

Media Law Handbook for Southern Africa

VOLUME 1

Media Law Handbook for Southern Africa

VOLUME 1

Justine Limpitlaw

Published by Konrad-Adenauer-Stiftung Regional Media Programme

60 Hume Road	PO Box 55012
Dunkeld 2196	Northlands
Johannesburg	2116
Republic of South Africa	Republic of South Africa

Telephone: +27 (0)11 214-2900

Telefax: +27 (0)11 214-2913/4

E-mail: medialaw.sa@kas.de

www.kas.de/mediaafrica

ISBN: 978-0-9870243-1-2

© Konrad-Adenauer-Stiftung, 2012

This publication is an open source publication. Parts thereof may be reproduced or quoted provided the publication is fully acknowledged as the source thereof.

Cover design: Jocelyn Adamson Design

Editing, layout
and production: Tracy Seider, Tyrus Text and Design
tyrustext@gmail.com

Printing: United Litho, South Africa

Acknowledgements

It is not easy to write a book about media law in Southern Africa due to the difficulty in accessing the laws. In some countries, consolidated laws are not published, so one has to piece together the current state of the law based on a series of amendment acts. In other countries, law reports are not published, so copies of actual judgments have to be obtained from the courts. In many countries there is only one source for statutes or regulations – the government printer, with a single outlet in the capital. Not only is it tough for journalists in these countries to access laws, it is tough for an author to track them down. This book would therefore not have been written without the very great assistance provided by lawyers, legal consultants or academics in the countries studied. As such, I am greatly indebted to Dr Tachilisa Balule (Botswana), Olivier Marc Mwamba Kabeya (Democratic Republic of Congo), Adv. SP Sakoane (Lesotho), Kelvin Sentala (Malawi), Ivan Macoo (Mozambique), Yvonne Dausab and Felicity !Owoses-/Goagoses (Namibia), Lindiwe Khumalo-Matse (Swaziland), Adv. Mohammed Tibanyendera (Tanzania), Masautso Phiri (Zambia), and Sternford Moyo and Doreen Gapare (Zimbabwe).

Sadly, I am not multilingual and so I relied heavily on my able French and Portuguese translators, Laurent Badibanga (Democratic Republic of Congo) and Luis Chuquela (Mozambique), for two chapters. Again, I am indebted to them.

Finally, this project would not have happened without the Konrad-Adenauer-Stiftung's (KAS) Regional Media Programme and, in particular, the leadership that the media programme has had for the past few years. Gaby Neujahr hatched the original idea of a Southern African media law handbook, Frank Windeck changed the game by insisting on including all laws that affect media publication, and the irrepressible Markus Brauckmann brought the project to fruition and ensured that lawyers and journalists on the subcontinent started talking about media law reform again.

A number of KAS employees and contractors have been particularly helpful in getting the book to print, and I would like to make particular mention, with thanks, of Ronelle Drummond-Hay and Tracy Seider.

It has been rewarding and exhilarating to work with KAS's Media Programme, which is committed to democracy as well as to the rights to a free press, and the free flow of information and ideas.

Justine Limpitlaw

Foreword

The *Media Law Handbook for Southern Africa* is the culmination of an ongoing project within the Konrad-Adenauer-Stiftung (KAS). KAS is an independent non-profit organisation bearing the name of Germany's first post-World War II chancellor. In the spirit of Konrad Adenauer, KAS aims to strengthen democratic forces and develop social market economies. For more than 40 years, KAS has been cooperating with partner organisations in over 100 countries to deepen democracy. For an overview of KAS activities, go to www.kas.de.

The KAS Media Programme in sub-Saharan Africa promotes a free media through support for:

- Advanced training
- The development of educational materials for journalists
- Networking and advocacy

KAS views the media as an integral part of a modern democracy and as being essential for development. To this end, the media must be empowered and supported to fulfil its role as the whistleblowers and watchdogs within society. However, reporting on public and private sector misdeeds is not enough. The media must be a progressive force, supporting human rights and shaping ideas in an open society through informed and impartial reporting and analysis.

A free, sustainable and competent press is a catalyst for literacy, modernisation, informed citizenry and participatory development. For more information on the KAS Media Programme and its activities, go to www.kas.de/mediaafrica.

Through its ongoing work in Southern Africa, the KAS Media Programme has seen the critical role that media law plays in regulating the media and creating a media environment, whether free or not free. There are, however, far too many journalists in Southern Africa who do not have access to applicable media laws (statutes, regulations or case law) because these are not easily available.

The handbook is not an academic treatise; it is designed to be a clear, user-friendly tool for journalists working in newspaper and broadcasting newsrooms. In addition to a comprehensive overview of applicable media laws governing both the print and broadcast media for each country covered, the introductory chapters explain why freedom of the press is important, the hallmarks of democratic media regulation and the kinds of media laws that enable or hinder a robust press. The final assessment

chapter (in volume two) puts forward proposals for media law reform in Southern Africa and on the continent more broadly.

In supporting this project, the KAS Media Programme has worked with the editor, Justine Limpitlaw, for many years. Her experience as a media lawyer who has worked in a number of African countries has given her a unique understanding of the legal environment in Southern Africa.

Working with lawyers and consultants on the ground in each country under review, Limpitlaw has put together a comprehensive book. We hope that journalists find this handbook a useful resource. We also hope that media law activists and reformers find concrete guidance regarding the changes that ought to be made to deepen democratic media environments in Southern Africa.

*Markus Brauckmann
Head of the Regional Media Programme
Sub-Saharan Africa, KAS*

Abbreviations

General

AU	African Union
EU	European Union
HRC	Human Rights Commission
ICCPR	International Covenant on Civil and Political Rights
ICT	Information and communication technology
JSC	Judicial Service Commission
NGO	Non-governmental organisation
MP	Member of Parliament
SADC	Southern African Development Community
UN	United Nations
UNESCO	United Nations Education, Scientific and Cultural Organisation
WSIS	World Summit on the Information Society

Botswana

CPEA	Criminal Procedure and Evidence Act
MPA	Media Practitioners Act
NBB	National Broadcasting Board

Malawi

CHRPCA	Commission on Human Rights and Public Administration
MACRA	Malawi Communications Regulatory Authority
MBC	Malawi Broadcasting Corporation
MCM	Media Council of Malawi
STA	Swaziland Television Authority

South Africa

BCCSA	Broadcasting Complaints Commission of South Africa
CPA	Criminal Procedure Act
ECA	Electronic Communications Act
ECNS	Electronic communications network service
IBA	Independent Broadcasting Authority

Icasa	Independent Communications Authority of South Africa
MDDA	Media Development and Diversity Agency
NAB	National Association of Broadcasters
NCOP	National Council of Provinces
PAIA	Promotion of Access to Information Act
PDA	Protected Disclosures Act
SABC	South African Broadcasting Corporation

Swaziland

CHRNA	Commission on Human Rights and Public Administration
STA	Swaziland Television Authority

Zambia

MMD	Movement for Multi-party Democracy
ZNBC	Zambian National Broadcasting Corporation
IBA	Independent Broadcasting Authority
ZICTA	Zambia Information and Communications Technology Authority
ZAMEC	Zambia Media Council

Contents

CHAPTER 1 THE ROLE OF THE MEDIA AND PRESS FREEDOM IN SOCIETY	1
1 INTRODUCTION	1
2 WHY IS FREEDOM OF EXPRESSION IMPORTANT? CONSTITUTIVE RATIONALES	2
2.1 Overview	2
2.2 Constitutive rationales for freedom of expression	2
2.2.1 <i>Equality</i>	2
2.2.2 <i>Dignity</i>	3
2.2.3 <i>Autonomy and personality</i>	3
2.3 Foundational international instruments and the constitutive rationales for freedom of expression	3
2.3.1 <i>The Universal Declaration of Human Rights</i>	3
2.3.2 <i>The International Covenant on Civil and Political Rights</i>	4
2.3.3 <i>The American Convention on Human Rights</i>	4
2.3.4 <i>The African Charter on Human and Peoples' Rights</i>	4
3 WHY IS FREEDOM OF EXPRESSION IMPORTANT? INSTRUMENTAL RATIONALES	5
3.1 Overview	5
3.2 The search for truth in the marketplace of ideas	5
3.3 Freedom of expression is critical to democracy	6
4 FREEDOM OF EXPRESSION	6
4.1 Freedom of expression in various international human rights instruments	6
4.1.1 <i>The Universal Declaration of Human Rights</i>	6
4.1.2 <i>The International Covenant on Civil and Political Rights</i>	7
4.1.3 <i>The EU Convention for the Protection of Human Rights and Fundamental Freedoms</i>	8
4.1.4 <i>The African Charter on Human and Peoples' Rights</i>	9
4.2 Summary of key elements of the right to freedom of expression	10
5 THE RELATIONSHIP BETWEEN FREEDOM OF EXPRESSION AND FREEDOM OF THE MEDIA	11

6 THE ROLE OF THE MEDIA IN SOCIETY GENERALLY	11
6.1 Definition of the media	11
6.2 General role of the press	12
6.3 The press as public watchdog	13
6.3.1 <i>Overview</i>	13
6.3.2 <i>Reporting on government</i>	13
6.3.3 <i>Reporting on economic development</i>	14
6.3.4 <i>Reporting on social issues</i>	15
6.4 The press as detective	15
6.5 The press as public educator	15
6.6 The press as democracy and good governance advocate	16
6.7 The press as catalyst for democracy and development	17
7 IMPORTANCE OF THE BROADCAST MEDIA	19
Notes	20
CHAPTER 2 HALLMARKS OF A DEMOCRATIC MEDIA ENVIRONMENT	23
1 INTRODUCTION	24
2 KEY INTERNATIONAL INSTRUMENTS THAT ESTABLISH DEMOCRATIC MEDIA AND BROADCASTING REGULATORY PRINCIPLES	24
3 THE 10 KEY PRINCIPLES OF DEMOCRATIC MEDIA REGULATION	26
3.1 Principle 1: Freedom of the press and other media	26
3.1.1 <i>Relevant provisions in international instruments</i>	26
3.1.2 <i>Summary</i>	27
3.1.3 <i>Comment</i>	28
3.2 Principle 2: An independent media	28
3.2.1 <i>Relevant provisions in international instruments</i>	28
3.2.2 <i>Summary</i>	29
3.2.3 <i>Comment</i>	29
3.3 Principle 3: Diversity and pluralism in the media	30
3.3.1 <i>Relevant provisions in international instruments</i>	30
3.3.2 <i>Summary</i>	31
3.3.3 <i>Comment</i>	32
3.4 Principle 4: Professional media	32
3.4.1 <i>Relevant provisions in international instruments</i>	32
3.4.2 <i>Summary</i>	33

3.4.3	<i>Comment</i>	34
3.5	Principle 5: Protecting confidentiality of sources	34
3.5.1	<i>Relevant provisions in international instruments</i>	34
3.5.2	<i>Summary</i>	35
3.5.3	<i>Comment</i>	35
3.6	Principle 6: Access to information	35
3.6.1	<i>Relevant provisions in international instruments</i>	35
3.6.2	<i>Summary</i>	37
3.6.3	<i>Comment</i>	37
3.7	Principle 7: Commitment to transparency and accountability	37
3.7.1	<i>Relevant provisions in international instruments</i>	37
3.7.2	<i>Summary</i>	38
3.7.3	<i>Comment</i>	39
3.8	Principle 8: Commitment to public debate and discussion	39
3.8.1	<i>Relevant provisions in international instruments</i>	39
3.8.2	<i>Summary</i>	40
3.8.3	<i>Comment</i>	40
3.9	Principle 9: Availability of local content	41
3.9.1	<i>Relevant provisions in international instruments</i>	41
3.9.2	<i>Summary</i>	42
3.9.3	<i>Comment</i>	42
3.10	Principle 10: Ensuring states do not use their advertising power to influence content	42
3.10.1	<i>Relevant provisions in international instruments</i>	42
3.10.2	<i>Comment</i>	43
4	THE EIGHT KEY PRINCIPLES OF DEMOCRATIC BROADCASTING REGULATION	43
4.1	Principle 1: National frameworks for the regulation of broadcasting must be set down in law	43
4.1.1	<i>Relevant provisions in international instruments</i>	43
4.1.2	<i>Summary</i>	44
4.1.3	<i>Comment</i>	44
4.2	Principle 2: Independent regulation of broadcasting	44
4.2.1	<i>Relevant provisions in international instruments</i>	44
4.2.2	<i>Summary</i>	46
4.2.3	<i>Comment</i>	46
4.3	Principle 3: Pluralistic broadcasting environment that provides for a three-tier system for broadcasting: public, commercial and community services	47
4.3.1	<i>Relevant provisions in international instruments</i>	47
4.3.2	<i>Summary</i>	48

4.3.3	<i>Comment</i>	48
4.4	Principle 4: Public as opposed to state broadcasting services	48
4.4.1	<i>Relevant provisions in international instruments</i>	48
4.4.2	<i>Summary</i>	51
4.4.3	<i>Comment</i>	52
4.5	Principle 5: Availability of community broadcasting	52
4.5.1	<i>Relevant provisions in international instruments</i>	52
4.5.2	<i>Summary</i>	53
4.5.3	<i>Comment</i>	53
4.6	Principle 6: Equitable, fair, transparent and participatory licensing processes, inclusive of frequencies	53
4.6.1	<i>Relevant provisions in international instruments</i>	53
4.6.2	<i>Summary</i>	54
4.6.3	<i>Comment</i>	55
4.7	Principle 7: Universal access to broadcasting services, and equitable access to signal distribution and other infrastructure	55
4.7.1	<i>Relevant provisions in international instruments</i>	55
4.7.2	<i>Summary</i>	55
4.7.3	<i>Comment</i>	56
4.8	Principle 8: Regulating broadcasting content in the public interest	56
4.8.1	<i>Relevant provisions in international instruments</i>	56
4.8.2	<i>Summary</i>	57
	<i>General content regulation</i>	57
	<i>Local content regulation</i>	58
	<i>Election-related content regulation</i>	58
4.8.3	<i>Comment</i>	58
	Notes	59
 CHAPTER 3 MEDIA LAW: PITFALLS AND PROTECTIONS FOR THE MEDIA		61
1	INTRODUCTION	61
2	RESTRICTING FREEDOM OF EXPRESSION	63
2.1	Relevant provisions in international instruments	64
2.2	Summary	65
2.3	Comment	66
3	REGULATING AND PROHIBITING THE DISSEMINATION OF CERTAIN FORMS OF EXPRESSION BY THE MEDIA	67

