law article 2 (20) as 'an organ set up by journalists themselves,' and as such a level of independence is presumed. The organ makes it own regulations like the Constitution although it has not yet been adopted and the Code of Conduct for journalists. It also appoints its executive staff.

RURA, on the other hand, is a statutory regulator. Even though its founding Act (RURA Law) in Article 21 requires that its Regulatory Board shall always act in 'an independent, transparent and objective manner,' the appointment of senior staff by the President and their supervision by the Prime Minister's Office have a big implication on the independence of the regulator.[47]

Uganda has five main media regulators: Uganda Communications Commission (UCC), Pornographic Control Committee (PCC), the Media Council, the National

[47] Limpitlaw, J, **Media Law Handbook for Eastern Africa**-Volume 2, page 488

Institute of Journalists of Uganda (NIJU) and the Uganda Communications Tribunal (UCT). None of the five regulators can make regulations without involvement of other executive bodies. The relevant line ministries appoint and fire senior staff of each of the regulators and are responsible for regulation-making and allocation of budgets. In all the regulators, except in respect of NIJU, the executive is responsible for appointment and removal of members of the governing structures. In sum, none the regulators may be adjudged as independent as they lack control over the appointment of their senior staff.

Tanzania Communications Regulatory Authority (TCRA) is a statutory regulator in Tanzania. Through the TCRA Act the Minister in charge has significant powers in respect of the process of appointing board members and in terms of regulatory functions, including the power to make broadcasting-related content regulations.

Findings:

- ✓ There is lack of independence of regulators from government roughout East African countries. This is because all the four governments have statutory broadcasting regulators that are largely nominated and appointed by the government of the day.
- ✓ Interference has been rife starting with decisions about who may establish a media outlet (gatekeeping) and continuing into regulatory decisions that apply sanctions for breach of various rules.

Recommendations:

- **East African Community member states should set up independent regulatory authorities.**
- **Member states should devise a policy or legislative framework to ensure the unimpeded functioning of regulatory authorities which clearly affirms and protects independence.**
- **The media policy or legislative framework should guarantee that members of regulatory bodies are appointed in a democratic and transparent manner and their removal is not discretionary but based on justiciable reasons in a democracy.**

3.4 REGULATION OF JOURNALISTS

The obligation to promote pluralism above also implies that there should be no onerous legal restrictions on who may practice journalism, and that licensing or

registration systems for individual journalists are incompatible with the right to freedom of expression.

As such, under international law, it is not permissible to impose limitations on who may practice as a journalist or to require journalists to belong to a particular association or to be licenced or registered. The UN Human Rights Committee has made it clear that this applies to all types of journalists:

> *Journalism is a function shared by a wide range of actors, including professional fulltime reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere, and general State systems of registration or licensing of journalists are incompatible with paragraph 3.*[48]

In a joint Declaration issued in December 2003, the (then) UN Special Rapporteur on Freedom of Expression, OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression state:

> *Individual journalists should not be required to be licenced or to register.*
>
> *Accreditation schemes for journalists are appropriate only where necessary to provide them with privileged access to certain places and/or events; such schemes should be overseen by an independent body and accreditation decisions should be taken pursuant to a fair and transparent process, based on clear and non-discriminatory criteria published in advance.*

The Revised Declaration in Principle 12 (2) states that

> *Any registration system for media shall be for administrative purposes only and shall not impose excessive fees or other restrictions on the media.*

Several issues or questions are worth discussion in this section as they form a big plunk of what may constitute a progressive media policy. The first question is that who is a journalist and when is accreditation permissible?

Kenya's Media Council Act, 2013 in section 2 defines a journalist as 'any person who is recognised as such by the Council upon fulfilment of a criteria set by the council.' The section defines a foreign journalist as 'any journalist who is not a citizen of Kenya and is accredited as such under this Act'.

Section 6 (f) gives the Council power to accredit local and foreign journalists by certifying their competence, authority and credibility against official standard based on quality and training of journalists in Kenya including maintaining a register of journalists, media enterprises…

[48] General Comment No. 34, 12th Sept 2011, CCPR/C/GC/34, Para. 44.

The Media Council of Kenya has also developed accreditation guidelines through which they have expanded the definition of who is a journalist and laid down procedures for accreditation.[49]

The Media law in Rwanda defines "professional journalist" as: *a person who possesses basic journalism skills and who exercises journalism as his/her first profession.*

Rwanda's Regulating Media Law No 2 of 2013 in Article 5 spells out the obligations of a journalist, and it states that the main obligations of journalists are to inform, educate the population, promote leisure activities, defend the freedom of information, and analyse and comment on information. Article 3 of the same law requires a Rwandan or foreign journalist to be accredited. While the Rwandan journalist shall be accredited by the Rwanda Media Commission, it remains unclear which competent public organ accredits foreign journalists.

Tanzania's Media Services Act, No 120 of 2016 in section 3 defines a journalist as 'a person accredited as a journalist under this Act, who gathers, collects, edits, prepares or presents news, stories, materials and information for a mass media service, whether an employee of media house or as a freelancer.' The Media Services Act, 2016 also introduces mandatory accreditation of journalists and gives powers to the Board of Accreditation to cancel the same under sections 12,14,19,20 and 21 of the Act.

Uganda's Press and Journalist Act, 1995 in section 1 defines a journalist as a 'person who is enrolled as a journalist under this Act.' Section 27 (3) and 5 of this law provides that no person shall practice journalism, including freelance journalism, unless they are in possession of a valid practising certificate issued by the Media Council. However, one cannot acquire a practising certificate unless they have a duly awarded certificate of enrolment from NIJU. Section 29 further requires every journalist to have an accreditation card issued by the Media Council

From the above laws, the term journalist is difficult to define with precision. This was recognised by the UN Human Rights Committee in its General Comment 34 cited above. A good media policy shall not endeavour to find a precise definition but adopt a working definition like has been made in Kenya.

Accreditation on the other had can have a legitimate aim if it is not compulsory and does not put onerous requirements and restrictions for journalists. [50] Section 19,20 and 21 of the Tanzania's Media Services Act, 2016 and Section 27 and 29 of the

[49] Media Council of Kenya, Accreditation Guidelines, available at < https://mediacouncil.or.ke/~mediaco7/index.php/services/accreditation/guidelines >, Accessed on 23rd Nov 2022.

[50] For similar arguments see Scanlen vs Zimbabwe, Case No 297/05(2009), African Commission on Human and Peoples Rights

Press and Journalists Act, 1995 are examples of illegitimate accreditation requirements.

Recommendations:

- **Media policies must refrain from requiring onerous registration and accreditation mechanism for journalists and media houses as they unduly restrict media freedom.**
- **An independent media regulator must be the only one allowed to accredit journalists and once accredited and issued with a press card it must suffice in all other situations and operations. Other agencies like police, parliament, ministries, and departments must just seek concurrence of the accrediting organ.**
- **Any fees chargeable for accreditation must be nominal that it does not turn out as a hindrance to those who qualify and would want to lawfully practice journalism.**

3.5 REGULATION OF PRINT MEDIA

International law does not permit licensing regimes for newspapers. This can be found in several positions by the UN Human Rights Committee and the Declaration of Principles on Freedom of expression and Access to Information in Africa. Both hold that licensing requirements for print media constitutes a violation of the right to freedom of expression.

In 1999, for example, the Committee noted, in respect of Lesotho's regular report:

> *The committee is concerned that the relevant authority under Printing and Publishing Act has unfettered discretionary power to grant or to refuse registration to a newspaper, in contravention of Article 19 of the Covenant.*[51]

The African Commission in the Declaration of Principles states

> *Any registration system for print media shall not impose substantive restrictions on the right to freedom of expression.*[52]

The UN Human Rights Committee further states

> *It is incompatible with Article 19 to refuse to permit the publication of newspapers and other print media other than in the specific circumstances*

[51] Concluding Observations of the Human Rights Committee: Lesotho, 8th April 1999, UN Doc. No CCPR/C/79/Add.106, para 23.
[52] Principle VIII (I)

of the application of paragraph 3. Such circumstances may never include a ban on a particular publication unless specific content, that is not severable, can be legitimately prohibited under paragraph 3.[53]

From the above, there is an important distinction to be made regarding regulation of print media between licensing and registration. Licensing is a process that requires prior authorisation of a regulatory authority or the government. The authorisation can be withheld or revoked even after issuance. Registration, on the other hand, obliges those who wish to publish a newspaper or magazine to provide certain information to the regulator before they begin.

While international law proscribes licensing of newspapers and other print media, it does not presently rule out purely technical registration schemes for mass media organisations even though it points out that such registration requirements should not be onerous.

In their Joint Declaration of December 2003, the three specialised mandates for protecting freedom of expression stated:

Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media, or which are overseen by bodies which are not independent of government are particularly problematic.