3.1	Legitimate licensing and regulation of broadcasting and cinema	67
3.1.1	<i>Relevant provisions in international instruments</i>	67
3.1.2	<i>Comment</i>	68
3.2	Protecting reputations	68
3.2.1	<i>Relevant provisions in international instruments</i>	68
3.2.2	<i>Summary</i>	69
3.2.3	<i>Comment</i>	70
3.3	Protecting the rights of others generally	70
3.3.1	<i>Relevant provisions in international instruments</i>	70
3.3.2	<i>Comment</i>	71
3.4	Protecting privacy	71
3.4.1	<i>Relevant provisions in international instruments</i>	71
3.4.2	<i>Comment</i>	71
3.5	Regulating obscenity and protecting children and morals	71
3.5.1	<i>Relevant provisions in international instruments</i>	71
3.5.2	<i>Summary</i>	72
3.5.3	<i>Comment</i>	73
3.6	Propaganda for war	73
3.6.1	<i>Relevant provisions in international instruments</i>	73
3.6.2	<i>Summary</i>	73
3.6.3	<i>Comment</i>	73
3.7	Hate speech or discriminatory speech	73
3.7.1	<i>Relevant provisions in international instruments</i>	73
3.7.2	<i>Summary</i>	74
3.7.3	<i>Comment</i>	75
3.8	Protection of national security or territorial integrity	75
3.8.1	<i>Relevant provisions in international instruments</i>	75
3.8.2	<i>Summary</i>	76
3.8.3	<i>Comment</i>	77
3.9	War or state of emergency	77
3.9.1	<i>Relevant provisions in international instruments</i>	77
3.9.2	<i>Summary</i>	78
3.9.3	<i>Comment</i>	78
3.10	Protection of public order or safety	79
3.10.1	<i>Relevant provisions in international instruments</i>	79
3.10.2	<i>Summary</i>	79
3.10.3	<i>Comment</i>	79
3.11	Protection of public health	80
3.11.1	<i>Relevant provisions in international instruments</i>	80
3.11.2	<i>Summary</i>	80
3.12	Maintaining the authority and impartiality of the judiciary	80

3.12.1	<i>Relevant provisions in international instruments</i>	80
3.12.2	<i>Summary</i>	81
3.12.3	<i>Comment</i>	81
3.13	For the prevention of crime	81
3.14	Prevent the disclosure of information received in confidence	81
4	LAWS THAT HINDER THE MEDIA IN PERFORMING ITS ROLE	81
4.1	Laws that unreasonably restrict market entry	82
4.2	Laws that provide for prior censorship	83
4.3	Laws that favour individual rights, particularly of public officials, over the public's right to know	83
4.4	Laws that do not comply with internationally accepted restrictions upon the publication of obscene materials	83
4.5	Laws that do not comply with internationally accepted restrictions upon the publication of propaganda for war or hate speech	84
4.6	Laws that do not comply with internationally accepted restrictions upon the publication of information which threatens national security, territorial integrity and public order	84
4.7	Laws that do not comply with internationally accepted restrictions upon the publication of information which threatens law enforcement	85
4.8	Laws that provide for indefinite states of emergency	85
4.9	Laws that do not comply with internationally accepted restrictions upon the publication of information which undermines the judiciary	85
4.10	Laws that criminalise defamation	86
5	LAWS THAT ASSIST THE MEDIA TO PERFORM ITS VARIOUS ROLES	86
5.1	Constitutions	87
5.2	Laws that comply with internationally accepted standards for democratic media regulation	87
5.3	Laws that comply with internationally accepted standards for democratic broadcasting regulation	88
5.4	Laws that comply with internationally accepted standards for restricting publication or broadcasting by the media	88
5.5	Access to information legislation	88
5.6	Whistleblower protection or anti-corruption laws	89
5.7	Laws that establish independent bodies to act in the public interest	89
	Notes	89

CHAPTER 4	BOTSWANA	91
1	INTRODUCTION	91
2	THE MEDIA AND THE CONSTITUTION	92
2.1	Definition of a constitution	92
2.2	Definition of constitutional supremacy	93
2.3	Definition of a limitations clause	93
2.4	Constitutional provisions that protect the media	95
2.4.1	<i>Freedom of expression</i>	95
2.4.2	<i>Privacy of home and other property</i>	97
2.4.3	<i>Deprivation of property</i>	98
2.4.4	<i>Freedom of conscience</i>	99
2.4.5	<i>Freedom of assembly and association</i>	99
2.4.6	<i>Protection of law</i>	100
2.5	Constitutional provisions that might require caution from the media or might conflict with media interests	101
2.6	Key institutions relevant to the media established under the Constitution of Botswana	102
2.6.1	<i>The judiciary</i>	102
2.6.2	<i>The Judicial Service Commission</i>	104
2.7	Enforcing rights under the Constitution	104
2.8	The three branches of government and separation of powers	105
2.8.1	<i>Branches of government</i>	105
	<i>The executive</i>	105
	<i>The legislature</i>	106
	<i>The judiciary</i>	107
2.8.2	<i>Separation of powers</i>	107
2.9	Weaknesses in the Constitution that ought to be strengthened to protect the media	107
2.9.1	<i>Remove internal limitations to certain rights</i>	107
2.9.2	<i>Provide for an independent broadcasting regulator and for a public broadcaster</i>	108
3	THE MEDIA AND LEGISLATION	108
3.1	Legislation: An introduction	109
3.1.1	<i>What is legislation?</i>	109
3.1.2	<i>The difference between a bill and an act</i>	110
3.2	Statutes governing the print media	110
3.2.1	<i>Registration of newspaper</i>	111
3.2.2	<i>Publication of details of the publisher</i>	111

3.2.3	<i>Duty to keep copies of publications and to produce them on demand</i>	112
3.2.4	<i>Foreign application of the act</i>	112
3.2.5	<i>Seizures of publications</i>	112
3.3	Statutes governing the making of films	112
3.4	Statutes governing media practitioners	113
3.4.1	<i>Statutes that regulate media practitioners generally</i>	113
3.4.2	<i>Institutions established under the MPA</i>	114
3.4.3	<i>Functions of the institutions</i>	114
	<i>The Media Council</i>	114
	<i>The Complaints Committee</i>	115
	<i>The Appeals Committee</i>	116
3.4.4	<i>Establishment of the institutions</i>	116
	<i>The Media Council</i>	116
	<i>The Executive Committee of the Media Council</i>	116
	<i>The Complaints Committee</i>	117
	<i>The Appeals Committee</i>	117
3.4.5	<i>Funding for the institutions</i>	117
	<i>The Media Council</i>	117
	<i>The Executive Committee</i>	117
	<i>The Complaints and Appeals committees</i>	118
3.4.6	<i>Regulations made in terms of the MPA</i>	118
	<i>The Executive Committee</i>	118
	<i>The minister</i>	118
3.4.7	<i>Amending the legislation to strengthen the media generally</i>	118
3.5	Statutes governing the broadcast media generally	119
3.5.1	<i>Statutes regulating broadcasting generally</i>	119
3.5.2	<i>Botswana's National Broadcasting Board</i>	119
3.5.3	<i>Main functions of the NBB</i>	119
3.5.4	<i>Appointment of NBB members</i>	120
3.5.5	<i>Funding for the NBB</i>	121
3.5.6	<i>Making broadcasting regulations</i>	121
3.5.7	<i>The licensing regime for broadcasters in Botswana</i>	121
	<i>Broadcasting licence requirement</i>	121
	<i>Categories of broadcasting licences</i>	122
	<i>Broadcasting licensing process</i>	122
	<i>Frequency spectrum licensing</i>	123
3.5.8	<i>Responsibilities of broadcasters in Botswana</i>	123
	<i>Adherence to licence conditions</i>	123
	<i>Reporting obligations</i>	124
	<i>Record-keeping obligations</i>	124

Audience advisories	124
Adherence to broadcasting regulations	125
3.5.9 <i>Is the NBB an independent regulator?</i>	125
3.5.10 <i>Amending the legislation to strengthen the broadcast media generally</i>	125
3.6 Statutes that regulate the state broadcast media	126
3.7 Statutes governing broadcasting signal distribution or transmission	126
3.8 Statutes that undermine a journalist's duty to protect his or her sources	127
3.8.1 <i>Criminal Procedure and Evidence Act, Act 52 of 1938</i>	127
3.8.2 <i>Penal Code, Law 2 of 1964</i>	128
3.8.3 <i>National Security Act, Act 11 of 1986</i>	128
3.8.4 <i>Cybercrime and Computer Related Crimes Act, Act 22 of 2007</i>	129
3.9 Statutes that prohibit the publication of certain kinds of information	129
3.9.1 <i>Prohibition on the publication of information relating to legal proceedings</i>	130
3.9.2 <i>Prohibition on the publication of state security-related information</i>	130
<i>Penal Code, Law 2 of 1964</i>	130
Treason and other crimes against the state's authority	130
<i>Prohibited publications</i>	130
<i>Seditious publications</i>	131
<i>Alarming publications</i>	132
Defamation of foreign princes	132
Insults to Botswana	132
<i>National Security Act, Act 11 of 1986</i>	132
Activities prejudicial to Botswana	133
Wrongful communication of information	133
Protection of classified information	134
<i>Intelligence and Security Service Act, Act 16 of 2007</i>	134
3.9.3 <i>Prohibition on the publication of expression that is obscene or contrary to public morality</i>	134
<i>Penal Code, Law 2 of 1964</i>	134
Expression contrary to public morality	134
Traffic in obscene publications	135
<i>Cybercrime and Computer Related Crimes Act, Act 22 of 2007</i>	136
3.9.4 <i>Prohibitions on the publication of expression that constitutes criminal defamation</i>	136
<i>Definition of criminal defamation</i>	136
<i>When is the publication of defamatory matter unlawful?</i>	136
<i>Absolute privilege</i>	137
<i>Conditional privilege</i>	137
<i>Definition of good faith</i>	138

3.9.5	<i>Prohibition on the publication of expression that poses a danger to public health</i>	139
3.9.6	<i>Prohibition on the publication of expression that promotes hatred</i>	140
3.9.7	<i>Prohibition on the publication of expression that incites violence or disobedience of the law</i>	140
3.9.8	<i>Prohibition on the publication of expression that wrongfully induces a boycott</i>	140
3.9.9	<i>Prohibition on the publication of expression that intends to wound religious feelings</i>	141
3.9.10	<i>Prohibition on the publication of expression that relates to economic crime</i>	141
3.9.11	<i>Prohibition on the publication of expression by public officials</i>	142
3.9.12	<i>Prohibition on the publication of expression that the speaker of the National Assembly has ruled out of order</i>	142
3.10	Legislation prohibiting interception of communication	142
3.11	Legislation that specifically assists the media in performing its functions	143
4	REGULATIONS AFFECTING THE BROADCAST MEDIA	143
4.1	Definition of regulations	143
4.2	Key regulations governing broadcasting content	143
4.2.1	<i>Effective code of practice</i>	144
4.2.2	<i>Provisions on advertisement and sponsorship</i>	146
4.2.3	<i>Ownership restrictions</i>	148
4.2.4	<i>Local content requirements</i>	148
4.2.5	<i>Public notices of emergencies or public disaster announcements</i>	149
4.2.6	<i>Obligations of public broadcasters</i>	149
4.2.7	<i>Other licensing matters</i>	150
5	MEDIA SELF-REGULATION	150
5.1	General duties	150
5.2	Good practice	151
5.3	Rules of the profession	152
5.4	Editorial rules	153
6	COMMON LAW AND THE MEDIA	154
6.1	Definition of common law	154
6.2	Defamation	155
6.2.1	<i>Defences to an action for defamation</i>	155
6.2.2	<i>Remedies for defamation</i>	157

	<i>Publication of a retraction and an apology by the media organisation concerned</i>	157
	<i>Action for damages</i>	157
	<i>Prior restraints</i>	158
6.3	Withdrawal of government advertising as a response to press criticism	158
Notes		159
 CHAPTER 5 MALAWI		 161
1	INTRODUCTION	161
2	THE MEDIA AND THE CONSTITUTION	162
2.1	Definition of a constitution	162
2.2	Definition of constitutional supremacy	163
2.3	Definition of a limitations clause	164
2.3.1	<i>State of emergency derogations</i>	164
2.3.2	<i>General limitations</i>	164
2.4	Constitutional provisions that protect the media	165
2.4.1	<i>Rights that protect the media</i>	165
	<i>Freedom of expression</i>	165
	<i>Freedom of the press</i>	165
	<i>Access to information</i>	166
	<i>Right to administrative justice</i>	166
	<i>Privacy</i>	167
	<i>Freedom of opinion</i>	167
	<i>Freedom of association</i>	168
2.4.2	<i>Other constitutional provisions that assist the media</i>	168
	<i>Provisions regarding the functioning of Parliament</i>	168
	<i>Provisions regarding national policy on transparency and accountability</i>	169
2.5	Constitutional provisions that might require caution from the media or might conflict with media interests	169
2.5.1	<i>Right to dignity</i>	169
2.5.2	<i>Right to privacy</i>	169
2.5.3	<i>States of emergency provisions</i>	169
2.6	Key institutions relevant to the media established under the Constitution of Malawi	170
2.6.1	<i>The judiciary</i>	170
2.6.2	<i>The Judicial Service Commission</i>	171

2.6.3	<i>The Ombudsman</i>	171
2.6.4	<i>The Human Rights Commission</i>	171
2.7	Enforcing rights under the Constitution	172
2.8	The three branches of government and separation of powers	173
2.8.1	<i>Branches of government</i>	173
	<i>The executive</i>	173
	<i>The legislature</i>	174
	<i>The judiciary</i>	174
2.8.2	<i>Separation of powers</i>	175
2.9	Weaknesses in the Constitution that ought to be strengthened to protect the media	175
3	THE MEDIA AND LEGISLATION	175
3.1	Legislation: An introduction	176
3.1.1	<i>What is legislation?</i>	176
3.1.2	<i>The difference between a bill and an act</i>	176
3.2	Statutes governing the operations of the print media	176
3.3	Statutes governing the making and exhibition of films	177
3.3.1	<i>Making of films</i>	177
3.3.2	<i>Exhibition of films</i>	178
3.4	Statutes governing the broadcast media generally	179
3.4.1	<i>Statutes that regulate broadcasting generally</i>	179
3.4.2	<i>Establishment of the Malawi Communications Regulatory Authority</i>	179
3.4.3	<i>Main functions of MACRA</i>	179
3.4.4	<i>Appointment of MACRA members</i>	180
3.4.5	<i>Funding for MACRA</i>	180
3.4.6	<i>Making broadcasting regulations</i>	180
3.4.7	<i>Licensing regime for broadcasters in Malawi</i>	181
	<i>Broadcasting licence requirement</i>	181
	<i>Categories of broadcasting licences</i>	181
	<i>Broadcasting licensing process</i>	181
	<i>Frequency spectrum licensing</i>	182
3.4.8	<i>Responsibilities of broadcasters under the Communications Act</i>	183
	<i>Adherence to licence conditions</i>	183
	<i>Adherence to the ownership and control limitations for private broadcasting services</i>	184
	<i>Adherence to the Code of Conduct for Broadcasters</i>	184
3.4.9	<i>Is MACRA an independent regulator?</i>	185
3.4.10	<i>Amending the legislation to strengthen the broadcast media generally</i>	186