If such a regime is nevertheless maintained, the register should be run as a purely administrative matter, akin to company registration. The information required should be lodged with an administrative body and registration should be automatic upon the submission of the relevant documents.
The African Commission recommends that a technical registration scheme for mass media organisations is compatible with the guarantee of freedom of expression only if it meets the following conditions:

- The authorities should have no discretion to refuse registration once the requisite information has been provided.
- Registration should not impose substantive burdens and conditions upon the media; and
- The registration system should be administered by bodies which are independent of government.[54]

In Tanzania, the Newspaper Act, 1976 and the Media Services Act, governs newspapers on mainland Tanzania. Section 6 prohibits publishing of a newspaper

[53] General Comment No. 34, Paragraph 39.
[54] Constitutional Rights Project and Media Rights Agenda v. Nigeria, 31 October 1998, Communication Nos. 105/93, 130/94, 128/94 and 152/96. See also the 2003 Joint Declaration.

unless the proprietor, printer and publisher have registered an affidavit. Under section 9 of the Newspaper Act, the printer and publisher of every newspaper published in Tanzania shall deliver or send by registered post to the registrar of Newspapers, a copy of every newspaper published. Failure to register the affidavit or supply copies of published newspapers are offences and upon conviction a person would be liable to a fine, imprisonment or both.

Recommendations:

- **Member states should consider doing away with registration requirement for print media.**
- **At a minimum, any registration regime should comply with the principles set out above.**
- **A media law or policy may state as follows:**

i) "Media activities, including the establishment of publishing enterprise or any other firm in the media business, may not be rendered dependent upon any form of special licensing or registration.

ii) Notwithstanding the above, publishing houses, like all other enterprises- shall be required under the Companies Act."[55]

3.6 REGULATION OF BROADCAST

There is a significant difference in ways that the print and broadcast media are regulated in most countries. Such regulatory measures are, among others, informed by how specific media are distributed. For broadcasting, the distribution of the broadcast signals has traditionally relied upon a limited public resource, namely the airwaves.

Regulation for broadcasting has thus been justified on the basis both that it is necessary to prevent disorder in their airwaves and that it is legitimate to regulate the exclusive grant of a right to use a public resource. These rationales have been used to justify two common forms of broadcast regulation, namely licensing and regulation content.

Licensing process in broadcasting is a keyway of promoting diversity in the airwaves. However, it is essential that the licensing process be conducted by a body that is independent of government, political or commercial interests.

The licensing process should not be onerous, especially for community broadcasters. As the UN Human Rights Committee has stated:

[55] Bussiek, H. (2015) Freedom of Expression and Media Regulation: A Media Legislation Manual, FES, Namibia, Page 23.

> *State parties must avoid imposing onerous licensing conditions and fees on broadcast media, including on community and commercial stations. The criteria for application of such conditions and licence fees should be reasonable and objective, clear, transparent, non-discriminatory, and otherwise in compliance with the Covenant. Licensing regimes for broadcasting via media with limited capacity, such as audio-visual terrestrial and satellite services should provide for an equitable allocation of access and frequencies between public, commercial, and community broadcasters.*[56]

Similarly, Principle V (2) of the African Declaration states, in part:

> *[L]icencing processes shall be fair and transparent and shall seek to promote diversity in broadcasting.*[57]

To ensure fairness and transparency, the process for assessing licence applications should be set out clearly and precisely in law, with a framework of rules provided for in the primary legislation and more detail specified in subordinate rules. This should at least include the following:

- Clear time limits for each step of the process, including the deadline for filing applications and the timeframe within which decisions are expected to be made.
- Details about the nature of the process, which should be open and allow both the applicant and interested members of the public to make representations. The rules should require the regulator to provide clear written reasons for any refusals, citing clearly the specific legal provisions that were relied upon. Applicants should also have a right to appeal to the courts against any adverse decision by the regulator.
- Details about any fees to be charged should also be included. It is common to charge a fee for processing licence applications, although this is often waived or reduced in competitions for community broadcasting licences. It is also very common to expect broadcasters to pay an annual fee for the use of the frequency, which may be based on the set schedule or based on bids. Once again, different, and far less onerous, rules normally apply to community broadcasters.
- The detailed criteria by which competing applications are to be assessed should be set out in the rules. Common criteria include

[56] General Comment No. 34, 12 Sept 2011, CCPR/C/GC/34, Para 39. Available at < https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/453/31/PDF/G1145331.pdf?OpenElement. > Accessed on 22 Nov 2022.

[57] See also 2003 Joint Declaration of the special international mandates, which states: "The allocation of broadcast frequencies should be based on democratic criteria and should ensure equitable opportunity of access."

whether the applicant possesses the necessary technical expertise and financial resources to provide the proposed broadcasting programme, as well as the contribution of new service to promoting diversity. Where there are pre-test technical and financial conditions, these should be stipulated in advance.

In most democracies, political parties are not allowed to hold broadcasting licences. Indeed, in most democracies, broadcasters are required to treat matters of controversy with due balance and impartiality, a condition which would negate the very idea of a political party broadcaster.

Until recent, most democracies also prohibited religious institutions from holding broadcasting licences, However, the trend now is to relax this rule considering reduced scarcity in the airwaves. Blanket prohibitions based on broadcast applicants' form or nature would likely represent a breach of the right to freedom of expression.

Broadcasting licences come with conditions, which may be general or specific to the licensee. General conditions may include such matters as technical criteria, which would normally apply to a class of licences, a requirement to abide by promises made in the licence application, rules on copyright, licence duration (again normally by class of licence), and a requirement to adhere to a code of conduct and sometimes to positive content rules. Specific conditions may apply to individual licensees. These might, for example require a licensee to carry a minimum quota of news or children's programming (both of which are aimed at promoting content diversity).

While it is legitimate to impose certain conditions on broadcasters, based largely on the ideas of promoting diversity and fairness in the system, these are still restrictions on freedom of expression, which therefore need to be justified. Unduly onerous conditions are, therefore, not legitimate.

3.6.1 THE PRACTICE OF BROADCASTING REGULATORS IN THE REGION

One of the fundamental characteristics of democracy is the separation of powers, typically between the legislative, the judiciary and the executive. In the field of broadcasting, a similar separation of responsibilities applies between government, regulator, and service providers.

Responsibilities of different entities with regards to broadcasting can be summarised in the table below:

Responsibilities of Different Actors in the Media Ecosystem	
Actor	Role
Executive/Government	Formulate national policy and legislative proposals
Legislature/Parliament	Pass appropriate policies and law
Regulator	Licence of broadcasters
Service providers	Providing service and programmes

In Kenya, the 2010 Constitution provides for an independent broadcasting regulator in Article 34 (3):

> Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that-
>
> (a) are necessary to regulate the airwaves and other forms of signal distribution; and
>
> (b) are independent of control by government, political interests, or commercial interests.

We cite the above constitutional provision as a good standard formulation that may be provided for in relevant national laws and policies. The idea that the Media Council of Kenya which is the body envisaged in the constitution and has been established and run with no legal challenges offers an opportunity for the other countries to learn on how recruitment, tenure of office and accountability mechanisms can ensure credibility and legitimacy across different sets of stakeholders including government.

Kenya, Uganda, and Tanzania have broadcasting regulators that combine regulation of the telecommunication, broadcasting, and postal services. Rwanda on the other hand has the biggest regulator that regulates energy, water, telecommunications, broadcasting.

Recommendations

- **Digital transformations and convergences require that regulators are re-tooled for purpose, but they must not be too big to fail in effectively serving their mandates of consolidating the growth of broadcasting and film sector.**
- **Broadcasting regulators must be transformed to focus on licensing of broadcasters, signal distributers and frequency spectrum management. The regulation of professional standard and content must be left to self-regulatory or co-regulatory agencies.**

3.7 PUBLIC SERVICE BROADCASTING

The advancement of pluralism in the media is also an important rationale for public service broadcasting. Several international instruments stress the importance of public service broadcasters and their contribution to promoting diversity and pluralism.[58]

However, such broadcasters must be independent of government control but be assured of sufficient and appropriate funding. The vision of independent public broadcasting is supported by international law. The UN Human Rights Committee indicates:

> *State parties should ensure that public broadcasting services operate in an independent manner. In this regard, state parties should guarantee their independence and editorial freedom. They should provide funding in a manner that does not undermine their independence.*[59]

Several Declarations adopted under the auspices of UNESCO, among them the 1996 Sanaa Declaration,[60] the 1997 Sofia Declaration,[61] also note the importance of independent public service broadcasters.

Similarly, in their Joint Declaration of 2010, the special international mandates expressed concern about political "influence or control" over public broadcasters,

[58] See, for example, the Declaration of Alma Ata, 9 October 1992 (endorsed by the General Conference of UNESCO at its 28th Session in 1995).
[59] General Comment No. 34, Para.16, Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/453/31/PDF/G1145331.pdf?OpenElement. Accessed on 22nd Nov 2022.
[60] Resolution 34 adopted by the General Conference at its 29th Session (1997)
[61] Resolution 35 adopted by the General Conference at its 29th Session (1997), clause 7

which results in them serving "as government mouthpieces instead of as independent bodies operating in the public interest."[62]

The African Declaration also highlights the importance of independence for public broadcasters, calling for state and government-controlled broadcasters to be transformed into public service broadcasters.[63]

Historically, in all the East African countries, these broadcasters have often been subject to government control. The idea of public service broadcasting posits another approach: publicly owned broadcasters which operate independently of government control, and which serve the wider public interest, complementing and extending the services offered by commercial broadcasters, and thereby contributing to diversity in the media.