3.5	Statutes that regulate the state broadcast media	186
3.5.1	<i>Establishment of the MBC</i>	186
3.5.2	<i>The MBC's mandate</i>	186
3.5.3	<i>Appointment of the MBC Board</i>	187
3.5.4	<i>Funding for the MBC</i>	187
3.5.5	<i>The MBC: Public or state broadcaster?</i>	188
3.5.6	<i>Weaknesses in the MBC provisions of the Communications Act which should be amended</i>	188
3.6	Statutes that undermine a journalist's duty to protect his or her sources	189
3.6.1	<i>Courts Act, Act 1 of 1958</i>	189
3.6.2	<i>Penal Code, Act 22 of 1929</i>	189
3.6.3	<i>Official Secrets Act, Act 3 of 1913</i>	190
3.7	Statutes that prohibit the publication of certain kinds of information	190
3.7.1	<i>Prohibition on publication of information relating to legal proceedings</i>	191
	<i>Censorship and Control of Entertainments Act, Act 11 of 1968</i>	191
	<i>Children and Young Persons Act, Act 7 of 1969</i>	191
	<i>Penal Code, Act 22 of 1929</i>	192
3.7.2	<i>Prohibition on the publication of state security-related information</i>	192
	<i>Censorship and Control of Entertainments Act, Act 11 of 1968</i>	192
	<i>Preservation of Public Security Act, Act 11 of 1960</i>	192
	<i>Penal Code, Act 22 of 1929</i>	192
	Prohibition on the importation of publications	193
	Prohibition of seditious publications	193
	<i>Alarming publications</i>	194
	<i>Official Secrets Act, Act 3 of 1913</i>	194
	<i>Protected Places and Areas Act, Act 6 of 1960</i>	194
	<i>Prisons Act, Act 9 of 1955</i>	194
3.7.3	<i>Prohibition on the publication of expression that constitutes intimidation</i>	195
3.7.4	<i>Prohibition on the publication of expression that is obtained from public officers and relates to corrupt practices</i>	195
3.7.5	<i>Prohibition on the publication of expression that insults the president, the flag and protected emblems</i>	195
3.7.6	<i>Prohibition on the publication of expression that is obscene or contrary to public morals</i>	195
3.7.7	<i>Prohibition on the publication of expression that constitutes defamation or otherwise causes contempt and defamation of foreign princes</i>	196

<i>Defamation – Penal Code, Act 22 of 1929</i>	196
What is defamatory matter?	196
When is the publication of defamatory matter unlawful?	196
<i>Absolute privilege</i>	196
<i>Conditional privilege</i>	197
<i>Definition of good faith</i>	198
<i>Censorship and Control of Entertainments Act, Act 11 of 1968</i>	198
<i>Defamation of Foreign Princes – Penal Code, Act 22 of 1929</i>	198
3.7.8 <i>Prohibition on the publication of expression that is likely to offend religious convictions</i>	199
<i>Censorship and Control of Entertainments Act, Act 11 of 1968</i>	199
<i>Penal Code, Act 22 of 1929</i>	199
3.7.9 <i>Prohibition on the publication of expression that harms relations between sections of the public</i>	199
3.7.10 <i>Prohibition on the publication of expression that constitutes commercial advertising involving traditional music</i>	199
3.8 Legislation that specifically assists the media in performing its functions	200
4 REGULATIONS AFFECTING THE MEDIA	200
4.1 Definition of regulations	200
4.2 Key regulations governing the media	200
4.2.1 <i>Public Security Regulations, 1965</i>	200
<i>Prohibiting publication</i>	200
<i>Undermining a journalist's duty to protect his or her sources</i>	201
4.2.2 <i>Corruption Practices (Prohibition of Abuse of Information Obtained in Official Capacity) Regulations, 1999</i>	201
5 MEDIA SELF-REGULATION	201
6 COMMON LAW AND THE MEDIA	203
6.1 Definition of common law	204
6.2 Judicial review	204
6.2.1 <i>The difference between a review and an appeal</i>	204
6.2.2 <i>Grounds for judicial review</i>	204
6.2.3 <i>High Court ruling in MACRA v Joy Radio</i>	205
<i>Facts of the case as determined by the court</i>	205
<i>Court finding</i>	206

CHAPTER 6 SOUTH AFRICA	209
1 INTRODUCTION	209
2 THE MEDIA AND THE CONSTITUTION	211
2.1 Definition of a constitution	211
2.2 Definition of constitutional supremacy	212
2.3 Definition of a limitations clause	212
2.3.1 <i>Internal limitations</i>	212
2.3.2 <i>Constitutional limitations</i>	213
2.3.3 <i>General limitations</i>	213
2.4 Constitutional provisions that protect the media	214
2.4.1 <i>Rights that protect the media</i>	214
<i>Freedom of expression</i>	214
<i>Right of access to information</i>	215
<i>Right to just administrative action</i>	216
<i>Privacy</i>	216
<i>Freedom of religion, belief and opinion</i>	217
<i>Freedom of association</i>	217
<i>Freedom of trade, occupation and profession</i>	217
2.4.2 <i>Other constitutional provisions that assist the media</i>	217
<i>Provisions regarding the functioning of Parliament</i>	217
<i>Provisions regarding public administration</i>	218
2.5 Constitutional provisions that might require caution from the media or might conflict with media interests	218
2.5.1 <i>Right to human dignity</i>	219
2.5.2 <i>Right to privacy</i>	219
2.5.3 <i>Internal limitation to the right to freedom of expression</i>	219
2.5.4 <i>States of emergency provisions</i>	220
2.6 Key institutions relevant to the media established under the South African Constitution	220
2.6.1 <i>The judiciary</i>	220
2.6.2 <i>The Judicial Service Commission</i>	221
2.6.3 <i>The Public Protector</i>	221
2.6.4 <i>The Human Rights Commission</i>	222
2.6.5 <i>The independent authority to regulate broadcasting</i>	222
2.7 Enforcing rights under the Constitution	222
2.8 The three branches of government and separation of powers	223
2.8.1 <i>Branches of government</i>	223
<i>The executive</i>	223
<i>The legislature</i>	224

<i>The judiciary</i>	224
2.8.2 <i>Separation of powers</i>	224
2.9 Weaknesses in the Constitution that ought to be strengthened to protect the media	225
2.9.1 <i>Remove internal constitutional limitation</i>	225
2.9.2 <i>Bolster independence of the broadcasting regulator</i>	225
2.9.3 <i>Constitutional protection for the public broadcaster</i>	225
3 THE MEDIA AND LEGISLATION	226
3.1 Legislation: An introduction	226
3.1.1 <i>What is legislation?</i>	226
3.1.2 <i>The difference between a bill and an act</i>	227
3.2 Statutes governing the print media	228
3.2.1 <i>Imprint Act, Act 43 of 1993</i>	228
3.2.2 <i>Legal Deposit Act, Act 54 of 1997</i>	228
3.3 Statutes governing the broadcast media generally	229
3.3.1 <i>Statutes regulating broadcasting generally</i>	229
3.3.2 <i>Establishment of Icasa and the MDDA</i>	229
3.3.3 <i>Main functions of Icasa and the MDDA</i>	230
<i>Icasa</i>	230
<i>The MDDA</i>	230
3.3.4 <i>Appointment of Icasa councillors and MDDA board members</i>	230
<i>Icasa</i>	230
<i>The MDDA</i>	231
3.3.5 <i>Funding for Icasa and the MDDA</i>	231
<i>Icasa</i>	231
<i>The MDDA</i>	232
3.3.6 <i>Making broadcasting regulations</i>	232
3.3.7 <i>The licensing regime for broadcasters in South Africa</i>	232
<i>Categories of broadcasting services</i>	232
<i>Types of broadcasting licences</i>	233
<i>Frequency spectrum licensing</i>	233
3.3.8 <i>Responsibilities of broadcasters in South Africa</i>	233
<i>Adherence to licence conditions</i>	233
<i>Adherence to content requirements or restrictions</i>	234
<i>Adherence to a broadcasting code of conduct</i>	234
<i>Adherence to an advertising code</i>	234
<i>Adherence to local content quotas</i>	234
<i>National sporting events</i>	235
<i>Political broadcasting restrictions</i>	235

<i>Keeping records of programmes broadcast</i>	236
<i>Adherence to ownership and control requirements</i>	236
No party political broadcasters	236
Limitations on foreign ownership and control of commercial broadcasting services	236
Limitations on the number of commercial broadcasting services a single entity can control	236
Limitation on cross-media control of commercial broadcasting services	237
Ownership and control of individual licences by persons from historically disadvantaged groups	237
3.3.9 <i>Is Icasa an independent regulator?</i>	237
3.3.10 <i>Amending the legislation to strengthen the broadcast media generally</i>	239
3.4 Statutes that regulate the public broadcasting sector	240
3.4.1 <i>Introduction</i>	240
3.4.2 <i>Establishment of the SABC</i>	240
3.4.3 <i>The SABC's mandate</i>	240
3.4.4 <i>Appointment of the SABC Board</i>	241
3.4.5 <i>Funding for the SABC</i>	242
3.4.6 <i>SABC: Public or state broadcaster?</i>	243
3.4.7 <i>Amending the legislation to strengthen the public broadcaster</i>	243
3.5 Statutes governing broadcasting signal distribution	244
3.5.1 <i>Licences required by broadcasting signal distribution providers</i>	244
3.5.2 <i>The regulatory framework for an ECNS</i>	245
3.5.3 <i>Types of broadcasting signal distribution ECNSs</i>	245
3.5.4 <i>Legal provisions governing Sentech</i>	245
3.6 Statutes that undermine a journalist's duty to protect his or her sources	246
3.6.1 <i>Criminal Procedure Act, Act 51 of 1977</i>	246
3.6.2 <i>National Prosecuting Authority Act, Act 32 of 1998</i>	246
3.7 Statutes that prohibit the publication of certain kinds of information	247
3.7.1 <i>Prohibition on the publication of a minor's identity in legal proceedings</i>	247
<i>Criminal Procedure Act, Act 51 of 1977</i>	247
<i>Child Justice Act, Act 75 of 2008</i>	248
<i>Children's Act, Act 38 of 2005</i>	248
3.7.2 <i>Prohibition on the publication of certain information relating to legal proceedings</i>	248
<i>Criminal Procedure Act, Act 51 1977</i>	248
<i>Divorce Act, Act 70 of 1979 and Mediation in Certain Divorce Matters Act, Act 24 of 1987</i>	249

3.7.3	<i>Prohibition on the publication of state security-related information and the administration of justice</i>	249
	<i>Defence Act, Act 42 of 2002</i>	249
	<i>Protection of Information Act, Act 84 of 1982</i>	249
	<i>National Key Points Act, Act 102 of 1980</i>	250
	<i>Correctional Services Act, Act 111 of 1998</i>	250
	<i>South African Police Service Act, Act 68 of 1995</i>	250
	<i>National Prosecuting Authority Act, Act 32 of 1998</i>	251
3.7.4	<i>Prohibition on the publication of obscene materials</i>	251
	<i>Materials not regulated under the Films and Publications Act</i>	251
	<i>Bodies established under the act, appointment of members and functions</i>	252
	<i>Classification of publications</i>	252
	<i>How are films classified?</i>	254
	<i>Provisions applicable to internet service providers or mobile telephone providers</i>	255
	<i>Penalties for contravening the provisions of the legislation</i>	255
3.7.5	<i>Prohibition on the publication of racist expression</i>	256
3.7.6	<i>Prohibition on the publication of election-related information</i>	257
3.7.7	<i>Prohibition on the publication of state procurement-related information</i>	258
3.7.8	<i>Prohibition on the disclosure of Financial Intelligence Centre information</i>	258
3.7.9	<i>Prohibition on roadside advertising</i>	258
3.8	<i>Legislation prohibiting the interception of communication</i>	258
3.9	<i>Legislation that specifically assists the media in performing its functions</i>	259
	3.9.1 <i>Promotion of Access to Information Act, Act 2 of 2000</i>	260
	3.9.2 <i>Protected Disclosures Act, Act 26 of 2000</i>	262
	3.9.3 <i>Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, Act 4 of 2004</i>	263
4	REGULATIONS AFFECTING THE BROADCAST MEDIA	263
4.1	<i>Definition of regulations</i>	264
4.2	<i>Key regulations governing broadcasting content</i>	264
	4.2.1 <i>Regulation setting out the Code of Conduct for Broadcasters</i>	264
	4.2.2 <i>Subscription broadcasters' obligation to carry SABC channels</i>	266
	4.2.3 <i>Local content regulations</i>	266
	<i>Television</i>	267
	<i>Radio</i>	268
	4.2.4 <i>Sports broadcasting rights regulations</i>	268

4.3	Other key broadcasting-related regulations	268
4.3.1	<i>People with disabilities</i>	268
5	MEDIA SELF-REGULATION	269
5.1	The Code of Advertising Practice	269
5.2	The BCCSA Code of Conduct for Free-to-Air Broadcasters	271
5.3	The BCCSA Code of Conduct for Subscription Broadcasters	272
5.4	The South African Press Code	273
6	COMMON LAW AND THE MEDIA	274
6.1	Definition of common law	274
6.2	Defamation	275
6.2.1	<i>Definition of defamation</i>	275
6.2.2	<i>Defences to an action for defamation</i>	275
6.2.3	<i>Remedies for defamation</i>	277
6.3	Contempt of Court	278
6.3.1	<i>The sub judice rule</i>	278
6.3.2	<i>Scandalising the court</i>	278
6.4	Broadcasting court proceedings	278
	Notes	279
CHAPTER 7 SWAZILAND		281
1	INTRODUCTION	281
2	THE MEDIA AND THE CONSTITUTION	282
2.1	Definition of a constitution	282
2.2	Definition of constitutional supremacy	284
2.3	Constitutional provisions that protect the media	284
2.3.1	<i>Rights that protect the media</i>	284
	<i>Freedom of expression</i>	284
	<i>Right to administrative justice</i>	286
	<i>Freedom of association</i>	287
2.3.2	<i>Other constitutional provisions that assist the media</i>	287
	<i>Parliamentary privilege</i>	287
	<i>Public access to courts</i>	287
2.4	Definition of a limitations clause	288
2.4.1	<i>Internal limitations</i>	288
	<i>Internal limitation on the right to freedom of expression</i>	288