The main reason why independence is so important for public broadcasters has been elaborated on eloquently by the Supreme Court of Ghana:

> *"[T]he State-owned media are national assets: they belong to the entire community, not to the abstraction known as the state; nor to the government in office, or to its party. If such national assets were to become the mouthpiece of any one or combination of the parties vying for power, democracy would be no more than sham.*[64]
>
> *As regards the governing body, the National Media Commission, the Ghanaian Supreme Court stated that it was their role "to breathe the air of independence into the state media to ensure that they are insulated from government control."*[65]

In practical terms, protecting the independence of public broadcasters is achieved in many of the same ways as protecting independence of broadcast regulators, namely through measures to ensure that their governing bodies and funding are independent.

Another key means of promoting independence, which does not apply in the case of regulatory bodies, is through protection for editorial independence. Editorial independence refers to the idea that editorial decisions are made by professional staff-and ultimately by senior editors-rather than governing bodies. In practice, this is promoted by ensuring a clear separation between the governing body, which has

[62] Adopted 3 February 2010
[63] Principle VI. See also Principle 13 of the Revised Declaration of Principles on Freedom of Expression and Access to Information in Africa, adopted by the African Commission on Human and Peoples' Rights at its 65th Ordinary Session held from 21st Oct-10th Nov 2019.
[64] New Patriotic Party v. Ghana Broadcasting Corporation, 30 November 1993, Writ No. 1/93, P.17
[65] Ibid., P. 13. See also National Media Commission v. Attorney General, 20 January 200, Writ No 2/96 (Supreme Court of Ghana).

overall responsibility for the organisation, and managers and editors, who have responsibility for day-to-day and editorial decision-making.

The governing body may set directions and policy but should not, except perhaps in very extreme situations, interfere with a particular programming decision. This approach erects a two-tier structure to protect independence, composed of a governing body, which oversees the work and reports to parliament (that is, acts as an interface between the organisation and the top-level accountability bodies) and the management of the organisation itself.

The African Declaration calls for public broadcasters to be accountable to the public through the legislature. This ensures structural independence. It also states:

> *Public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature:*
>
> *The editorial independence of the public service broadcasters should be guaranteed.*[66]

Independence does not mean lack of accountability, and in many democracies, accountability is primarily through the governing board to the public, not the government. In most cases, this involves the submission of an annual report, often to parliament, as well as more direct accountability systems, such as public surveys and direct stakeholder meetings.

Another way of ensuring independence is to give public broadcasters clear public interest mandates, against which their performance can be measured.

Many public broadcasters are also required to be balanced and impartial, particularly in relation to their news and current affairs programming. Thus, the African Declaration calls for public service broadcasters to be under an "obligation to ensure that the public receive adequate, politically balanced information.[67]

To be able to execute their mandate well, public service broadcasters should be able to count on a degree of reliability in the allocation of their funding, without which it is difficult to plan their activities, maintain a stable workforce and adapt to new technologies. This suggests that they need longer-term, multi-year funding allocations.

In most cases, public service broadcasters work on mixed funding model, whereby some of their funding comes from public sources and some from commercial activities, including advertising.

[66] Principle VI
[67] Principle VI

There are pros and cons to each of the various sources of funding. A licence fee has the advantage of being more stable and less susceptible of government interference, although the government normally sets the rate of the licence fee.

At the same time, licence fees may be difficult and/or costly to collect and, where they are not already in place, they may be difficult to introduce because they are not likely to be very popular. In addition, the high visibility of a general charge may put pressure on the public broadcaster to compete for ratings, to justify the general charge, rather than to concentrate on quality and diversity. Direct government grants are less associated with these pressures, but it is far more difficult to insulate them from political influence.

Article 19 has adopted a set of principles on broadcast regulation, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*,[68] which set out policy guidelines in all areas of interest when developing media policies and can act as a guide in different settings.

The four countries in this study have retained a place for public service broadcasters in their media policies and laws. We also take note of the changes that have been initiated and sustained in ensuring that each one of them, though founded in the early 1960s, continue to perform their expected roles in the member states.

However, the current agencies namely Kenya Broadcasting Corporation, Rwanda Broadcasting Authority, Uganda Broadcasting Corporation, and Tanzania Broadcasting Corporation remain largely state broadcasters but to varying degrees. For instance, RBA law states in article 9 that members of the board shall 'demonstrate independence' and 'shall always act in public interest.' Such legal provisions must be recommended and encouraged. The laws establishing each of the four public service media respectively provide for de jure independence however, none of the four has de facto independence. Therefore, the granting of de jure independence is a good starting point but in and of itself it remains insufficient to guarantee de facto independence.

In Kenya before 2022 general elections, it seemed that the day-to-day decisions are taken by managers of the public service broadcasters (PSB) about their output or the output of their subordinates, without receiving and acting on the basis of instructions, threats or other inducement from politicians, or the anticipation thereof; or considering whether the interests of those politicians would be harmed by particular choices about output. The situation in Rwanda, Uganda and Tanzania is different. Senior managers seem to be subservient to political elites and the governments. News items and other programming seem to be modelled around those in power.

[68] Article 19 (2002) Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation, London.

The key challenge is that they lack autonomy and are largely not allocated sufficient funding, under government subsidies, to discharge their universal access remits.

Other factors may also militate against de facto independence like bureaucratic partisanship, size of the market for news, party system polarization but we have no comprehensive study conducted so far.

Findings

- Public service broadcasting independence is both desired and desirable in the four countries, but institutional designs remain different.
- The de facto independence of public service broadcasters remains a challenge and an issue worth consideration in every successive media policy reform,
- Competitive recruitment of board members and senior managers and ensuring a tenure of office for them is one key plunk in giving teeth to the de jure independence of PSBs.

Recommendations

- **The founding laws of the public broadcaster must state clearly and unequivocally that the agency is a public service media, and not state broadcasters, and not limit themselves to only broadcasting.**
- **The governance structures (boards of management) of each of the public broadcasters be made more independent by allowing parliament to directly engage in the recruitment through vetting of nominees before the appointment by the President or respective Minister.**
- **The board boards of management ought to be able to appoint and dismiss the director-general or senior executives of the public broadcaster without the involvement of the Minister or the President.**

3.8 REGULATION OF FILM

INTRODUCTION

The production and distribution of film and audiovisual work is one of the most dynamic growth sectors within the East African Community. Thanks to digital technologies, production has been growing exponentially in the recent years. This has enabled the emergence of a local industry of production and distribution with its own economic model. Yet across the sub-region, the economic potential of film and audiovisual sectors remain largely untapped.

At the continental level, the Pan-African Federation of Filmmakers points out that the sector is structurally and historically underfunded, undeveloped, and undervalued generating only US$ 5 billion out of the potential of US$ 20 billion of the in revenues and employs 5 million people.

All the governments in the four countries in this study have embraced the film sector as a key economic driver, especially on the backdrop of increased digital economy activities and the growth of what they call "the screen industries" (film, TV, animation, gaming, video-on-demand, etc.).

Looking at extant literature in the East African region, regulation of film is largely for three purposes:

- Prevent child pornography and protect children from harmful and disturbing content
- Promote good films, movies and attract investors in the sector
- Censoring production and distribution of offensive materials (indecent and obscene) movies and films.

Regulation in film sector is largely done by means of classification system, by imposing age and other restrictions and by giving consumer advice. Publications which are deemed to have some degree of literary, artistic, educational, or scientific merit are excluded from the classification system.

A brief about the state of film and the regulatory mechanisms in each of the four countries follows below.

STATE AND REGULATION OF FILM IN KENYA

According to the Kenya National Bureau of Statistics 2019 Economic Survey, the Kenyan film industry directly employed 129,824 people in 2019, or about 4.5 per cent of the country's total employed workforce. Out of those, practitioners estimate that 30 to 40 percent are women. In 2019, the Kenyan film and audiovisual sector contributed an estimated US$ 110,758,056 to the country's US$ 95.5 billion GDP. In total, practitioners estimate that some 500 local films are produced in Kenya annually.

There are currently two statutory bodies, specifically tasked with regulating, developing, and promoting film industry in Kenya. The Kenya Film Classification Board (KFCB), established under the Films and Stage Plays Act.[69] Section 15 of the Film and Stage Plays Act stipulates the mandate of KFCB. It has mandates to regulate the creation, broadcasting, possession, distribution, and exhibition of films. It has several powers key among them: examining and classifying all film, film trailers and film posters using the National Film Classification Guidelines to protect children

[69] Film and Stage Plays Act (Cap 222), No 34 of 1962. Available at < http://www.kenyalaw.org/lex/actview.xql?actid=CAP.%20222 > Accessed on 22nd Nov 2022.

from consuming adult content; imposing age restriction on viewership; giving consumer advice; registering and issuing certificates to film exhibitors and distributors of film; and developing classification guidelines, standards, and regulations for the film industry. In concurrence with the Media Council of Kenya, the Communications Authority of Kenya, KFCB also ensures that the watershed rule (no age-restricted content between 5am and 10pm) is adhered to.

The functions, roles, and mandate of KFCB as a regulator have been tested on several issues in Kenyan with mixed results. The High Court affirmed that the regulatory arm of the board extended to television and radio advertisements in general and to alcohol advertisements during the watershed period.[70]

The Classification Guidelines outline six (6) key thematic and classification elements namely: violence and crime; sex, obscenity, and nudity; occult and horror; drugs, alcohol, and other harmful substances; religion and community; and propaganda for war, hate speech or incitement to violence. The extent to which a film exhibits the presence of, or lack of the above elements and the implication of such presence determines their classification into the five classes:

- General exhibition
- Parental Guidance
- Unsuitable for persons younger than 16 years
- Adults only
- Restricted

In 2014 and 2018, KFCB banned two films by local directors (*The Stories of Our Lives* and *Rafiki*) for including LGBTQI community content. Within the same period, the regulatory body banned *the Wolf of Wall Street* and *Fifty Shades of Grey*, both by international directors for their explicit sexual content.

Consequently, the place and role of the Kenya Film Classification Board as a regulator has been subject to both praise and condemnation in equal measures. Some commentators argue that we need it for the protection of women and children from sexual exploitation while others see it as moral police not necessary in 21st century.[71]

The legality of the restrictions on freedom of expression on public morality grounds has also been tested in courts especially after the KFCB banned public exhibition of

[70] Alcoholic Beverages Association of Kenya v. Kenya Film Classification Board, See also Alcoholic Beverages Association of Kenya v. Kenya Film Classification Board & 2 others (Civil Appeal 232 of 2017)[2022] KECA 1051 (KLR) (23 September 2022) (Judgment), available at <http://kenyalaw.org/caselaw/caselawreport/?id=242451 > Accessed on 28th Nov 2022.

[71] For a critique based on issues of identity see Ndanyi, Samson Kaunga, (2021) "Film Censorship and Identity in Kenya," Ufahamu: A Journal of African Studies, 42 (2), <https://escholarship.org/content/qt8v7112b0/qt8v7112b0.pdf?t=qvkwtp > , Accessed on 22nd Nov 2022.

the Rafiki film. The High Court of Kenya in the case *Wanuri Kahiu & Another v. Ezekiel Mutua and 2 others*[72] found that restriction of a film due to presence of offensive classifiable elements namely homosexuality and lesbianism does not amount to violation of the right to freedom of expression.

THE STATE AND REGULATION OF FILM IN RWANDA

Production of film and audiovisual content in Rwanda remains in a nascent stage. The country does not have a standalone film policy or Bill. However, government recognizes the cultural and commercial value of the creative economy and of the film and audiovisual industry.

The film industry only emerged after 1994. Several producers and directors got their start on NGO-funded documentaries. Limited investment in the sector made it difficult for players to access the necessary equipment, knowledge, and skills that they need to produce content according to global standards. Nevertheless, practitioners estimate that about 20 production companies currently operate in Rwanda, and that the industry has created 1,000 direct and 6000 indirect jobs. The Ministry of Youth and Culture (MYCULTURE) is the central government institution mandated to make Rwandan culture the foundation for national transformation.[73] The Rwanda Cultural Heritage Academy (RCHA), an agency affiliated to the ministry has responsibility to contribute to the promotion and artistic creations, including film.

The Rwanda Film Office was established by the Rwanda Development Board in 2019 and has been a major step towards creating a film-friendly environment and infrastructure.[74]

UGANDA

Practitioners estimate that the Ugandan film and audiovisual industry employs some 5,000 people directly and 10,000 indirectly although the figures are likely higher given the fact that the sector is largely informal. No thorough mapping of the industry has ever been conducted to determine the exact number of people employed by the sector. A recent study by the Uganda Bureau of Statistics (UBOS), the national statistics and planning body, estimates that the entire local CCI contributes about 3.5 per cent to national GDP of which film is thought to rank higher than most of other domains within the sector. The Ugandan 2006 Cultural Policy mainly relates to traditional forms of literature, music, dance and not the creative economy. Ironically, culture is not mentioned as a key part of the 2040 Vision although the current National Development Plan. Uganda Communications

[72] Wanuri Kahiu & Another v. Ezekiel Mutua & 2 others; Article 19 and 2 Others (Interested Parties) [2019] eKLR, available at <http://kenyalaw.org/caselaw/cases/view/175675/ > Accessed on 22nd Nov 2022.
[73] <https://www.myculture.gov.rw/about > Accessed on 6th Dec 2022.
[74] <http://rfo.rw/about-rfo/ > Accessed on 7th Dec 2022

Commission is the regular responsible for streamlining distribution and exhibition of films as well as managing the annual national film festival.

TANZANIA

According to a 2007-2010 survey on the Economic contribution of Tanzania's Copyright Industries by the world Intellectual Property Organisation (WIPO), the Tanzanian copyright-based industries, of which film and music are a significant part of, generated an added value of between 170million and US$295 million,[75] creating over 150,000 jobs during that period. Practitioners estimate that a dozen production companies operate in the country, with audiovisual industry employing some 44,331 people directly or indirectly.[76] Tanzania Film Board, established in 1976, is the main regulator of the film sector, it advices the government on film and theatre issues, supervises and coordinates the development of the film and theatre industry. It is also responsible for licensing, certification, regulation, and content examination.

In 2020, the Tanzanian government set up a Culture Development Trust Fund to provide financial support to artists. This was a year after it introduced new restrictions on foreign film makers. Foreign companies filming in Tanzania now must give the government the right to vet raw footage and let the country use the movie in promotional material. Film makers must also submit a finished copy of their work to Tanzania Film Board to get clearance before exiting Tanzania.

Recommendations

- **A comprehensive film policy be developed and implemented in each of the countries.**
- **A film regulator be created as a standalone agency or as part of any other regulator that manages content regulation in the country. But such a regulator must be different from the broadcasting regulator that manages frequency spectrum and licensing of broadcasters.**
- **The movie, music and video game industries that operate under video-on-demand must be encouraged to undertake voluntary ratings, self-classification of content and warnings designed to help parents**
- **There is need for the development and implementation of a sub-regional standard on how best to deal with non-obscene sexual expression as subscription TV stations may have such content.**

[75] < https://issuu.com/cdea.tanzania/docs/cdea_report_film_2 > accessed on 6th Dec 2022.
[76] WIPO: September 2012. The Economic Contribution of Copyright- Based Industries in Tanzania.

3.9 APPROACHES TO MEDIA REGULATION

It is generally recognised that there should be a set of recognised standards and rules for journalists, and a means to complain about and correct mistakes for example factual inaccuracies. Therefore, journalists worldwide, including in most countries of East African Community, have formulated, and adopted codes of professional standards or codes of ethics/practice.

Apart from codes of conduct, national laws and policies and programming codes act as rules for journalists and there is need for a body or bodies responsible for enforcement and adjudication.

The above is reinforced by among other the African Declaration of Principle on Freedom of Expression in Africa in Principle IX which states:

1. *A public complaints system for print or broadcasting should be available in accordance with the following principles:*
    - *Complaints shall be determined in accordance with established codes of conduct agreed between all stakeholders; and*
    - *The complaints system shall be widely accessible.*
2. *Any regulatory body established to hear complaints about media content, including media councils, shall be protected against political, economic or any other undue interference. Its powers shall be administrative in nature, and it shall not seek to usurp the role of the courts.*
3. *Effective self-regulation is the best system for promoting high standards in the media.*

Different countries take different approaches to regulation of content in print and broadcasting media sector. The approach taken seeks to redress complaints and enforce the codes of conduct. The three approaches are either purely self-regulatory system, co-regulatory systems, or statutory systems.

A statutory regulatory system is one in which the state sets up a body which regulates print, broadcast, and online media. The state sets the rules and enforces them. All broadcast regulators in East African Community are statutory. This is the case with Rwanda Utilities Regulatory Authority;[77] the Communications Authority of Kenya;[78]the Tanzania Communications Regulatory Authority;[79] and Uganda Communications Authority. The four are integrated communications authorities

[77] For details see Rwanda Utilities Regulatory Authority website at < https://rura.rw/index.php?id=156 > Accessed on 23rd Nov 2022.
[78] Established by the Kenya Information and Communications Act, 1998, Communications Authority of Kenya < https://www.ca.go.ke/ > Accessed on 22nd Nov 2022.
[79] Established under the Tanzania Communications Regulatory Authority Act, No. 12 of 2003. See Tecra website at < https://www.tcra.go.tz/> Accessed on 22nd Nov 2022.

which comprise among other telecommunications and broadcasting departments/directorates.

Given that these agencies regulate content and frequency spectrum, they all must be made to meet the independence criteria discussed earlier in this study.

Self-regulatory systems are those accountability mechanism that are free from government control and are designed to uphold the quality of media.[80] They often take the form if codes of conduct, media councils, or complaints commissions and in-house ombudspersons. Self-regulation is a pledge by quality-conscious media professionals to maintain a dialogue with media users or consumers. The complaints mechanism under self-regulatory systems is an autonomous forum set up to rationally deal with justified complaints and concerns. The complaints can be about published articles, pictures, cartoons, advertisements, billboard, and breaches of good journalist practices in obtaining and publishing information.

The set-up of self-regulatory mechanisms can be set up using two different approaches:

- One is to appoint representatives of journalists and publishers only self-regulation in the narrow sense.
- The other is to have members of the public actively involved in order to increase the mechanism's credibility and acceptance.

Tanzania has an example of a self-regulatory mechanism. The Media Council of Tanzania (MCT) was established by the media fraternity as an independent, voluntary self-regulatory body on June 30, 1995. It started full operations in 1997 when it was formally registered under the Societies Act. It has an ethics committee, comprising of five members in good standing within the country. [81]

The Media Council of Tanzania and its constituent bodies has no legislative backing but is a purely voluntary organisation with a membership of over 222 news media organisations, individuals, and collectives. It has no legally enforceable punitive powers. It has the backing of most of the editors and journalists in legacy media outlets. MCT is funded through membership fees and donations from different bilateral and multilateral donors.