	<i>Internal limitation on the right to freedom of association</i>	289
2.4.2	<i>Limitations arising from states of emergency</i>	290
2.5	Constitutional provisions that might require caution from the media or might conflict with media interests	291
2.5.1	<i>Internal limitations on the right to freedom of expression</i>	291
2.5.2	<i>States of emergency provisions</i>	291
2.6	Key institutions relevant to the media established under the Constitution	291
2.6.1	<i>The judiciary</i>	291
2.6.2	<i>The Judicial Service Commission</i>	293
2.6.3	<i>The Commission on Human Rights and Public Administration</i>	293
2.7	Enforcing rights under the Constitution	294
2.8	The three branches of government and separation of powers	295
2.8.1	<i>Branches of government</i>	295
	<i>The executive</i>	295
	<i>The legislature</i>	296
	<i>The judiciary</i>	297
2.8.2	<i>Separation of powers</i>	297
2.9	Weaknesses in the Constitution that ought to be strengthened to protect the media	298
2.9.1	<i>Access to information</i>	298
2.9.2	<i>Access by the public to parliamentary processes</i>	298
2.9.3	<i>Independent broadcasting regulator and a public broadcaster</i>	298
3	THE MEDIA AND LEGISLATION	299
3.1	Legislation: An introduction	299
3.1.1	<i>What is legislation?</i>	299
3.1.2	<i>The difference between a bill and an act</i>	300
3.2	Statutes governing the print media	300
3.3	Statutes governing the making and exhibition of films	302
3.3.1	<i>The making of films and the taking of photographs</i>	302
3.3.2	<i>Exhibition of objectionable pictures</i>	302
3.4	Statutes governing the broadcast media generally	303
3.4.1	<i>Statutes that regulate broadcasting generally</i>	303
3.4.2	<i>Establishment of the Swaziland Television Authority</i>	303
3.4.3	<i>Main functions of the STA and the STA Board of Control</i>	304
	<i>The STA</i>	304
	<i>The STA Board of Control</i>	305
3.4.4	<i>Appointment of board members</i>	305
3.4.5	<i>Funding for the STA</i>	305
3.4.6	<i>Broadcasting regulations</i>	306
3.4.7	<i>Licensing regime for broadcasters in Swaziland</i>	306

3.4.8	<i>Is the STA an independent regulator?</i>	306
3.4.9	<i>Amending the legislation to strengthen the broadcast media generally</i>	307
3.5	Statutes that regulate the state broadcast media	308
3.5.1	<i>STA: Public or state broadcaster?</i>	308
3.6	Statutes that undermine a journalist's duty to protect his or her sources	309
3.6.1	<i>Magistrates Courts Act, Act 66 of 1939</i>	309
3.6.2	<i>Parliamentary Privileges Act, 1968</i>	309
3.6.3	<i>Public Accounts Committee Order, 1973</i>	309
3.6.4	<i>Official Secrets Act, Act 30 of 1968</i>	310
3.6.5	<i>Control of Supplies Order, 1973</i>	310
3.6.6	<i>Aviation Act, 1968</i>	310
3.7	Statutes that prohibit the publication of certain kinds of information	311
3.7.1	<i>Prohibition on the publication of state security-related information</i>	312
	<i>Proscribed Publications Act, Act 17 of 1968</i>	312
	<i>Cinematograph Act, Act 31 of 1920</i>	312
	<i>Sedition and Subversive Activities Act, Act 46 of 1938</i>	313
	<i>Official Secrets Act, Act 30 of 1968</i>	313
	<i>Public Order Act, Act 17 of 1963</i>	314
	<i>Protected Places and Areas Act, Act 13 of 1966</i>	314
3.7.2	<i>Prohibition on the publication of expression that constitutes intimidation</i>	315
3.7.3	<i>Prohibition on the publication of expression obtained from public officers and relates to corrupt practices</i>	315
3.7.4	<i>Prohibition on the publication of expression that is obscene or contrary to public morals</i>	315
	<i>Obscene Publications Act, Act 20 of 1927</i>	315
	<i>Proscribed Publications Act, Act 17 of 1968</i>	315
	<i>Cinematograph Act, Act 31 of 1920</i>	316
3.7.5	<i>Prohibition on the publication of expression that is likely to offend religious convictions</i>	316
3.7.6	<i>Prohibition on the publication of information relating to voting</i>	316
3.7.7	<i>Prohibition on the publication of information provided in response to statistical questionnaires</i>	317
3.7.8	<i>Prohibition on the publication of information relating to identity documentation</i>	317
3.7.9	<i>Prohibition on the publication of expression that constitutes offensive impersonation of the king</i>	317
3.7.10	<i>Prohibition on the publication of expression that is offensive in its portrayal of executions, murders and the like</i>	318

3.7.11	<i>Prohibition on the publication of expression which constitutes contempt or ridicule</i>	318
3.7.12	<i>Prohibition on the publication of expression that is prejudicial or potentially prejudicial to public health</i>	318
3.7.13	<i>Prohibition on the publication of expression that induces a boycott</i>	319
3.7.14	<i>Prohibition on the publication of expression that constitutes advertisements relating to medicines and medical treatments</i>	319
3.7.15	<i>Prohibition on the publication of pictures that the minister declares to be ‘objectionable’</i>	319
3.8	Legislation that hinders the press in performing its reporting functions	320
3.9	Swaziland’s stalled media reform initiatives	320
3.9.1	<i>Freedom of Information and Protection of Privacy Draft Bill, 2007</i>	321
3.9.2	<i>Swaziland Broadcasting Draft Bill, 2007</i>	321
3.9.3	<i>Swaziland Public Broadcasting Corporation Draft Bill, 2007</i>	322
3.9.4	<i>National Film Draft Bill, 2007</i>	323
3.9.5	<i>Swaziland Media Commission Draft Bill, 2007</i>	323
4	COMMON LAW AND THE MEDIA	324
4.1	Definition of common law	324
4.2	Defamation	324
4.2.1	<i>Defamation and the defences to an action for defamation</i>	324
4.2.2	<i>Defences to an action for defamation</i>	325
4.2.3	<i>Remedies for defamation</i>	326
4.3	Judicial review	327
4.3.1	<i>The difference between a review and an appeal</i>	327
4.3.2	<i>Grounds for judicial review</i>	328
4.4	High Court ruling in <i>Swaziland Independent Publishers (Pty) Ltd T/A The Nation Magazine v the Minister of Public Service and Information</i>	328
Notes		329
CHAPTER 8	ZAMBIA	331
1	INTRODUCTION	331
2	THE MEDIA AND THE CONSTITUTION	332
2.1	Definition of a constitution	333
2.2	Definition of constitutional supremacy	333

2.3	Definition of a limitations clause	334
2.4	Constitutional provisions that protect the media	334
2.4.1	<i>Freedom of expression</i>	335
2.4.2	<i>Protection for privacy of the home and other property</i>	337
2.4.3	<i>Protection of freedom of conscience</i>	338
2.4.4	<i>Protection of freedom of assembly and association</i>	338
2.4.5	<i>Provisions to secure protection of law</i>	339
2.5	Constitutional provisions that might require caution from the media or might conflict with media interests	340
2.6	Key institutions relevant to the media established under the Zambian Constitution	341
2.6.1	<i>The judiciary</i>	341
2.6.2	<i>The Judicial Service Commission</i>	343
2.6.3	<i>The Human Rights Commission</i>	343
2.7	Enforcing rights under the Constitution	344
2.8	The three branches of government and separation of powers	344
2.8.1	<i>Branches of government</i>	344
	<i>The executive</i>	344
	<i>The legislature</i>	345
	<i>The judiciary</i>	346
2.8.2	<i>Separation of powers</i>	346
2.9	Weaknesses in the Constitution that ought to be strengthened to protect the media	346
2.9.1	<i>Remove internal constitutional qualifiers to certain rights</i>	346
2.9.2	<i>Objective grounds for declaring a state of emergency</i>	347
2.9.3	<i>Independent broadcasting regulator and public broadcaster</i>	347
2.9.4	<i>Strengthen the independence of institutions</i>	348
3	THE MEDIA AND LEGISLATION	348
3.1	Legislation: An introduction	348
3.1.1	<i>What is legislation?</i>	348
3.1.2	<i>The difference between a bill and an act</i>	349
3.2	Statutes governing the print media	349
3.3	Statutes governing the exhibition of films	350
3.4	Statutes governing the broadcast media generally	351
3.4.1	<i>Statutes that regulate broadcasting generally</i>	351
3.4.2	<i>Establishment of the IBA</i>	351
3.4.3	<i>Main functions of the IBA</i>	351
3.4.4	<i>Appointment of IBA board members</i>	352
3.4.5	<i>Funding for the IBA</i>	352
3.4.6	<i>Making broadcasting regulations</i>	353

3.4.7	<i>Licensing regime for broadcasters in Zambia</i>	353
	<i>Broadcasting licence requirement</i>	353
	<i>Categories of broadcasting licences</i>	353
	<i>Broadcasting licensing process</i>	355
	<i>Frequency spectrum licensing</i>	356
3.4.8	<i>Responsibilities of broadcasters under the IBA Act</i>	357
3.4.9	<i>Is the IBA an independent regulator?</i>	357
3.4.10	<i>Amending the legislation to strengthen the broadcast media generally</i>	358
3.5	<i>Statutes that regulate the state broadcast media</i>	358
3.5.1	<i>Establishment of the ZNBC</i>	359
3.5.2	<i>The ZNBC's mandate</i>	359
3.5.3	<i>Appointment of the ZNBC Board</i>	360
3.5.4	<i>Funding for the ZNBC</i>	360
3.5.5	<i>The ZNBC: Public or state broadcaster?</i>	361
3.5.6	<i>Weaknesses in the ZNBC provisions of the ICT Act which should be amended</i>	361
3.6	<i>Statutes that undermine a journalist's duty to protect his or her sources</i>	361
3.6.1	<i>Criminal Procedure Code, 1933</i>	362
3.6.2	<i>Penal Code, Act 42 of 1930</i>	362
3.6.3	<i>Subordinate Courts Act, 1934</i>	363
3.6.4	<i>High Court Act, Act 36 of 1933</i>	363
3.6.5	<i>Supreme Court of Zambia Act, Act 41 of 1973</i>	363
3.6.6	<i>National Assembly (Powers and Privileges) Act, Act 34 of 1956</i>	363
3.7	<i>Statutes that prohibit the publication of certain kinds of information</i>	364
3.7.1	<i>Prohibition on the publication of information relating to legal proceedings</i>	364
	<i>Publication that constitutes contempt of court</i>	364
	Penal Code, Act 42 of 1930	364
	Contempt of Court Act, Act 32 of 1965	365
	Local Courts Act, 1966	365
	<i>Publication of sketches or photographs that deal with court proceedings</i>	366
	<i>Publication of information regarding matrimonial proceedings</i>	366
	<i>Publication of information regarding indecent matters in legal proceedings</i>	366
3.7.2	<i>Prohibition on the publication of state security-related information</i>	367
	Penal Code, Act 42 of 1930	367
	Treason and other offences	367
	Prohibited publications	367
	Seditious publications	368

	<i>Alarming publications</i>	369
	<i>Insulting the national anthem</i>	369
	<i>Insulting the president</i>	369
	Offences affecting relations with foreign states and external tranquillity	369
	<i>Defamation of foreign princes</i>	369
	Unlawful assemblies, riots and other offences against public tranquillity	369
	<i>Inducing a boycott</i>	369
	<i>Prisons Act, Act 56 of 1965</i>	370
	<i>Zambian Security Intelligence Service Act, Act 14 of 1998</i>	370
	<i>Preservation of Public Security Act, Act 5 of 1960</i>	370
	<i>State Security Act, Act 36 of 1969</i>	370
	Activities prejudicial to Zambia	371
	Wrongful communication of information	371
	Protection of classified information	372
3.7.3	<i>Prohibition on the publication of expression relating to the Citizenship Board</i>	372
3.7.4	<i>Prohibition on the publication of expression that is obscene or contrary to public morality</i>	372
	<i>Penal Code, Act 42 of 1930</i>	372
	Public morality	372
	Obscenity	373
3.7.5	<i>Prohibition on the publication of expression that constitutes criminal defamation</i>	373
	<i>What is criminal defamation?</i>	373
	<i>When is the publication of defamatory matter unlawful?</i>	373
	<i>Absolute privilege</i>	374
	<i>Conditional privilege</i>	374
	<i>Definition of good faith</i>	376
3.7.6	<i>Prohibition on the publication of expression that poses a danger to public health</i>	376
3.7.7	<i>Prohibition on the publication of expression that promotes hatred</i>	377
3.7.8	<i>Prohibition on the publication of expression that relates to corruption</i>	377
3.7.9	<i>Prohibition on the publication of expression relating to voting</i>	377
3.7.10	<i>Prohibition on the publication of information relating to parliamentary proceedings</i>	378
3.8	Legislation that codifies and clarifies aspects of the law of defamation	378
3.8.1	<i>Introduction</i>	378
3.8.2	<i>Justifications for libel or slander</i>	379

	<i>Fair comment</i>	379
	<i>Newspaper and ZNBC reportage of court proceedings absolutely privileged</i>	379
	<i>Qualified privilege for newspapers and the ZNBC</i>	379
	Statements that are privileged without explanation or contradiction	379
	Statements privileged subject to explanation or contradiction	380
	<i>Limitation on privilege at elections</i>	381
3.9	Legislation that specifically assists the media in performing its functions	381
3.9.1	<i>Introduction</i>	381
3.9.2	<i>National Assembly (Powers and Privileges) Act, 2006</i>	381
3.9.3	<i>Public Interest Disclosure (Protection of Whistleblowers) Act, Act 4 of 2010</i>	382
	<i>Institutions to which the Whistleblowers Act applies</i>	382
	<i>Protection given to whistleblowers</i>	382
	<i>Who are public interest disclosures made to?</i>	382
	<i>On what grounds can an investigating authority decline to act on a public interest disclosure?</i>	383
	<i>Remedies to ensure that a whistleblower's claims are investigated</i>	383
	<i>Provisions relating to defamation in the Whistleblowers Act</i>	383
4	REGULATIONS AFFECTING THE MEDIA	383
4.1	Definition of regulations	383
4.2	Key regulations governing the media	384
5	MEDIA SELF-REGULATION	386
5.1	Definition of self-regulation	386
5.2	The Zambia Media Council	386
5.3	Key provisions of the ZAMEC Draft Code of Ethics	387
6	COMMON LAW AND THE MEDIA	390
6.1	Definition of common law	390
6.2	Deportation of foreign journalists	390
6.3	Ministerial discretion regarding appointments to independent media bodies	391
6.4	Publication of classified documents	392
6.5	Defamation	392
	6.5.1 <i>The defence of fair comment to an action for libel</i>	392
	6.5.2 <i>Remedies for defamation</i>	394
	6.5.3 <i>Criminal defamation</i>	395
	Notes	395

1

The role of the media and press freedom in society



In this chapter you will learn:

- Why freedom of expression is important
- Why freedom of expression is a key building block of democracy
- What freedom of expression means
- The relationship between freedom of expression and freedom of the media
- The role of the media in society
- Why the broadcast media is so important, particularly in Southern Africa

1 INTRODUCTION

In the day-to-day life of a busy journalist, publisher, broadcaster or media owner, it is easy to overlook the fundamental principles that are at stake when going about one's work. Newsroom or broadcasting studio constraints include deadlines, squeezed budgets, limited electronic and library resources, demanding managers, distribution difficulties and draconian media laws, to say nothing of news subjects who are often wary of journalists, if not overtly hostile. This makes for a challenging work environment, and it is easy for journalists to lose sight of the big picture.