The Ethics Committee serves as the autonomous adjudicatory body. The ethics committee is chaired by a retired judge and has four other members. It also has responsibility to advice the organisation on the state of the media in the country. The Committee can receive a complaint from any member of the public who feels aggrieved by a story published in print or broadcast or online. A member of the

[80] Barker I and Evans, L,
[81] Media Council of Tanzania, Annual Report, 2021, available at < https://mct.or.tz/wp-content/uploads/2022/10/Annual-Report-2021-Final.pdf > Accessed on 23rd Nov 2022.

public may also file a complaint if they think that the responsible journalist did not comply with the requirements of the Code of Conduct/Ethics.

Another example of self-regulatory mechanism in the East African Community is the Rwanda Media Commission (RMC). However, MCT and RMC are different. RMC is established by law and has ability to issue enforceable penalties and sanctions while MCT is neither established by law nor can it enforceable penalties. RMC is established under the terms of Article 2 (20) of the Regulating Media Law. It provides that:

> *Media self-Regulatory Body: an organ set up by journalists themselves whose responsibilities is to ensure compliance with the principles governing media and to defend the general interest.*

RMC is made up of three main organs: the general assembly; the board and the secretariat. The general assembly comprises of journalists, media practitioners and editors. The general assembly elects the board and oversights the board.

The board comprises of seven (7) commissioners is the policy organ of the commission and on a rotational basis constitutes itself into the Ethics Committee for adjudicatory functions. Four of these are competitively elected from among respected journalists and editors while the remaining three (3) are picked from Rwanda's eminent citizens but also elected by the General Assembly. Once the seven (7) commissioners have been elected, three (3) members are designated to act as the Ethics Committee.

RMC in consultation with Association of Rwanda Women Journalists, the Association of Rwanda Journalists, and Rwanda Editors Forum developed a Code of Conduct which form the professional standards that all professional journalists must adhere. The code spells out journalists' obligations in information collection, processing, broadcasting, and publication.

The code also spells out the enforcement mechanism by an Ethics Committee and the applicable sanctions.[82]

In Uganda, a statutory and voluntary media council exist side by side. The Independent Media Council of Uganda and the Media Council set up under the 1995 Press and Journalists Act. Both agencies have not been effective.[83]

Kenya has a co-regulatory system under the Media Council of Kenya. The media sector, the public and government participate in the formation of the body corporate either by forming the recruitment panels or proposing nominees to sit on the media council board or on the Complaints Commission. Its precursor was a self-

[82] Rwanda Media Commission, Article 28 speaks on the enforcement and Article 29 on sanctions.
[83] Kimumwe Paul (2014), Media Regulation and Practice in Uganda, Clearmark Publishers, Kampala, pages 22-28.

regulatory mechanism, but it faltered as it lacked funding and could not get support from all journalists and media practitioner.[84]

The Media Council of Kenya is established by law, the Media Council Act, 2013 and receives funding from the government but enjoy independence from government and the media sector in its operations. The Media Council Act, 2013 also establishes an independent Media Complaints Commission which is funded by the state but mediates and adjudicates conflicts within the sector independently.[85]

While media self-regulation as administered by the Rwanda Media Commission and MCT has seen some positive results since their respective establishment, their effectiveness has been hampered by lack of funds and challenges relating to the self-regulators' structures and operations. RMC has handled an estimated 163 complaints since inception. Ethical breaches are on the increase in Rwanda and Tanzania. While MCK and MCT are held in high, RMC seems not to be held in as a high regard as the sister bodies in Kenya and Tanzania.

Findings:

- ✓ The establishment and effective functioning of independent media self-regulation lie at the heart of any effective ongoing promotion of journalistic professional and ethical standards.
- ✓ Media self-regulatory systems facilitate a connection between journalists and those who read, listen to, or watch their coverage, which benefits both sides: it enables media users to voice their criticisms and concerns, and those creating media products to respond to these and taken them into account.
- ✓ Some of the most functional media regulatory systems [self-regulation or co-regulation] serve to protect both the media (by reducing the number of legal claims against journalists and news outlets, diminishing government interference, and thus allowing media to work more freely) and the public (by providing safeguards against abuse and other forms of unethical conduct by media professionals).
- ✓ Media regulatory instruments and institutions-including codes of ethics, media councils/commissions, and the positions of news ombudsman and other readers' editor-serve as an essential source of guidance to journalists and editors.
- ✓ There is still insufficient tradition in the sub-region in implementation of media self-regulation or co-regulation, except in Tanzania where Media Council of Tanzania has existed for nearly three decades.

[84] Origins of the Media Council of Kenya < https://mediacouncil.or.ke/index.php/about-us/origins-of-the-council > Accessed on 22nd Nov 2022.
[85] Media Council Act, 2013, section 27-44 establishes the Media Complaints Commission, its functions and powers among others.

Self-regulatory mechanisms though young in the region, will play a big role in future given the transforming effects of digitalization.

- ✓ A few media houses/outlets, particularly from Kenya, have established internal news ombudsman or public editors.

Recommendations:

- **Content regulation whether print, broadcast or online is best regulated through media self-regulatory mechanisms which can be through media councils, commissions or news ombudsman or a combination of any two.**
- **Countries must phase-out statutory content regulators allowing media stakeholders to set comprehensive codes of conduct and programming codes and their enforcement.**
- **Co-regulatory mechanism seems more accommodative especially for young democracies as they ensure that all actors-public, government, and media-are involved, set rules, and hold each other accountable**
- **Statutory regulation may remain necessary for telecommunications, film, postal services but such regulators must embrace a light-touch regulatory mechanism with a view to guide the sectors to grow as big contributors to the economies of each country and not to control and stifle them.**

4.0 OTHER RULES

4.1 CRIMINAL RESTRICTIONS

Certain expressions pose a serious risk of harm to the public interest that generally there is agreement that they may subject of criminal proscriptions. Thus, States may limit speech to protect equality, security and public order, public morals and ensure the administration of justice. Each of these is addressed in turn below.

4.1.1 PROTECTING EQUALITY AND HATE SPEECH RULES

Article 19 (3) of the ICCPR allows states to restrict freedom of expression in certain limited circumstances, but the ICCPR does not generally require states to restrict speech. One exception to this is the obligation on States to prohibit hate speech, in accordance with Article 20 (2) of the ICCPR, which states:

> *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

It seems clear that while States must prohibit speech in accordance with this provision, they may not go beyond the parameters of Article 20(2) in prohibiting speech to protect equality. In other words, Article 20 (2) defines precisely what States must prohibit in this area.

The term 'advocacy" in Article 20 (2) has been understood as meaning that the person acted with intent of inciting hatred, an important limitation on the scope of legitimate hate speech prohibitions, which is consistent with general principles of criminal law. Incitement has been interpreted as requiring a very close nexus between the speech and the prohibited outcome. Only incitement to discrimination, violence and hostility may be prohibited, and the latter should be understood as an extreme emotion that goes well beyond mere prejudice or stereotyping.

In a 2001 Joint Statement on Racism and the Media, the special international mandates set out several conditions which hate speech laws should respect:

- *No one should be penalised for statements which are true.*
- *No one should be penalised for dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility, or violence.*

- *The right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance.*
- *No one should be subject to prior censorship; and*
- *Any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.*[86]

4.1.2 PROTECTING SECURITY AND PUBLIC ORDER

It is incumbent on states to safeguard national security and public order, failing which they would not be able to protect human rights or democracy itself. At the same time, abuse of this duty has been rife in many states around the world, and particularly in the states in the East African Community. This is exemplified well by the cases of switching off television stations in Kenya,[87] suspending of journalists in radio and TV stations in Uganda,[88] and banning indefinitely of newspapers in Tanzania.

To prevent abuse of national security and public order rules, the concepts must not be defined in an unduly broad manner. The UN Human Rights Committee, for example, has stated:

> *Extreme care must be taken State parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to strict requirements of paragraph 3. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. Nor is it generally appropriate to include in the remit of such laws such categories of information as those relating to the commercial sector, banking, and scientific progress. The committee has found in one case that a restriction on the issuing of a statement in support of a labour dispute, including for the convening of a national strike, was not permissible on the grounds of national security.*
>
> *Such offenders as "encouragement of terrorism" and "extremist activity" as well as offences of "praising," "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression/. Excessive*

[86] Adopted 27 February 2001

[87] See among others The East African, "Major television stations in Kenya switched off," <available at < https://www.theeastafrican.co.ke/tea/news/east-africa/major-television-stations-in-kenya-switched-off-1382922

[88] https://observer.ug/news/headlines/60575-ucc-orders-suspension-of-39-journalists-at-13-media-houses

restrictions on access to information must also be avoided. The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalised for carrying out their legitimate activities.[89]

Second, there must be an intent requirement, consistently with basic criminal law principles.

Third, there must be a close nexus between the expression and the risk of harm. In this regard, Principle XIII (2) of the African Declaration states:

Freedom of expression should not be restricted on public order or national security ground unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.