The big picture is that the work of journalists reflects how we as humans interact with each other, and is a measure of how well our society is functioning. The principles of interaction that apply to us as individuals are carried through and apply to how broader social institutions, such as the media and government, interact with each other. You can tell a lot about the state of a country's governance, as well as its commitment to democracy and economic and social development, by looking at whether it respects its citizens and its media.

This handbook unpacks the internationally developed standards and best practice models of democratic media regulation. It examines universally agreed norms for democratic media and democratic broadcasting regulations, as well as the standards for imposing restrictions upon, or otherwise regulating, media content. Eleven Southern

African countries are examined in this work. Each country's media laws are identified and analysed to assess their compliance with best practice standards.

2 WHY IS FREEDOM OF EXPRESSION IMPORTANT? CONSTITUTIVE RATIONALES

2.1 Overview

This handbook begins with a look at certain principles of basic human interaction, in particular, freedom of expression.

It is important to understand why freedom of expression has achieved global recognition as being foundational to human rights generally. There are a number of reasons why we protect the right to freedom of expression. These fall within two broad groupings:

- *Constitutive rationales*: These are based on the recognition that freedom of expression matters because human beings matter, irrespective of whether or not their views are correct, true or valuable in any ultimate sense.
- *Instrumental rationales*: These are based on the recognition that freedom of expression leads to something valuable – that having freedom of expression advances important goals.

2.2 Constitutive rationales for freedom of expression

Human beings matter; their exploits (mistakes or successes) and experiences have shaped and impacted upon the world from time immemorial. However, only in fairly recent times has human society come to recognise the importance of the autonomy of every human being. The international community now clearly acknowledges that humans matter intrinsically: who we are and what we think matters. Where does this recognition come from? What is it based on? And what are the hallmarks of that recognition?

2.2.1 Equality

The international community has grappled with the notion of equality since the mid-20th century. The previous century had seen the almost worldwide recognition that slavery – the notion that one human being could be owned by and live in bondage to another human – was barbaric and an affront to humanity as a whole. In the latter half of the 20th century, reflections upon colonialism, apartheid and the Holocaust caused much of the community of nations to accept that every human being,

irrespective of age, gender, race, ethnicity, nationality, language, class, social origin, or religion, is inherently equal.

2.2.2 Dignity

The recognition of equality is intrinsically linked to the recognition of the inherent dignity of human beings. A key notion that underpins international recognition of human rights is that each person, regardless of the differences between that person and any other, is entitled to have his or her dignity respected. The recognition that a person is entitled to dignity represents a profound change in human relations, and is a recent and fundamental departure from historical practices and beliefs.

2.2.3 Autonomy and personality

Once there is widespread recognition of the equality and inherent dignity of each human being, there is recognition of the right of all individuals to be free to develop their personalities, indeed to develop themselves, to their fullest potential. It is this recognition of the right to personal fulfilment and autonomy – the right to be who you are, based on inherent dignity and equality – that underscores so many of the internationally agreed upon statements on fundamental basic human rights and freedoms.

2.3 Foundational international instruments and the constitutive rationales for freedom of expression

Below are excerpts from some of the foundational international human rights instruments that give recognition to the concepts of the inherent dignity and equality of human beings, as well as to our right to autonomy and self-fulfilment.

2.3.1 The Universal Declaration of Human Rights

The first sentence of the preamble to the Universal Declaration of Human Rights¹ adopted by the United Nations (UN) General Assembly in 1948 states: ‘*Whereas* recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.’ The second sentence of the preamble states: ‘... the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.’

Article 1 of the Universal Declaration of Human Rights states: ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and

conscience and should act towards one another in a spirit of brotherhood.’ The first sentence of article 2 states: ‘Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ The first sentence of article 7 states: ‘All are equal before the law and are entitled without any distinction to equal protection of the law.’

2.3.2 The International Covenant on Civil and Political Rights

The Preamble to the UN International Covenant on Civil and Political Rights² (ICCPR), which was adopted by the UN in 1966 and came into force in 1976, reaffirms that ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’ and, consequently, that rights ‘derive from the inherent dignity of the human person’.

2.3.3 The American Convention on Human Rights

The American Convention on Human Rights,³ which came into force in 1978, states in its preamble that it is recognised that: ‘[T]he essential rights of man are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality.’

2.3.4 The African Charter on Human and Peoples’ Rights

The African Charter on Human and Peoples’ Rights,⁴ adopted by the Organisation of African Unity and later by the African Union (AU), entered into force in 1986 and contains a number of noteworthy statements that underpin the notion of human rights.

- The preamble to the African Charter specifically considers that ‘freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples’.
- Article 2 of the African Charter states that: ‘[e]very individual shall be entitled to the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.’ The first clause in the first sentence in article 5 states that: ‘[e]very individual shall have the right to the respect of the dignity inherent in a human being’

International recognition of the basic dignity, equality and autonomy of all people has impacted strongly upon the formulation of fundamental rights, particularly with regard to freedom of expression.

Freedom of expression is seen as a foundational human right and is internationally protected (as discussed later in this chapter) precisely because the notions of equality, dignity and individual development or fulfilment require that when human beings talk or otherwise express themselves, what they are expressing or communicating is a reflection of who they are, and therefore worthy of respect and protection.

3 WHY IS FREEDOM OF EXPRESSION IMPORTANT? INSTRUMENTAL RATIONALES

3.1 Overview

The other broad set of rationales for freedom of expression is that free expression is a means to an end – it is necessary for achieving important societal goals. There is no closed list of these goals, but there is consensus on at least two of the main ones:

- The search for truth in the marketplace of ideas
- That freedom of expression is essential for democracy

3.2 The search for truth in the marketplace of ideas

The argument behind this rationale is that it is only through the ongoing and open expression of different ideas that we are able to test the ‘truth’ of any single idea. This rationale is based on the recognition that freedom of expression is central to people’s ability to:

- Develop, hone and refine their own ideas, opinions and views
- Reject, discard or replace ideas, opinions and views
- Convince others of their arguments, ideas, opinions and views
- Consider and assess others’ arguments, ideas, opinions and views

The process of sifting through the notional ‘marketplace of ideas’ is effectively a search for truth. This point is powerfully made with regard to academic or scientific research, which relies heavily on frank peer review ‘expression’ to sift out erroneous conclusions. But the same is true for our general discourse.

Only through free expression can one ensure that there will be competing ideas or views which human beings can adopt or reject for themselves. The enterprise of human development is based on ideas, viewpoints and arguments. For there to be

progress, these need continually to be assessed, challenged, validated, refined or discarded. And this cannot happen fully without free expression.

3.3 Freedom of expression is critical to democracy

This rationale is based on the notion that democracy – which recognises that people have the right to elect a government of their choosing – cannot exist in any meaningful way without the right to freedom of expression.

There are many aspects to this rationale, but the fundamental concept is that in order for democracy to be effective, the citizenry that votes in elections and engages in public processes with government must be informed and must have the right to participate freely in public discourse.

If there is no freedom of expression – if people are not free to share information and express a range of ideas, opinions and political views; and, the corollary to that, if people are not free to receive information in the form of a range of ideas, opinions and political views – they will not be sufficiently well informed to make appropriate and meaningful political choices, whether at the ballot box or in their interactions with government more generally.

4 FREEDOM OF EXPRESSION

4.1 Freedom of expression in various international human rights instruments

It is useful to look at how international human rights instruments define the scope of freedom of expression in order to understand what falls within the freedom and what does not. This section examines the relevant provisions of certain universally accepted human rights instruments, which set out the internationally agreed scope of the right to freedom of expression. Certain aspects of the international human rights instruments are commented on.

4.1.1 The Universal Declaration of Human Rights

Article 19 of the Universal Declaration of Human Rights provides that: ‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.’

Article 19 warrants some discussion because so many elements of the right to freedom of expression are contained in these few lines. Importantly, the right:

- Is granted to ‘everyone’; there are no qualifiers, such as citizenry or age
- The right is to ‘freedom of opinion and expression’. In other words, not only is everyone entitled to hold their own opinions on any issue (clearly encompassing thoughts, ideas and beliefs), they are also entitled to express these
- Is to freedom of ‘expression’. This is broader than speech as it encompasses non-verbal or non-written expression, such as dance, mime, art, photography and other non-verbal action
- Specifically includes the right to ‘seek, receive and impart information and ideas’. This is a critical aspect of the right as it means that everyone has the right to obtain information. Thus, states that deny media freedom also trample upon the rights of their citizens to receive information freely
- Includes the right to seek information and ideas ‘through any media’. This is a critically important statement for the press and media because it makes it clear that newspapers, radio, television and the internet, for example, are all encompassed within the right
- Exists ‘regardless of frontiers’. In other words, this is internationally recognised as a universal right that is not dependent upon, or determined by, national borders

4.1.2 The International Covenant on Civil and Political Rights

Article 19 of the ICCPR elaborates on a number of the provisions of the Universal Declaration of Human Rights. It provides:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) for respect of the rights or reputations of others;
 - (b) for the protection of national security or of public order, or of public health or morals.

Article 19 of the ICCPR warrants some discussion because it reveals certain important differences between its provisions and those of article 19 of the Universal Declaration.

Some particularly noteworthy aspects are discussed below.

- Perhaps the most noteworthy aspect is that article 19 of the ICCPR, unlike the Universal Declaration, contains, in paragraph 3, a clear statement on how the right to freedom of expression may be restricted by states. We all know that rights may conflict with each other. Some examples of this are that the right to freedom of expression can be used unfairly to:
 - Ruin a person’s reputation through the publication of untrue defamatory statements and therefore infringe upon that person’s right to dignity
 - Justify the taking of intimate photographs of a person and therefore violate his or her right to privacy
- The provisions of paragraph 3 in article 19 of the ICCPR acknowledge this clashing of rights and recognise the right of states to pass laws to restrict freedom of expression in certain limited circumstances – namely, where this is necessary to protect the rights or reputations of others, as well as to protect national security, public order, public health or morals.
- The use of the word ‘necessary’ is noteworthy. It means that unless freedom of expression is restricted, the protection of reputations, national security and public health will be endangered. This is a high standard to meet.

A number of regional international human rights instruments contain similar protections of the right to freedom of expression. Two examples of such regional instruments are highlighted and contrasted below – namely, the EU Convention for the Protection of Human Rights and Fundamental Freedoms, and the African Charter of Human and People’s Rights.

4.1.3 The EU Convention for the Protection of Human Rights and Fundamental Freedoms

The European Union (EU) Convention for the Protection of Human Rights and Fundamental Freedoms,⁵ which came into being in 1950, protects freedom of expression in article 10. This article provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas

without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 10 of the EU Convention features two particularly noteworthy aspects regarding the formulation of the right to freedom of expression:

- In paragraph 1, it specifically provides that the right does not prevent states from requiring licences for broadcasting, television or cinema enterprises. In our view, licensing of the broadcast media is not, in and of itself, a threat to freedom of expression. Indeed, as broadcast media in Africa makes use of a scarce and finite natural resource, namely, the radio frequency spectrum (as opposed to cable media, which is not used widely in Africa), licensing is essential to avoid inevitable frequency interference, which would result in no broadcast media being available to the public. However, it is, sadly, a feature of certain Southern African countries that licences to produce print media are required. It is noteworthy that the licensing of the print media is not included in article 10, paragraph 1 of the EU Convention.
- Article 10, paragraph 2 of the EU Convention sets out a fairly comprehensive list of allowed restrictions on freedom of expression by states. Importantly, these are subject to the overall test that such restrictions must be ‘necessary in a democratic society’. The list of allowed restrictions is broader than that contained in the ICCPR, for example, and extends to confidential information and protecting the authority and impartiality of the judiciary.

4.1.4 The African Charter on Human and Peoples’ Rights

The African Charter on Human and Peoples’ Rights’ provisions on the rights to freedom of expression are weak. They do not provide anything like the protection of freedom of expression afforded by the global instruments such as the ICCPR or other regional instruments such as the EU Declaration. Article 9 of the African Charter states:

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

There are two particular aspects to article 9 of the African Charter that warrant further discussion:

- Unlike some other international human rights instruments, there is no express corresponding right to impart information in clause 1 of article 9.
- The right to express and disseminate opinions is fairly severely curtailed as this must be done ‘within the law’. What is noteworthy about this restriction on the right to freedom of expression is not that there are legal restrictions upon the right (as can be seen from the instruments discussed above, this is common) but that there are no requirements in article 9 that such laws be necessary to protect some other social good, such as the rights of others, public health or national security. Effectively, the African Charter elevates restrictions upon freedom of expression found in ordinary national laws – however passed and no matter what their content – above the right to freedom of expression. Needless to say, this is extremely disappointing as it effectively provides no guarantee of freedom of expression.

4.2 Summary of key elements of the right to freedom of expression

It is clear from the international instruments that the scope of the right to freedom of expression is generally accepted to be as follows:

- The right is available to everyone – individuals as well as juristic persons, such as companies.
- The right to freedom of expression is broader than freedom of speech and includes non-verbal or non-written forms of expression.
- The right generally encompasses the right to receive as well as to impart information and ideas.
- The right includes the freedom of means of communication, demonstrating that there is no limitation on the medium that may be used to express ideas or opinions.
- Broadcasting licensing requirements do not constitute undue infringements on the right to freedom of expression.

- The right to freedom of expression is not absolute and states are entitled to limit it. However, such limitations must be necessary in a democracy to protect the rights of others or important societal interests, such as national security or public health.

5 THE RELATIONSHIP BETWEEN FREEDOM OF EXPRESSION AND FREEDOM OF THE MEDIA

It is clear from the international human rights instruments examined above that the right to freedom of expression requires not only that everyone is free to express themselves, but that they are free to do so over a range of different types of media, including the print or broadcast media, subject to licensing requirements in respect of the broadcast media. Indeed, one academic, Michael Bratton, has said:

In order to be politically active, citizens require means to communicate with one another and to debate the type of government they desire for themselves. Civic discourse can take place in various forums, the most important of which are the public communications media, both print and electronic.⁶

It is also clear from the international human rights instruments that freedom of expression includes the right to receive information and ideas. This is a critical component of the right. The effect of this is that when a state acts to silence or curtail the operations of the media, whether print or broadcast media, not only is it violating the expressive rights of the media and of the journalists, editors and publishers thereof, but it is also violating the rights of its citizens to receive information and ideas freely.

Consequently, the internationally recognised basic contours of the right to freedom of expression clearly and inherently protect the right to freedom of expression of the media, too. The expressive and information rights of individuals and the media are thus inextricably intertwined.

6 THE ROLE OF THE MEDIA IN SOCIETY GENERALLY

6.1 Definition of the media

‘The media’ is not a monolithic entity but rather a broad term encompassing a variety of content provided to the public, or sectors of the public, over a range of platforms. There is no closed list of content provided by the media: news, politics, business, current affairs, entertainment, motoring, gardening, religion, home decor, fashion, food, celebrity and lifestyle are some of the many topics covered by the media.

Furthermore, these topics are provided over a range of platforms. Traditionally, when one thought of the media one thought of newspapers, magazines, radio and television. This is no longer the case. The so-called ‘new media’ encompasses a range of platforms, including web-based platforms, such as internet sites, but also mobile platforms such as mobile television or the ability to listen to news headlines on your mobile phone. Internet-based media can be merely electronic versions of what is available in the print media. For example, a newspaper’s website will carry an electronic version of the newspaper for that day, or such media can carry unique content not available in hard-copy form. New media is changing the way citizens and the media relate. Social networking sites such as Twitter and Facebook, for example, have played a significant role as sources of news and information in repressive countries. The most significant example is the recent uprisings in the Arab world.

Just as there is no monolithic ‘media’ entity, similarly there is no single role that it plays. Indeed, the role of a particular part of the media is very much determined by a range of factors relating to the nature of the media itself, in particular the content of the media (news or current affairs versus light entertainment) and the medium used (print, broadcasting or internet based). Thus the media plays a number of different roles in society, including being informative, educational or entertaining. Media can be narrowly focused by appealing to a particular interest (for example, a fishing magazine), religion (such as a Christian broadcaster) or area of specialisation (such as a trade publication). It can also appeal to a mass audience by being a full service television station or a daily newspaper covering a variety of news and current affairs, whether local, national or international.

It is common to conflate the terms ‘the media’ with ‘the press’. This is not necessarily a problem; however, when thinking about media and press freedom concerns it is helpful to see the term ‘the press’ as a sub-set of ‘the media’. The press has a connotation that is clearly associated with the news media, whether provided in print or electronically. Within the term ‘the press’ (meaning the news media) there are various kinds of press outlets – state media, public media, commercial media, and even certain forms of community media can be included in ‘the press’. It is important to bear these distinctions in mind when considering the role of the press in particular, and of the media more generally.

6.2 General role of the press

Academic commentators have often characterised the media or the press as being ‘a separate player on behalf of the public against the agencies of power’, and that media organisations ‘take a position between government agencies and the public’.⁷ Clearly, this is true only to a certain extent as a number of media outlets (print, broadcasting

or otherwise) are fundamentally part and parcel of government, and therefore cannot and will not play any role that is not supportive of government. However, it is true that a strong and independent media, together with other organs of civil society, can play mutually reinforcing roles to exert pressure on governments to support democracy and socio-economic development.⁸ Media commentator and academic Masudul Biswas has said that the major aim of the independent media is to make ‘political participation meaningful’.⁹

This links to one of the instrumental rationales for freedom of expression – namely, that the free flow of information and exchange of ideas is good for democracy because it makes for better democratic decision-making by government, improves transparency and accountability, and gives citizens the ability to make informed political choices.

In order to achieve the important aim of assisting to give democratic participation ‘meaning’, the press must fulfil a number of other roles. These are elaborated on next.

6.3 The press as public watchdog

6.3.1 Overview

The role of the press as ‘watchdog’ is a traditional characterisation of the role of the news media in particular. Biswas describes the media as ‘a watchdog of the society [monitoring] the activities of public administrations and other institutions and practices that directly and indirectly affect the public’.¹⁰

This watchdog role can take many forms depending on the nature of the medium concerned, as well as on the state of democracy and development in a particular country. Essentially, this role is to provide information – to be the ‘eyes and ears’ of the public in monitoring what is happening in public life by reporting on daily events as they unfold.

6.3.2 Reporting on government

When one thinks of the press as watchdog, one thinks of the press as reporting on the happenings of government. In and of itself ‘reporting on government’ is a huge task. It involves reporting on the programmes and activities of the three branches of government:

- *The legislature*: Its activities include not only deliberating upon and passing legislation, but also important committee work, overseeing the executive’s

operations and being the body to which public authorities are generally accountable.

- *The executive:* Its activities include the day-to-day management of government. The activities of all ministries and government departments fall under the auspices of the executive, which is essentially the ‘engine room’ of governance in a country. The media needs to be able to report on all these ministries – finance, health, trade, education, sports and more.
- *The judiciary:* These are the courts – that is, the administration of justice within a country. The media needs to be able to communicate judgments and court proceedings.

But reporting on government also involves reporting on the activities of other related bodies, including:

- International bodies to which the country belongs, such as the Southern African Development Community (SADC), the AU, the UN and the Commonwealth
- Public authorities, such as the central or reserve bank, the independent broadcasting authority, the public broadcaster, the independent electoral commission, the public protector or public ombudsman (if any)
- Parastatal companies, such as national airlines, electricity utilities, railways and telephony companies
- Different spheres of government, such as provincial government and local government, the latter being the most relevant tier of government to the daily lives of readers, viewers or listeners

6.3.3 Reporting on economic development

Economic issues can be as important as political ones; hence, a watchdog press also needs to report on economic developments and news. While these will often overlap with government-related reporting (for example, when covering issues such as interest rates, unemployment figures, gross domestic product figures, the budget, development projects or the use of international donor aid), this is not necessarily the case.

Often economic issues involve the private sector, and a watchdog press will need to be able to report on the activities of major corporations and concerns in all spheres

of the economy, including mining and/or oil operations, agriculture, manufacturing and services. In doing so, it is important for the press to keep the public informed about the side-effects of economic activity, such as the actions of polluting companies.

6.3.4 Reporting on social issues

The press also needs to be able to report accurately on the social life of the nation. This means covering artistic and cultural happenings and sporting events, as well as social trends and developments that impact on the daily life of all, including children, the youth, the elderly and the disabled.

6.4 The press as detective

The role of ‘detective’ is a critical adjunct to the role of the press as public watchdog; however, it is dealt with separately here to emphasise the difference between reporting on public affairs, and journalistic investigations into wrongdoing in the administration of public affairs.

When journalists are well trained and have trusted sources of information, the press is able to investigate wrongdoing by public officials. This includes perpetrating fraud or engaging in corruption in order to divert and personally benefit from public funds or other public resources.

This ‘press as defective’ role is evidenced when the press is able to engage in fairly long-term, detailed, in-depth investigative journalism – the kind that is able to report to the public on large-scale systematic wrongdoing by public (or indeed private) officials, which may include nepotism, corruption, fraud or other kinds of criminality. These exposés often rely on more than one journalist and require the backup of the media publication or outlet (be it broadcasting or print) as a whole to provide the necessary resources for the investigative exercise.

In many countries, the ability and willingness of the press to engage in investigative journalism is key to encouraging the police and prosecuting authorities to act against corrupt public figures, even if this only occurs as a result of the intolerable pressure that the resulting publicity puts on the police and prosecuting authorities.

6.5 The press as public educator

The press also plays a general educative role in society. This can be done at a number of levels. For example, in support of early childhood development, broadcasters can,

and often do, broadcast basic educational materials aimed at teaching children the alphabet, colours or animals.

In support of secondary education, print media outlets sometimes include supplementary educational materials for school-goers. Similarly, broadcasters can and do publish historical, scientific or even mathematical programmes also aimed at school-goers.

However, education is much broader than simply formal schooling, and the press can play a general educational role. For example, the media (print or electronic) can inform the adult population about a wide range of educational topics, including nutrition, health (especially in relation to diseases such as HIV and Aids, malaria and diabetes) basic money management and budgeting, developments in agriculture, child care, etc.

6.6 The press as democracy and good governance advocate

Linked to its general educational role, but more controversially, the press can also play the role of democracy and good governance advocate. This role is controversial because it envisages the press as both advocate and impartial reporter. In this role, the press comments on issues of the day and advocates improved democratic practices and good governance.

In this advocacy role, the press sees itself firmly on the side of the ordinary citizen, whose life can be improved or worsened depending on how public authority is exercised. This advocacy role is also closely linked to the watchdog role of the press; however, it goes further. The press as advocate will report not only on what is happening but on what *should* be happening.

The press in many developing countries is almost forced to playing this role because improving basic human living conditions cannot happen without democratic practices and good governance.

An example of this democratic advocacy role is the role of the press during an election. Besides reporting on election issues (for example, the polls, party programmes and party tactics) the media can help to strengthen democratic processes by encouraging the public authorities to hold a free and fair election through educating the public about what this would entail. In this role, the press can, for example, inform the public about how democratic elections ought to be run. The press can provide information on, among others, the importance of having an up-to-date voters' roll, a secret ballot, election observers, multiparty officials at different ballot stations, security of the ballot boxes, an independent electoral commission, and the

role of the media, particularly the public broadcaster. In other words, the press is able to vocalise a democratic standard by which public authorities should be held to account for conduct during an election. In this way the press educates the public about holding public officials accountable for their actions.

Other areas where the press can play a democracy advocacy role include:

- Clean administration versus corruption and nepotism
- Appropriate use of public resources versus mismanagement and waste
- Proper policing and public safety versus public violence, particularly if meted out by the security or intelligence forces
- Economic and social development versus growing poverty and unemployment
- Generally increasing living standards versus glaring inequality and wealth disparities
- Responsive and public-oriented public services versus bloated and self-serving bureaucracies
- Transparency, openness and accountability versus secrecy, neglect and repression

Importantly, a press that plays a democracy advocacy role will target not only government for coverage and comment. In many developing countries, companies (including subsidiaries of large multinational companies) and others in the private sector do not always adhere to basic standards in relation to working conditions, occupational health and safety or environmental issues. The press needs to be able to point out actions by companies and other private sector actors that fall short of national or international standards and which cause damage to individuals, communities or the environment. In a similar vein, policies of international bodies such as the International Monetary Fund, the World Bank and the World Trade Organisation can, and often do, have significant economic impact on developing countries. An advocacy press ought to be able to point out to citizens what, for example, a fair trade regime in relation to the country's exports and imports ought to look like.

6.7 The press as catalyst for democracy and development

If the press is able to perform only its most basic function – that is, reporting on matters of public interest – it nevertheless acts as a promoter of transparency,

openness and accountability. Governments (even repressive ones) and private sector actors dislike negative press coverage. Of course, a government may try to respond to negative press coverage by clamping down on press freedom through legal and illegal means, but this is not a sustainable long-term response and usually only serves to hasten the erosion of public confidence in, and support for, the government.

If the press is able to perform some or all of the roles set out above, it can act as a catalyst for democracy and development, helping to make public participation meaningful. The public supports a press that reports accurately and provides reliable news and information about matters of public concern. As this public support grows, governments come under public pressure to be more transparent and accountable, and to work with the press and not against it. As governments learn how to respond appropriately to press criticism, so the space for the media opens up and a positive cycle of more sophisticated government–press relations can ensue. In this way, the government sees the independent media as a key vehicle for communicating with the public about its programmes and actions, and also as a gauge to measure its own popular standing and support, as the press often (although not always) reflects public opinion.

In thinking about the press as a potential catalyst for democracy and development, it is crucial to bear in mind that a number of post-independence African governments expressly used the mass media:

as a tool for national consolidation, development, and authoritarian control ...
The reach of the mass media was extended to rural areas, supposedly to promote development and technical diffusion, but in actuality the media was used as a tool of state control and propaganda.¹¹

Clearly, this kind of government-controlled media is not the model of the ‘press as democracy and development catalyst’ that we are talking about here.

The stronger the media becomes in a particular country, the better it is able to fulfil its various roles as watchdog, detective, educator, good governance advocate, and even catalyst for democracy and development. The more the press is able to fulfil these roles, the more the public is informed about public interest issues. The more the public is so informed, the more it is able to hold public power accountable and relate to government (through the ballot box, or in consultations or other interactions), the private sector and even civil society in a manner that is informed. The government of an informed citizenry is often able to engage in focused decision-making as there is a free flow of information and ideas that the government can access to improve its operations.

Then-president of the World Bank, James Wolfensohn, said in a 2002 report:

A key ingredient of an effective development strategy is knowledge transmission and enhanced transparency. To reduce poverty, we must liberate access to information and improve the quality of information. People with more information are empowered to make better choices. For these reasons I have long argued that a free press is not a luxury. It is at the core of equitable development. The media can expose corruption. They can keep a check on public policy by throwing a spotlight on government action. They let people voice diverse opinions on governance and reform and help build public consensus to bring about change.¹²

7 IMPORTANCE OF THE BROADCAST MEDIA

When thinking about the press and the media, people often focus on the print media – essentially, newspapers. In Africa, and particularly in Southern Africa, this makes little sense for four key reasons:

- With few exceptions, newspapers are often distributed only in the larger cities and towns. In other words, they are not available in many rural areas.
- Relatively speaking, newspapers are expensive. Many countries in Southern Africa have extremely high rates of poverty. The little money people have is far more likely to be spent on food and essentials as opposed to newspapers, which are out of date within a day or so.
- In Southern Africa, newspapers tend to be published in English, French or Portuguese – the languages of government. However, a country's broadcasting landscape can be characterised by a number of radio stations broadcasting in different local languages, thereby enabling listeners to access news and information in their home languages.
- Most important is the issue of adult literacy: if people cannot read they obviously cannot access the content contained in the print media. SADC's Regional Indicative Strategic Development Report acknowledges that the region 'recorded the lowest adult illiteracy rate of 27 percent as compared to other regions in Africa',¹³ and that only six of SADC's member states have adult literacy rates 'in the range of 80 percent'.¹⁴

In the context of these low levels of literacy, the broadcast media – which provides content visually and/or through the spoken word – is extremely important. Of the

options provided by the broadcast media, most people access news and information via radio rather than television. This is due to three main reasons:

- Terrestrial television transmission or signal distribution facilities and infrastructure are extremely expensive to roll out. Terrestrial television is therefore often limited to urban areas. Radio or sound transmission facilities are far less expensive and so radio coverage is invariably greater than television coverage.
- In countries with erratic electricity supply or in areas where electricity is not available, watching television is simply not possible – although people sometimes make do by, for example, connecting television sets to car batteries or generators. As radio sets can be battery operated or even wind-up, the technology is far more suitable to conditions of no, limited or erratic electricity supply.
- The (relatively) prohibitive cost of television sets means that many households cannot afford them. Given the high levels of poverty in Southern African countries, a television set is a luxury item. Radio sets are far less expensive.

Clearly, broadcasting – and particularly radio – is the medium through which most people in Southern Africa access news and information. Historically, broadcasting has been a neglected area in the context of press freedom battles in Africa, particularly in Southern Africa. It is only fairly recently (in the past 15–20 years) that state monopolies over the airwaves (both radio and television) have been scrapped and a more pluralistic broadcast media has begun to emerge.