International law does allow for the proclamation of states of emergencies in certain limited circumstances, as defined by Article 4 (1) of the ICCPR, and for the derogation from certain rights, including the right to freedom of expression, during emergencies. However, Article 4 (1) sets very clear conditions on when emergencies may legitimately be declared, including the following:

- Emergencies may only be proclaimed in circumstances which "threaten the life of the nation."
- States of emergency must be officially proclaimed.
- Derogations may only limit rights to the extent strictly required by circumstances and may never be applied in a discriminatory way.
- States imposing derogations must inform other State parties through the UN Secretary-General of the rights to be limited and the reasons for limitations.
- Derogating states must inform other State parties upon the termination of any derogations.

Two major documents on freedom of expression and national security are worth looking at to inform the best balance between safeguarding national security and

[89] General Comment No. 34, 12 Sept 2011, CCPR/C/GC/34, para.30 and 46, available at https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf, Accessed on 22nd Nov 2022.

guaranteeing freedom of expression. These are the Johannesburg Principles,[90] and the Tshwane Principles.[91]

Recommendations

- **Media policies and laws must seek to ensure that all national security and public order laws are not overbearing on the media sector but serve the legitimate interest of safeguarding territorial integrity of the state and ensure that security agencies are not subjected to substantial risk by media reportage.**
- **Media policies must reiterate that sometimes to hold security actors accountable, media coverage will be permitted as lawful action as opposed to when it is permitted at the discretion of certain officials.**

4.1.3 Public Morals

Most States have in place certain restrictions on freedom of expression to protect moral, such as rules on child pornography, indecency, obscenity or glamourisation of violence.

This is in line with the dictates of international law especially the Convention on the Rights of the Child (CRC), and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Optional Protocol to CRC).[92]

International law also prohibits child pornography one key area on public morality that most member states of the UN agree on. Article 2 (c) of the Optional Protocol to CRC defines child pornography as "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes."

Article 34 of the UN CRC lays down that all signatories shall take appropriate measures to prevent the exploitative use of children in pornographic performance and materials. This requirement is bolstered by the Optional Protocol to CRC requires member states to pass specific penal laws against child pornography. It obliges member states to not only criminalise but appropriately punish the production,

[90] ARTICLE 19, Johannesburg Principles on National Security, Freedom of Expression and Access to Information, London. Available at < https://www.article19.org/wp-content/uploads/2018/02/joburg-principles.pdf > Accessed on 10 October 2022.
[91] Open Society Justice Initiative, The Global Principles on National Security and the Right to Information, Available at < https://www.justiceinitiative.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles > Accessed on 10th Oct 2022.
[92] UN General Assembly Resolution A/Res/54/263, adopted on 25th May 2000, entered into force on 18 Jan 2002.Ratified by 178 member states including Rwanda (2002), Uganda(2001), Tanzania (2003), South Sudan (2018). Kenya has signed but not ratified the Optional Protocol.

distribution, dissemination, importation, exportation, offering, selling, or possessing of child pornography. Member states are also obliged to developed appropriate laws to enable extradition, mutual assistance in investigation, and seizure of property.

While it is accepted that what constitutes an appropriate limitation on freedom of expression to protect morals does vary from society to society, at the same time there are limits to this. As the UN Human Rights Committee has stated:

> *The committee observed in General Comment No. 22, that "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations…for the purpose of protecting morals must be based on principles not deriving exclusively from single tradition." Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.*[93]

A particular issue here is the legitimate scope of laws which aim to protect the religious sensitivities of believers. Many democracies no longer have blasphemy laws on the books and in others these laws have not been used for many years. But in East African Community member states, the statutes still retain such colonial provisions.

International law provides protection to believers against incitement to hatred against them as individuals, in accordance with Article 20(2) of the ICCPR, it is not legitimate to protect religions, as such.

The four countries in this study have specific legislative provisions that prohibit publications contrary to public morality.

Kenya prohibits publications that are contrary to the interest of public morals and has criminalized indecency and obscenity through three main legislations and their attendant regulations. The primary legislations are the Penal Code, Sexual Offences Act, the Kenya Information and Communication Act.

Section 52 (1) of the Penal Code prohibits the importation of any publication that is judged by the Minister to be against the interests of the public morals under the powers accorded to him/her in section 52 (2). Being in possession of a prohibited publication is an offence punishable with imprisonment. For the prohibition to take effect the minister must publish the order in the official Gazette.

In Section 181 of the Penal Code, states that:

> *…any person who makes, produces, or has in his possession obscene writing, drawing, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films, or any other obscene object or objects*

[93] General Comment No. 34, 12 Sept 2011, CCPR/C/GC/34, para.32, available at <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> Accessed on 22nd Nov 2022.

tending to corrupt morals, or publicly exhibits any indecent show or performance, is guilty of a misdemeanour and is liable to imprisonment or a fine.[94]

The Sexual Offences Act, 2006 seeks to hold accountable both natural and juristic persons as it prohibits publications that constitute child pornography. Section 16 (1) states that:

> *Any person, including a juristic person, who '… publicly exhibits or puts in circulation…makes, produces or has in his or her possession any obscene book, pamphlet, paper, drawing, painting, art, representation or figure or any other obscene object whatsoever which depicts the image of any child'* is guilty of an offence which is punishable by imprisonment, a fine or both. A subsequent conviction is punishable by longer imprisonment without the option of a fine.

The legislation, under section 16 (3) indicates that an item shall be deemed obscene if it appeals to the 'prurient interest,' or if it 'tends to deprave and corrupt persons…'

Similar provisions to the Sexual Offences Act and the Penal Code are also found in section 84 (D) of the Kenya Information and Communications Act which provides that:

> *Any person who publishes or transmits or causes to be published in electronic form, any material which is lascivious or appeals to the prurient interest, and its effect is likely to deprave and corrupt persons who read, see, or hear the matter, is liable on conviction to a fine , imprisonment or both.*

In Rwanda, the law No 02/2013 Regulating the Media, and the Organic Law No 1 of 2012 Instituting the Penal Code make specific provisions that prohibit publications contrary to public morality. Article 7 of the Regulating Media Law specifically prohibits media for children from 'acting as illustrations, story or opinion praising or promoting any malicious, indecent and delinquency acts that are likely to divert or demoralise them.' In addition, Article 9 of the same law stipulates that 'censorship of information is prohibited. However, the freedom of opinions and information shall not jeopardize the public order, and *good morals*…the freedom shall be also recognised if it *is not detrimental to the protection of children.*

Article 188 of the Penal Code in Chapter VI on Offences of Immorality deals with the exhibition, sale, or distribution of objects of a sexual nature. The punishment is imprisonment, a fine or both. The same penalties apply to any person who transports, exports, imports or advertises such objects, and to any person who

[94] Section 181, Penal Code (Cap 63) of 1930

produces such writings, drawings, who has printed or produced them as well as any person who designed them.

Further, Article 211 states that '[a]ny person who uses…children…in pornography shall be liable' to both a term of imprisonment and a fine.

Article 229 of the Penal Code makes any person who records a child's image or voice, or disseminates it in any way, for pornographic purposes, liable to both imprisonment and a fine.

Article 230 of the Penal Code makes it an offence to display, sell, rent, disseminate, or distribute pornographic pictures, objects, movies, photos, slides, or other pornographic material involving children.

Uganda has three laws that prohibit publications that are deemed to be against public morality, obscene or pornographic. Section 6 of the Press and Journalist Act, 2000 requires editors of a mass media organization ensure that what is published is not contrary to public morality, and this would similarly apply to internet content.

Section 13 of the Anti-Pornographic Act, 2014 makes it an offence to participate in the production, publication, broadcasting, procurement, import or export of, or in any way abet, any form of pornography. The penalty for this offence is a fine or imprisonment. Publishing child pornography is punishable by a larger fine, longer imprisonment or both.[95]

Further, section 17 of the Anti-Pornography Act regulates internet service providers. It makes it an offence punishable by a fine or imprisonment or both for any internet service provider to permit the upload or download of pornographic material.[96] In the event of subsequent offences, the court may suspend the business's operations.[97]

Section 23 of the Computer Misuse Act regulates and criminally sanctions the production, distribution, or transmission of child pornography- all these actions are determined to be an offence under the law.

Tanzania has also legislated against child pornography and prohibits and criminally sanctions production, possession and publication and dissemination of materials that may be deemed as indecent, obscene, or pornographic in five different legislations. The law of the Child, Act No 21 of 2009 in section 58(1) (b) makes it an offence to publish a photograph of a child or a dead child in a pornographic manner. Further, the Penal Code in section 175 makes it an offence to distribute or even possess any obscene writing, drawing, photograph, or cinematograph film.

[95] Section 14 Anti-Pornography Act, 2014
[96] Section 17 (1) and (2), Ibid
[97] Section 17 (3) Ibid

The Film and Stage Plays Act, 1976 makes it an offence to exhibit a film unless a certificate of approval has been obtained from the Censorship Board. Section 18(4) prohibits the Censorship Board from approving a film which, in its opinion 'tends to…offend decency, or the public exhibition…of which would…be undesirable in the public interest.'

The Cyber Crimes Act, 2015 in Section 13 makes it an offence for any person to publish child pornography or make available or facilitate access to child pornography using a computer system. Section 14 adds that 'it is an offence to publish, or cause to be published using a computer, or any other information and communication technology, pornography, or pornography which is lascivious or obscene

Similarly, section 53 of the Electronic and Postal Communications Act, 2010 prohibits the transmission by post of indecent articles. These include indecent or obscene printing, painting, photograph, lithograph, engraving, book, or card, or any other indecent or obscene article; any postal article having or on the cover, any words, marks, or designs of any indecent, obscene, seditious, scurrilous, threatening or grossly offensive character.