This handbook contributes to that movement by setting out (in Chapter 2) what a democratic media regulatory environment looks like, as well as by analysing the broadcasting regulatory environment in each country chapter to test whether or not it meets international best practice standards.

NOTES

- 1 <http://www.un.org/en/documents/udhr/> [accessed 29 February 2012]
- 2 <http://treaties.un.org/doc/db/survey/CovenantCivPo.pdf> [accessed 29 February 2012]
- 3 http://www.wunrn.com/reference/pdf/American_convention_Human_Rights.PDF [accessed 29 February 2012]
- 4 http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf [accessed 29 February 2012]
- 5 http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf [accessed 29 February 2012]

- 6 Michael Bratton, 'Civil Society and Political Transition in Africa'. Institute for Development Research Reports, 11(6), 1994, p 2. Available at <http://worlded.org/docs/Publications/idr/pdf/11-6.pdf> [accessed 2 January 2010].
- 7 Masudul Biswas, 'Media Freedom, Governance and Civil Society', Conference Paper, 2009, p 3. Available at http://www.allacademic.com/one/prol/prol01/index.php?cmd=prol01_search&offset=0&limit=5&multi_search_search_mode=publication&multi_search_publication_fulltext_mod=fulltext&textfield_submit=true&search_module=multi_search&search=Search&search_field=title_idx&fulltext_search=Media+Freedom%2C+Governance+and+Civil+Society [accessed 28 December 2009].
- 8 Ibid, p 5.
- 9 Ibid.
- 10 Biswas, op cit.
- 11 Erik Nisbet & Devra Moehler, 'Emerging Political Communication Systems in Sub-Saharan Africa: Some Preliminary Models'. Paper presented at the annual meeting of the American Political Science Association, Marriott Wardman Park, Omni Shoreham, Washington Hilton, Washington DC, 2005, p 5, citations omitted. Available at http://64.112.226.77/one/www/research/index.php?cmd=www_search&offset=0&limit=5&multi_search_search_mode=publication&multi_search_publication_fulltext_mod=fulltext&textfield_submit=true&search_module=multi_search&search=Search&search_field=title_idx&fulltext_search=saharan&PHPSESSID=914a7b08e25b3faac1029d0219bc038c [accessed 28 December 2009].
- 12 James Wolfensohn, 'The Right to Tell: The Role of Mass Media in Economic Development', World Bank Institute Report, World Bank, 2002, p v.
- 13 SADC, Regional Indicative Strategic Development Plan, Chapter 2 [online]. Available at <http://www.sadc.int/index/browse/page/108> [accessed 23 January 2010].
- 14 Ibid.

2

Hallmarks of a democratic media environment



In this chapter you will learn:

- ❑ The 11 international instruments that contain the key principles of democratic media regulation
- ❑ The ten key principles of democratic media regulation:
 - Freedom of the press and other 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
 - Ensuring that states do not use their advertising power to influence content
- ❑ The eight key principles of democratic broadcasting regulation:
 - National frameworks for the regulation of broadcasting must be set down in law
 - Independent regulation of broadcasting
 - Pluralistic broadcasting environment with a three-tier system for broadcasting: public, commercial and community
 - Public as opposed to state broadcasting services
 - Availability and nature of community broadcasting services
 - Equitable, fair and transparent processes for licensing
 - Universal access to broadcasting services and equitable access to broadcasting signal distribution and other infrastructure
 - Regulating broadcasting content in the public interest

1 INTRODUCTION

Chapter 1 examined a number of international human rights instruments to gain a clearer understanding of the nature and extent of the right to freedom of expression and its relationship to freedom of the press and other media. This chapter looks more specifically at the internationally accepted hallmarks of democratic media regulation – in other words, the legal regime that establishes a democratic media environment.

This chapter identifies 11 instruments, charters, protocols or declarations adopted either by international bodies (such as the UN, the AU and SADC) or at significant conferences held under the auspices of international bodies (such as the United Nations Education, Scientific and Cultural Organisation [UNESCO]) or civil society bodies focusing on the media (such as Article 19, which is an international non-governmental organisation [NGO] focusing on press freedom issues). The 11 instruments – many of which have a particular focus on Africa – deal with, among other things, various aspects of democratic media regulation. Ten key principles of general democratic media regulation and eight key principles of democratic broadcasting regulation have been identified from these instruments.

The principles can be used as a yardstick to assess an individual country's commitment to democratic media and broadcasting regulation and, more broadly, its commitment to the underlying principle of freedom of expression. Bear this in mind when reading the chapters that deal with the media laws of specific Southern African countries, and when evaluating their level of commitment to and compliance with international standards for democratic media and broadcasting regulation.

2 KEY INTERNATIONAL INSTRUMENTS THAT ESTABLISH DEMOCRATIC MEDIA AND BROADCASTING REGULATORY PRINCIPLES

This section examines 11 instruments, charters, protocols or declarations to determine what the international community has agreed are the principles that underpin democratic media and broadcasting regulatory environments.

As mentioned, some of these have been developed by international bodies established by treaty, such as the AU, and some have been established by NGOs with long-standing records of work in the areas of freedom of expression and freedom of the press.

Since this handbook is aimed at journalists and other media practitioners as opposed to lawyers, the instruments, charters, protocols or declarations are not set out in full. Instead, the key media-related provisions are detailed under the various principle headings.

It is also important to note that the instruments, charters, protocols or declarations discussed are a selection of key documents relevant to democratic media or broadcasting regulation made by bodies of international standing, with particular (but not exclusive) reference to Africa.

The selected instruments, charters, protocols and declarations are listed below in the order in which they were adopted:

- **The Windhoek Declaration:**¹ The Windhoek Declaration on Promoting an Independent and Pluralistic Press was adopted in 1991 by participants at a UN-UNESCO seminar on promoting an independent and pluralistic African press, and was thereafter endorsed by UNESCO's General Conference. The Windhoek Declaration is an important international statement of principle on press freedom and the date of its adoption, 3 May, is now the annual World Press Freedom Day.
- **The Johannesburg Principles:**² The Johannesburg Principles on National Security, Freedom of Expression and Access to Information were adopted in October 1995 by a panel of experts in international law, national security and human rights. The panel was convened by Article 19, the International Centre Against Censorship and the University of the Witwatersrand's Centre for Applied Legal Studies. The Johannesburg Principles have been endorsed by the UN Committee on Human Rights and the UN Special Rapporteur on Freedom of Opinion and Expression.
- **The SADC Protocol:**³ The Southern African Development Community Protocol on Culture, Information and Sport was adopted in 2000.
- **The African Charter on Broadcasting:**⁴ The African Charter on Broadcasting was adopted by participants at a 2001 UNESCO conference to mark the 10th anniversary of the Windhoek Declaration. While the Windhoek Declaration focuses mainly on the print media, the African Charter on Broadcasting focuses on the broadcast media.
- **The African Principles of Freedom of Expression Declaration:**⁵ The Declaration of Principles on Freedom of Expression in Africa was adopted in 2002 by the African Commission on Human and Peoples' Rights, a body established under the auspices of the AU.
- **The Access to the Airwaves Principles:**⁶ Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation is a set of standards on how to promote and protect independent broadcasting while ensuring that broadcasting serves the interests of the public. The principles were developed in 2002 by Article

19, an international NGO working on freedom of expression issues as part of its International Standards series.

- **The WSIS Geneva Principles:**⁷ The WSIS Geneva Principles were adopted in Geneva in 2003 at the World Summit on the Information Society (WSIS), held by the UN in conjunction with the International Telecommunications Union. While the WSIS Geneva Principles cover mainly issues concerning universal access to information and communication technologies (ICTs), they also contain some important statements on the media more generally.
- **The Dakar Declaration:**⁸ The Dakar Declaration was adopted in Senegal in 2005 by a UNESCO-sponsored World Press Freedom Day conference.
- **The African Democracy Charter:**⁹ The African Charter on Democracy, Elections and Governance was adopted by the AU in 2007. It is not yet in force as an insufficient number of countries have ratified it. Nevertheless, the African Democracy Charter contains a number of important statements on the media, even if these are only aspirational.
- **The Declaration of Table Mountain:**¹⁰ The Declaration of Table Mountain was adopted in 2007 by the World Association of Newspapers and the World Editors Forum. It contains a number of important statements on African media issues made by a civil society forum of newspaper publishers and editors.
- **UNESCO's Media Development Indicators:**¹¹ UNESCO's International Programme for the Development of Communications in 2008 published a document entitled 'Media Development Indicators: A Framework for Assessing Media Development'.

3 THE 10 KEY PRINCIPLES OF DEMOCRATIC MEDIA REGULATION

3.1 Principle 1: Freedom of the press and other media

3.1.1 Relevant provisions in international instruments

- Article 1 of the Windhoek Declaration states that 'the establishment, maintenance and fostering of [a] ... free press is essential to the development and maintenance of democracy in a nation, and for economic development'.
- Article 20 of the SADC Protocol requires SADC states to 'take necessary measures to ensure the freedom ... of the media'.

- Article VIII(1.) of the African Principles of Freedom of Expression Declaration states that ‘[a]ny registration system for the print media shall not impose substantive restrictions on the right to freedom of expression’.
- Article X(2.) of the African Principles of Freedom of Expression Declaration states that ‘[t]he right to express oneself through the media by practising journalism shall not be subject to undue legal restrictions’.
- Principle 55 of the WSIS Geneva Principles states in its relevant part that ‘the principle ... of freedom of the press ... [is] essential to the Information Society’.
- Article 2(10) of the African Democracy Charter states in its relevant part that one of its objectives is to ‘[p]romote the establishment of the necessary conditions to foster ... freedom of the press’.
- Article 27(8) of the African Democracy Charter provides in its relevant part that ‘[i]n order to advance political, economic and social governance, states shall commit themselves to ... [p]romoting freedom of expression, in particular freedom of the press ...’.
- The Declaration of Table Mountain declares, among other things, that ‘African states must recognise the indivisibility of press freedom and their responsibility to respect their commitments to African and international protocols upholding the freedom ... and safety of the press’.
- The UNESCO Media Development Indicators provide that states must guarantee freedom of expression in law and must respect it in practice. This requires, among other things:
 - National laws or constitutional guarantees on freedom of expression
 - Bodies that guarantee the concrete application of the right to freedom of expression

3.1.2 Summary

- A free press is essential for democracy.
- A free press is essential for economic and social development.
- A free press is essential to the information society.
- Governments must uphold the freedom and safety of the press.

- States must have national laws or constitutions guaranteeing the right to freedom of expression.
- Press registration provisions cannot impose substantive restrictions on publication.

3.1.3 Comment

- There is widespread international recognition that freedom of the press has tangible benefits for society, and that real economic and social development, or indeed democracy, is not possible without it.
- Also important is recognition of the need for legal, particularly constitutional, guarantees of freedom of expression.

3.2 Principle 2: An independent media

3.2.1 Relevant provisions in international instruments

- Article 1 of the Windhoek Declaration states that ‘the establishment, maintenance and fostering of an independent ... press is essential to the development and maintenance of democracy in a nation, and for economic development’.
- In article 2 of the Windhoek Declaration, an ‘independent press’ is defined as ‘a press independent from governmental, political or economic control or from control of materials and infrastructure essential for the production and dissemination of newspapers, magazines and periodicals’.
- In article 17(a) of the SADC Protocol, SADC members agreed ‘to cooperate in the area of information in order to attain ... [c]ooperation and collaboration in the promotion, establishment and growth of independent media ...’.
- Article 20 of the SADC Protocol requires SADC states to ‘take necessary measures to ensure the ... independence of the media’.
- Article 7 of Part I of the African Charter on Broadcasting states that ‘[s]tates should promote an economic environment that facilitates the development of independent production and diversity in broadcasting’.
- Article VIII(2.) of the African Principles of Freedom of Expression Declaration provides that ‘[a]ny print media published by a public authority should be protected adequately against undue political interference’.

- Article VIII(4.) of the African Principles of Freedom of Expression Declaration states that ‘[m]edia owners and media professionals shall be encouraged to reach agreements to guarantee editorial independence and to prevent commercial considerations from unduly influencing media content’.
- Principle 55 of the WSIS Geneva Principles states in its relevant part that ‘the principle ... of independence ... of media ... [is] essential to the Information Society’.
- The Dakar Declaration calls on member states of UNESCO to ‘create an enabling environment in which an independent ... media sector can flourish’.
- The Declaration of Table Mountain declares, among other things, that ‘African states must recognise the indivisibility of press freedom and their responsibility to respect their commitments to African and international protocols upholding the ... independence ... of the press’.

3.2.2 Summary

- Independence means being free from governmental, political and economic control or commercial interference – in other words, it means having editorial independence.
- An independent media is essential for democracy.
- An independent media is essential for economic development.
- An independent media is essential for the information society.
- Governments, media owners and publishers must act to secure the independence of the media.
- In respect of the broadcast media, independent production is an important aspect of independence.
- Media published by public authorities must be adequately protected against undue political interference.

3.2.3 Comment

- There is widespread international recognition that an independent media has

tangible benefits for society, and that real economic and social development, or indeed democracy, is not possible without it.

- Another noteworthy aspect is that independence does not only mean independence from governmental or political interference, but also independence from commercial interference, such as pressure from advertisers or owners of media companies to report on an issue in a particular way. Commercial interference is a problem in developed countries, and is likely to be even more of a problem in developing countries that have much smaller advertising pools.
- The international community has identified that media distributed by public authorities (for example, public broadcasters) needs particular protection against political interference.

3.3 Principle 3: Diversity and pluralism in the media

3.3.1 Relevant provisions in international instruments

- Article 1 of the Windhoek Declaration states that ‘the establishment, maintenance and fostering of [a] ... pluralistic ... press is essential to the development and maintenance of democracy in a nation, and for economic development’.
- Article 2 of the Windhoek Declaration defines a ‘pluralistic press’ as ‘the end of monopolies of any kind and the existence of the greatest possible number of newspapers, magazines and periodicals reflecting the widest possible range of opinion within the community’.
- Article 17(d) of the SADC Protocol requires member states to agree to cooperate in the area of information by ‘taking positive measures to narrow the information gap between the rural and urban areas by increasing the coverage of the mass media, whether private, public or community-based’.
- In article 18(4) of the SADC Protocol, member states agree ‘to create political and economic environments conducive to the growth of pluralistic media’.
- Article III of the African Principles of Freedom of Expression Declaration states that ‘[f]reedom of expression imposes an obligation on the authorities to take positive measures to promote diversity’, which include, among other things:
 - Availability and promotion of a range of information and ideas to the public

- Pluralistic access to the media and other means of communication
- Article V(1.) of the African Principles of Freedom of Expression Declaration provides that '[s]tates shall encourage a diverse ... private media sector. A state monopoly over broadcasting is not compatible with the right to freedom of expression'.
- Article XIV(3.) of the African Principles of Freedom of Expression Declaration states that '[s]tates should adopt effective measures to avoid undue concentration of media ownership, although such measures shall not be so stringent that they inhibit the development of the media sector as a whole'.
- Principle 55 of the WSIS Geneva Principles states in its relevant part that 'the principle ... of pluralism and diversity of media ... [is] essential to the Information Society ... Diversity of media ownership should be encouraged, in conformity with national law ...'.
- The Dakar Declaration calls on member states of UNESCO to 'create an enabling environment in which [a] ... pluralistic ... media sector can flourish'.