Findings

- ✓ **The four countries have appropriately prohibited importation, production, dissemination, and transmission of child pornography through film, broadcasts, or publications**
- ✓ **While several laws in each country proscribe production and dissemination of indecent and obscene or publications with profane language, there are no precise definitions of what may constitute indecent or obscene or profane language especially if it does not involve children.**
- ✓ **Although public morality is a legitimate ground for the restriction of freedom of expression, some of the laws are excessively broad and may end up unduly curtailing legitimate freedom of expression.**
- ✓ **The four countries do not clearly spell out what standards the censorship, classification boards or courts may use to adjudge publications indecent or obscene and as such courts have mixed positions in terms of setting jurisprudence and proper standards and thresholds.**
- ✓ **Minors Who take, possess, or distribute sexually explicit photos of other minors (and themselves) are not exempt from child pornography statutes. However, there is a question whether they should be treated like adult offenders or not?**

Recommendations:

- **A good media policy seeking to determine whether something is obscene must deploy a three part test :**

i) **An average person, applying contemporary local community standards finds that the work, taken as a whole, appeals to prurient interest.**
ii) **The work depicts a patently offensive way sexual conduct specifically defined by applicable state law**
iii) **The work in question lacks serious literary, artistic, political, or scientific value.**

- **There is need for the development of appropriate educational and administrative measures to assist children where they are child pornographers responsible for sexting and other related crimes.**
- **States must adopt media policies that are bereft of vagueness and not as overbroad.**

4.1.4 Administration of Justice

It is well established under international law that court hearings should be open to the public. Article 14 (1) of the ICCPR states:

> *All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*

In most cases, the public interest in open justice outweighs privacy interests although, as this provision suggests, privacy may be given priority in cases involving children.

Two other interests come up in this context. The first, and more important, is protection of the impartiality of the judicial system. It is clearly legitimate to prohibit certain types of expressions to this end, such as intimidating witnesses, acting in a manner which disrupts court processes or lying to the court.

A more difficult issue arises regarding the presumption of innocence in criminal trials. This is an important human right, which merits strong protection. At the same time,

the presumption of innocence does not mean that the media may be prevented from commenting on ongoing criminal trials.

A second interest is protection of the 'authority' of the judicial system. In many countries, this has been interpreted as justifying protection for the reputation of the courts or even individual judges. However, the real interest here is ensuring that individuals accept the courts as the proper forum for final arbitration of social disputes, not maintaining the reputation of the courts for more abstract reasons.

In most democracies, especially those that do not use juries, restrictions on freedom of expression to protect the authority of the courts are no longer applied as it is assumed that judges and magistrates have capacity to make independent decisions after listening and weighing all side of the case and their representations.

Recommendations:

- **Contempt of Court laws and any other actions to protect the integrity of courts must be properly balanced with the public interest override in right to access information.**
- **Lower courts citation of contemnors must be reviewable to higher courts of record**
- **Court reports that capture the proceedings of the court clearly must be a defence to any media practitioner cited for contempt.**
- **Courts in consultation with media regulatory bodies must develop clear guidelines for court reporting and enforce them.**

4.2 CIVIL RESTRICTIONS

This is a complex area and each specific type of restriction on freedom of expression has its own characteristics. Some of the leading international standards for two types of restrictions on freedom of expression-namely to protect reputation (defamation laws) and privacy-are outline below. A key international principle here is that where the civil law will provide adequate protection, it is unnecessary to resort to the criminal law to protect the interest.

4.2.1 DEFAMATION

The protection of reputation through defamation laws is one area where it is unnecessary to use the criminal law, although criminal defamation laws remain in place in many countries. As the UN Human Rights Committee has put it:

The penalisation of the media outlet, publishers or journalists solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression.

…

State parties should consider the decriminalisation of defamation, and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.[98]

In their 2002 Joint Declaration, the special international mandates put it even more clearly:

Criminal defamation is not justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.[99]

In their 2011 General Comment, the UN Human Rights Committee stated:

Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalising or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognised as a defence. Care should be take by state parties to avoid excessively punitive measures and penalties. Where relevant, state parties should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party.[100]

The African Declaration supports the idea that sanctions should not be excessive. Regarding public figures, it posits a slightly different test, essentially calling for a defence of reasonable publication.[101] The 2000 Joint Declaration by the special international mandates contains the most detailed single statement on minimum standards for defamation laws as follows:

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[98] General Comment No. 34, Para 42 and 47 (in part) ,Available at <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf >, Accessed on 22nd Nov 2022.
[99] 10 December 2002
[100] General Comment No 34, Para 47 (in part)
[101] Principle XII (I)

- *The repeal of criminal defamation laws in favour of civil laws should be considered, in accordance with relevant international standards.*
- *The state, objects such as flags or symbols, government bodies, and public authorities of all kinds should be prevented from bringing defamation actions;*
- *Defamation laws should reflect the importance of open debate about matters of public concern and the principle that public figures are required to accept a greater degree of criticism that private citizens; in particular, laws which provide special protection for public figures, such as* ***desacato*** *laws, should be repealed.*
- *The plaintiff should bear the burden of proving the falsity of any statements of facts on matters of public concern.*
- *No one should be liable under defamation law for the expression of an opinion.*
- *It should be a defence, in relation to a statement on a matter of public concern, to show that publication was reasonable in all the circumstances; and*
- *Civil sanctions for defamation should not be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant; in particular, pecuniary awards should be strictly proportionate to the actual harm caused and the law should prioritise the use of a range of non-pecuniary remedies.*[102]

Once again, we see the concern with criminal defamation, undue protection for public figures and excessive sanctions, as well as a call for defence of truth and reasonable publication, albeit applicable more broadly to all statements on matters of public concern, not just statements about public figures. This statement also rules out defamation cases in defence of symbols or public bodies and calls for absolute protection for the expression of opinions.

[102] Adopted 30 November 2000

Findings

Against international and regional standards:

- ✓ **Rwanda, Uganda, Tanzania still keep criminal defamation or aspects of it in their statute books.**
- ✓ **All the four countries have provisions on defamation of foreign princes, or kings or desecration of the flag or symbols of a foreign state.[103]**
- ✓ **There is undue protection of public officials yet by virtue of the offices they hold they must be tolerant to virulent criticism**

Recommendations

- **Media policies and laws in the respective East African Community member states seek to decriminalise defamation, publication of false news, and sedition.**
- **EAC member states must enact comprehensive Defamation laws and implement them.**

4.2.2 Privacy

Media laws and policies must seek to have clarity conceptually on what constitutes privacy and how it may be defined. Secondly, and even more important, when the right to freedom of expression comes into conflict with privacy, decision-makers, including courts, should assess the overall public interest in protecting privacy against the interest in allowing the expression. This is reflected in Principle XII (2) of the African Declaration, which states:

	Kenya	Rwanda	Uganda	Tanzania
Criminal Defamation	X	✓	✓	✓
Data Protection	✓	✓	✓	X
Access to Information	✓	✓	✓	✓

[103] Countries like Rwanda have continued to review such provisions through legislative amendments or through decisions of the Supreme Court like in the Baker Case [Case is in Kinyarwanda]

Findings

- ✓ Kenya, Rwanda, and Uganda have comprehensive Data Protection laws
- ✓ Kenya has a standalone oversight mechanism-Office of the Data Protection Commissioner
- ✓ Tanzania has a Draft Data Protection Bill which is still under consideration.

Recommendations

- **Every member state of the EAC passes and implements a comprehensive Data Protection law.**
- **Existing and yet to be passed Data Protection laws must make exemptions for processing of personal data on journalistic, artistic, and academic grounds.**
- **Media laws and policies must provide for protection of confidential sources as a critical plunk in ensuring independent and professional journalism.**

4.3 RIGHT TO INFORMATION

The right to access information held by public bodies was not yet recognised as human right when the UDHR and ICCPR were adopted. However, subsequent developments have led to the recognition of this as being encompassed within the language of international guarantees of the right to freedom of expression, and specifically the rights to 'seek' and 'receive' information and ideas.

This was highlighted early on by the UN Special Rapporteur on Freedom of Expression, who stated in his 1998 Annual Report: "[T]he right to seek, receive, and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems…

Since 1999, the special international mandates on freedom of expression have repeatedly recognised the right to information. Their 1999 Joint Declaration included the following statement:

> *Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.*[104]

[104] 26 November 1999.

Their 2004 Joint Declaration included a significant focus on the right to information, stating, among other things:

> *The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.*[105]

The statement went on to elaborate in some detail on the specific content of the right.

Around the same time, declarations on freedom of expression or specifically on the right to information were adopted by all three regional systems for the protection of human rights, in the Americas, Africa, and Europe. The African Declaration in Principle 26 also recognises right to information.[106]

The UN Human Rights Committee in its 2011 General Comment on Article 19 of the ICCPR also clearly recognises right to information. It states:

> Article 19, paragraph 2 embraces a right of access to information held by public bodies.[107]

	DRC	Kenya	Rwanda	South Sudan	Uganda	Tanzania
Ratification of ICCPR	✓	✓	✓	✓	✓	✓
Constitutional guarantee	✓	✓	✓	✓	✓	✓
RTI law	X	✓	✓	✓	✓	✓

Five of the seven member states of the East African Community have comprehensive right to information laws. Burundi and Democratic Republic of Congo do not have right to information laws.

According to Global Right to Information Rating, the strength of the five pieces of law varies drastically. The strongest is the 2013 South Sudan law which scores 120,

[105] Adopted on 6 December 2004.
[106] The African Commission on Human and People's Rights, ***Declaration of Principles on Freedom of Expression and Access to Information in Africa,*** adopted at the 65th Ordinary session, 21 Oct-10th Nov 2019.
[107] General Comment No 34, Para 18, < https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf > , Accessed on 22nd Nov 2022.

followed by the Kenyan Access to Information Act, which scores 113. The Ugandan law scores 97 followed by the Rwandan law at 85. Tanzania 2016 access to information Act is the weakest scoring 73.[108]

The legal text of all the laws shows that the region has recognised the right to access information and continues to implement them. All the four countries are under obligation to make voluntary reports to the High Panel on SDGS under Goal 16.10. In terms of time, the Rwanda Ministerial Order No 7/07/2013 of 27/12/2013 Determining the time limit for the provision of information or explanations for not providing it in Article 2 (2) law offers a very progressive provision that permits journalists to access information. It states that:

> However, the time may be shortened as follows:
>
> > *2.where the information is sought by a journalist for the purpose of news gathering, the information shall be provided within two (2) days from the receipt of the request.*

Findings

- ✓ Even though the African Declaration in Principle 27 states that "access to information laws shall take precedence over any other laws that prohibit or restrict the disclosure of information," countries in the region still give primacy to other laws that restrict disclosure.
- ✓ The implementation of the RTI laws is still challenged.
- ✓ Journalists are not accorded the right of access as is stipulated by the law as most state and public officials continue to encumber the implementation of the access to information law by having secrecy as a default.
- ✓ Most journalists in the four countries may be aware of the access to information laws but rarely use them as tools to undertake journalistic work.

Recommendations

- **Media policies seek to must reiterate the primacy of Access to Information laws when dealing with access to information.**
- **Develop and implement clear programmes to support journalists to use and deploy access to information laws as helpful tools in undertaking their work.**

[108] Global RTI Rating, available at < https://www.rti-rating.org/country-data/, Accessed on 16th Nov 2022.

SECTION 4

5.0 MEDIA VIABILITY AND SUSTAINABILITY

5.1 Why Media Viability?

Media viability is crucial because democracy and sustainable development rely on professional, independent, and public interest journalism to nourish citizenship, aid open and accountable governance, and expose malfeasance. An effective media that nurture public interest journalism is a public good.[109]

But most news media organisation globally are struggling with how best to produce quality content and remain financially viable. This is because of a myriad of factors affecting the media ecosystem key among them shrinking revenues, technological disruptions, the emergence of peripheral content creators, competition for advertisement revenues from among others big tech platforms, and debilitating effects of the covid-19 pandemic.

As such, media viability and sustainability has become a topic of concern given the digital disruptions and a few media development organisations have developed indicators to measure it, and essential guides on how to achieve it.[110] But what how may we define media viability?

5.2 What is Media Viability?

This chapter notes that there may be different definitions and conceptualisation of what may constitute media viability, but it adopts a basic definition largely looking at the economic aspects. "Media viability means the ability of institutions (or in some cases, individuals, and collectives) to balance income and expenses so that their output of journalism can be sustained."

The chapter seek to shed light to the question how can policy makers respond to the severe financial crisis that threatens the supply of independent journalism and compounds the erosion of press freedom in the East African Community? It provides a typology of emerging global and regional responses, assesses their pros and cons, and make some recommendations.

[109] Windhoek +30 Declaration: Information as a public good, available at < Uhttps://www.unesco.org/en/articles/windhoek30-declaration-information-public-good > Accessed on 15th Nov 2022.
[110] https://internews.org/wp-content/uploads/2022/02/MediaSustainGuide-Final-20220103.pdf

5.3 EMERGING ECONOMIC PRESSURES AND POSSIBLE MECHANISM TO FUND QUALITY JOURNALISM

While news media organisations in each member state of the East African Community may face the financial pressures differently, five clear trends are discernible:

- Migration of advertising revenue to big technology companies and platforms. This trend is in a way fast-tracking the collapse of age-old business models for subsiding news.
- Low income among the target audiences. This has seen low circulation rates for newspapers, low subscription rates for print and broadcasting channels and thus audience revenue.
- Lack of arms-length government support. In most of the countries in the region, government advertising is politically driven thus punishes independent and public interest journalism and rewards conveyor belt journalism that signs praises of those in power.
- Problems with access to reliable, quality information from government agencies. This problem weakens the record of independent, professional public interest journalism and makes it harder to win audience or donor support.
- Rising legal spending or corporate insurance costs to resists lawsuits. This adds to costs of protecting of journalists and the huge expenses for commissioning successful investigative journalism projects.

Several solutions are being employed as experiments around the world to support diversity of quality journalism, but they can be aggregated into five groups/typologies. Below we briefly highlight each typology and its pro and cons:

- Official subsidies for private news media outlets or individual journalists to help diversify outlets and information. This has been an approach that has been employed in Kenya by the Media Council of Kenya,[111] and Tanzania Media Foundation in Tanzania.[112]
- Indirect aid such as tax relief, public service/community media grants, reform of state advertising. This intervention has the risk of being used by governments to compromise editorial integrity as has been

[111] Media Council of Kenya is a media regulator with a dual mandate of regulation and media development. It has mobilized financial resources on thematic areas and supported journalists through grants and support to mentors.
[112] See Tanzania Media Foundation website for details at < https://www.tmf.or.tz/, Accessed on 22nd Nov 2022.

witnessed in Kenya over the centralisation of government advertising through the Government Advertising Agency.[113] There are discussion on a possibility of a media diversity fund in Kenya.

- Corporate charity is another intervention that has been employed in all the countries of study. The risky side of this intervention is that it can be used as public relations and brand building strategy for the donors and lead to reduced scrutiny of these companies and donors.

- Compulsory negotiation between tech companies and news media organisations publishers. This is a tough negotiation that requires all the governments and news media organisations to have all their hands on the deck. While it can unleash so much revenue, there is a risk that without proper guideline, it can disproportionately benefit incumbent and successful NMOs and not start-up, yet East African region has over 60 per cent of the media outlets being less than 10 years and less established. Similarly, such interventions may not support the strategic and sustainable innovation but simplistic glamourous pitches.

- State and donor support for journalism innovation. This is an intervention that has so much promise if well designed and targeted. However, it carries with it

Media viability research has recently been conducted in Kenya,[114] Uganda,[115] and Tanzania[116]and they provide several insights on this topical concern. However, there are no such reports on Rwanda, South Sudan, and Democratic Republic of Congo.

While interventions are urgent, there is no 'one size fits all' solution to the design, passage, and implementation of regulatory and/or other responses to the news media viability crisis. This is because of two reasons. First, there is no hard evidence globally or within the region as to what works. Second, it is not clear on whether to support the supply side or the demand side of the problem and what mix may be

[113] Mathenge, Oliver, "Media Calls for a Rethink on State Advertising Agency", The Star, 4th May 2019, available at < https://www.the-star.co.ke/news/2019-05-04-media-calls-for-a-rethink-on-state-advertising-agency/> Accessed on 22nd November 2022.
[114] Media Futures East Africa, (2021) The State of Innovation and Media Viability in East Africa: Kenya, available at < https://mediainnovationnetwork.org/wp-content/uploads/2021/08/Media-Viability-in-Kenya-1.pdf. Accessed on 22nd November 2022.
[115] Media Futures East Africa, (2021) Media Viability in East Africa: Uganda, available at https://mediainnovationnetwork.org/wp-content/uploads/2021/08/Media-Viability-in-Uganda-1.pdf Accessed on 22nd November 2022.
[116] Media Futures East Africa, (2021) Media Viability in East Africa: Tanzania, available at < https://mediainnovationnetwork.org/wp-content/uploads/2021/08/Media-Viability-in-Tanzania-1.pdf> Accessed on 22nd November 2022.

appropriate. For the recommendations below, we borrow heavily from the UNESCO policy brief, Finding the funds for journalism to thrive.[117]

Recommendations:

- **Each member state of the East African Community must consider creation of a multi-stakeholder consultative national commission or taskforce that would undertake a thorough enquiry into the problem of media viability and its practical solutions.**
- **Government subsidies are an option to ensuring media viability, but they must only be implemented after there is consensus on what is the definition of independent and public interest journalism and a clear eligibility criterion developed and agreed upon.**
- **There is need to commission periodic research into the digital advertising market within the East African Community and in each of the member states as there is dearth of reliable data to inform policy interventions.**
- **Develop and enforce government advertising regulations and oversight mechanisms that ensure that government advertising in each of the member states is independently and transparently allocated, based on objective criteria.**
- **News media organisations in the region to join coalitions like Ads for News, run by media development organisations or develop their own online apps like *Viusasa* by Royal Media Services or**
- **News media organisations should embrace and develop non-advertising models to generate revenue such like subscriptions, membership, and donations**

[117] UNESCO, Finding the Funds for Journalism to Thrive: Policy Options to Support Media Viability, available at < https://unesdoc.unesco.org/ark:/48223/pf0000381146> Accessed on 23rd Nov 2022.