3.3.2 Summary

- A diverse and pluralistic media environment is one in which there are no monopolies and in which there is a variety of media (print and electronic) reflecting the widest possible range of opinions.
- A diverse and pluralistic media environment is essential for democracy.
- A diverse and pluralistic media environment is essential for economic development.
- A diverse and pluralistic media environment provides a range of media options to both urban and rural people.
- Governments must act to ensure pluralistic media environments, and broadcasting regulatory regimes should provide for a diversity of broadcasting services.
- Governments must pass cross-ownership legislation to avoid market dominance by a single player across different media platforms.
- Avoid undue concentration of media ownership without damaging development of the media sector as a whole.

3.3.3 Comment

- There is widespread international recognition that a pluralistic media has tangible benefits for society, and that real economic and social development – or indeed democracy – is not possible without it.
- The international community recognises that diversity is not just a matter of having different types of media available in a country, but also availability in both rural and urban areas. In addition, it stresses the need for diversity within broadcasting and different categories of broadcasting services (public, commercial and community).
- The international media recognises that diversity of media ownership is key to ensuring not only diversity of services but also diversity of viewpoints. Consequently, it is important that there are laws to regulate media ownership diversity – that is, laws to prohibit undue media ownership concentration, particularly in respect of cross-ownership (for example, of print and broadcast media). However, this regulation cannot be done in such a way as to damage the development of the media sector as a whole. For example, if a country limits a media company to holding only one or two small media outlets, it might unwittingly be stifling investment in its media sector. There is a fine balancing act to be performed by governments in this regard: ensuring that media companies can grow sufficiently to encourage investment and growth in the industry as a whole without stifling diversity through allowing the development of media monopolies.

3.4 Principle 4: Professional media

3.4.1 Relevant provisions in international instruments

- Article 12 of the Windhoek Declaration describes the establishment of independent, representative associations, syndicates or trade unions of journalists and associations of editors and publishers as ‘a matter of priority in all the countries in Africa where such bodies do not now exist’.
- Article 13 of the Windhoek Declaration states that national media and labour relations laws of African countries should be drafted so as ‘to ensure that representative associations can exist and fulfil their important tasks in defence of press freedom’.
- Article 16(ii) of the Windhoek Declaration calls for detailed research to be done by the international community on ‘the training of journalists and managers and

the availability of professional training institutions and courses’, clearly indicating a concern for the issue.

- Article 5(1) of the SADC Protocol, in its relevant part, requires states to ‘cooperate in the research and training of ... media practitioners’.
- In article 18(5) of the SADC Protocol member states agree ‘to promote specialised training of journalists in the areas of culture and sports to improve the coverage of these’.
- Article IX(3.) of the African Principles of Freedom of Expression Declaration states that ‘[e]ffective self-regulation is the best system for promoting high standards in the media’.
- Article X(1.) of the African Principles of Freedom of Expression Declaration states that ‘[m]edia practitioners shall be free to organise themselves into unions and associations’.
- The Dakar Declaration calls on member states of UNESCO to ‘create an enabling environment in which [a] ... professional media sector can flourish’ and calls on media outlets and professional associations to ‘commit themselves to fair and professional reporting as well as to put in place mechanisms to promote professional journalism ... [and to] commit themselves to ongoing programmes for training for journalists to strengthen professional and ethical standards’.
- Article 27(8) of the African Democracy Charter provides in its relevant part that ‘[i]n order to advance political, economic and social governance, states shall commit themselves to ... fostering a professional media’.

3.4.2 Summary

- A professional media is essential to political, economic and social good governance.
- A professional media is essential to the defence of press freedom.
- A professional media requires independent associations of media owners, publishers and journalists, including trade unions.
- A professional media requires institutions and courses aimed at specialised training for journalists and other media professionals.

- A professional media requires specialist journalists.
- A professional media requires self-regulation through the development and enforcement of codes of ethics and good practice for journalists.

3.4.3 Comment

- It is noteworthy that so many international statements deal with the question of the need for a professional media, and state that a professional media is essential to good governance (whether political, social and economic) and for the defence of press freedom itself.
- Professionalism requires appropriate specialist training and expertise, which in turn raises the issue of the need for training institutions and courses for journalists.
- Professionalism is also, crucially, an issue of self-identification with professionalisation by the media industry itself. This industry professionalisation requires two important areas of development:
 - The need for media workers, owners and publishers to form representative industry bodies.
 - The need for these bodies to develop self-regulatory standards or codes of ethics and practice.

3.5 Principle 5: Protecting confidentiality of sources

3.5.1 Relevant provisions in international instruments

- Principle 18 of the Johannesburg Principles states that '[p]rotection of national security may not be used as a reason to compel a journalist to reveal a confidential source'.
- Article XIV(2.) of the African Principles of Freedom of Expression Declaration provides that '[m]edia practitioners shall not be required to reveal confidential sources of information or to disclose other material held for journalistic purposes except in accordance' with the following principles:
 - The identity of the source is necessary for the investigation or prosecution of a serious crime, or the defence of a person accused of a criminal offence.
 - The information or similar information leading to the same result cannot be obtained elsewhere.

- The public interest in disclosure outweighs the harm to freedom of expression.
 - Disclosure has been ordered by a court, after a full hearing.
- The UNESCO Media Development Indicators provide that journalists must be able to ‘protect the confidentiality of their sources without fear of prosecution or harassment’.

3.5.2 Summary

- A journalist should not be forced to reveal the identity of a confidential source or provide confidential journalistic material unless exceptional circumstances relating to national security or criminal proceedings exist, and such disclosure has been ordered by a court.

3.5.3 Comment

- It is extremely significant that international instruments have recognised the need to protect journalists’ confidential sources of information. However, the international instruments do not clearly state why this protection is necessary.
- Sources of information are vital for journalists. Without these, journalists have little, if any, real role to play. Sometimes journalists receive sensitive, perhaps explosive, information on political issues of the day. Journalists have to be able to reassure a source that his or her identity will be kept confidential, otherwise people with information that ought to be reported on in the media will not come forward and speak to journalists for fear of reprisals.
- The international principle is reasonable because it is not absolute. A court must be involved where the public interest requires a journalist’s confidential source to be revealed, and the revelation must be necessary in relation to matters of serious public concern, such as a criminal investigation.

3.6 Principle 6: Access to information

3.6.1 Relevant provisions in international instruments

- Article 1 of Part I of the African Charter on Broadcasting states that the ‘legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation including ... the free flow of information and ideas ...’.

- Part of Principle 11 of the Johannesburg Principles states that ‘[e]veryone has the right to obtain information from public authorities, including information relating to national security’.
- Principle 13 of the Johannesburg Principles states that ‘[i]n all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration’.
- Part of Principle 14 of the Johannesburg Principles states that ‘[t]he state is obliged to adopt appropriate measures to give effect to the right to obtain information’.
- Article (2)(d) of the SADC Protocol requires states to be guided by the general principle of ‘[c]ommitment to the right of access to information’.
- Article IV(1.) of the African Principles of Freedom of Expression Declaration states that ‘[p]ublic bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law’.
- Article XII(2.) of the African Principles of Freedom of Expression Declaration states that ‘privacy laws shall not inhibit the dissemination of information of public interest’.
- Principle 55 of the WSIS Geneva Principles states in its relevant part that ‘the principle ... of ... freedom of information ... [is] essential to the Information Society. Freedom to seek, receive, impart and use information for the creation, accumulation and dissemination of knowledge are important to the Information Society’.
- The Dakar Declaration calls on member states of UNESCO to ‘ensure that government bodies respect the principles of ... public access to information in their operations’.
- The Dakar Declaration calls on member states of UNESCO ‘to provide for comprehensive legal guarantees for the right to access information recognising the right to access information held by all public bodies, and requiring them to publish key categories of information and to introduce effective systems of record management ...’.
- Article 2(10) of the African Democracy Charter sets out certain of the African Democracy Charter’s objectives, the relevant part of which states that one of its

objectives is to '[p]romote the establishment of the necessary conditions to foster ... access to information ...'.

3.6.2 Summary

- Access to information is essential to the free flow of information and ideas.
- Freedom to receive information is essential to the information society.
- Public bodies hold information as custodians of the public good. Therefore everyone has the right of access to information held by public bodies.
- Governments must foster access to information by:
 - Respecting the principle of public access to information
 - Passing laws formally recognising the right to access information held by public bodies
 - Publishing categories of information available
 - Managing records effectively
- While national laws can impose limitations on the right to access publicly held information, privacy laws cannot inhibit the dissemination of information in the public interest.

3.6.3 Comment

- The importance of the right of access to information is becoming increasingly widely recognised, particularly in the information age. Many countries have elevated this to a constitutional right, and many more have passed laws containing detailed provisions in support of the right of access to information held by the state and private bodies in certain circumstances.

3.7 Principle 7: Commitment to transparency and accountability

3.7.1 Relevant provisions in international instruments

- The Dakar Declaration calls on member states of UNESCO to 'ensure that government bodies respect the principles of transparency [and] accountability ... in their operations'.
- The Dakar Declaration calls on member states of UNESCO to 'respect the functioning of the news media as an essential factor in good governance, vital to

increasing both transparency and accountability in decision-making processes and to communicating the principles of good governance to the citizenry’.

- Article 2(10) of the African Democracy Charter sets out certain objectives, the relevant part of which states that one of its objectives is to ‘[p]romote the establishment of the necessary conditions to foster transparency, ... and accountability in the management of public affairs’.
- Article 3(8) of the African Democracy Charter requires states to implement the charter in accordance with the principle of ‘[t]ransparency and fairness in the management of public affairs’.
- Article 12(1) of the African Democracy Charter requires states to ‘[p]romote good governance by ensuring transparent and accountable administration’.
- Article 32(1) of the African Democracy Charter requires states to strive to institutionalise good political governance through ‘[a]ccountable, efficient and effective public administration’.
- Article 33(2) of the African Democracy Charter requires states to institutionalise good economic and corporate governance through ‘[p]romoting transparency in public finance management’.

3.7.2 Summary

- Transparency and accountability promote good governance, whether political, economic or corporate governance.
- The news media is essential for good governance.
- The news media is vital to increasing transparency and accountability in decision-making processes.
- The news media is vital to communicating the principles of good governance to the citizenry.
- Governments must respect the functioning of the news media in relation to transparency and accountability.
- Governments must foster the principles of transparency and accountability in their operations and in public affairs generally.

3.7.3 Comment

- It is particularly noteworthy that the international instruments, declarations and statements deal with the issue of transparency and accountability by linking the relationship between the role of the news media, and the transparency and accountability of government.
- Governments are notorious for proclaiming a commitment to accountability and transparency while denying the news media appropriate scope within which to operate. A democratic media regulatory environment is one which recognises that the news media is essential to a government's ability to communicate with the public. Indeed, unless the news media operates in an environment in which it (and the public's right to transparency) is respected, real accountability by government to the public for its actions is all but impossible. This is because being transparent means that the public is able to see what government is doing and know why it is doing it. The public is generally informed about government decisions, actions and programmes through the media. Thus, if the media is shunned and shut out by government or, worse, actively prevented for obtaining or publicising information about governmental activities, the public is similarly shunned, shut out and prevented from being informed. Once the public is unable to know what government is doing, it becomes impossible for the public to hold government to account for its actions.
- The relationship of trust, mandate, representivity and responsibility that ought to exist between the government and the governed is largely held together by the mediating nature of the media. The media acts as a public information valve, reporting on government's activities and actions, and reflecting public sentiments and opinions thereon back to government.

3.8 Principle 8: Commitment to public debate and discussion

3.8.1 Relevant provisions in international instruments

- Article 2(10) of the African Democracy Charter sets out certain of the African Democracy Charter's objectives, the relevant part of which states that one of its objectives is to '[p]romote the establishment of the necessary conditions to foster citizen participation ... in the management of public affairs'.
- Article 3(7) of the African Democracy Charter requires states to implement the charter in accordance with the principle of '[e]ffective participation of citizens in democratic and development processes and in governance of public affairs'.

- Article 13 of the African Democracy Charter provides in its relevant part that states ‘shall take measures to ensure and maintain political and social dialogue, as well as public trust ... between political leaders and the people, in order to consolidate democracy and peace’.
- Article 27(2) of the African Democracy Charter requires states to commit to, among other things, ‘[f]ostering popular participation’.
- Article 28 of the African Democracy Charter requires states to ensure and promote ‘... dialogue between government, civil society and [the] private sector’.
- Article 30 of the African Democracy Charter requires states to ‘promote citizen participation in the development process through appropriate structures’.

3.8.2 Summary

- Public trust requires public participation.
- Public participation is essential for democracy, governance, peace and development.
- Governments must foster public dialogue, including between government, civil society and the private sector, on political and social issues.
- Governments must foster public participation in public affairs and administration, as well as in democratic and development processes.

3.8.3 Comment

- Governments are notorious for proclaiming a commitment to public debate, discussion and participation while denying the news media appropriate scope within which to operate. A democratic media regulatory environment is one which recognises that the news media is essential to a government’s ability to communicate with the public. Indeed, unless the news media operates in an environment in which it (and the public’s right to debate and discuss issues) is respected, real public participation and debate is impossible.
- It is accepted that public debate and discussion is essential for public participation, which is itself essential to democracy, and social and economic development. However, the way in which the public is informed about government decisions, actions and programmes is through the media. If the media is shunned and shut out by government or, worse, actively prevented for obtaining or publicising

information about governmental activities, the public is similarly shunned, shut out and prevented from being informed. Once the public is unable to know what the government is doing, it becomes impossible for the public to participate meaningfully in public debates and discussions.

- The relationship of trust, mandate, representivity and responsibility that ought to exist between the government and the governed is largely held together by the mediating nature of the media. The media acts as a public information valve, reporting on government's activities and actions, and reflecting public sentiments and opinions thereon back to government. The media is therefore the key vehicle through which society conducts its 'public discussions'.
- Another important way of fostering citizen participation in these public debates is to ensure that government is able to interact with the public electronically. The increasing availability of the internet and mobile technology allows for 'citizen-journalists' to play an increasingly important role in public debate and discussion.

3.9 Principle 9: Availability of local content

3.9.1 Relevant provisions in international instruments

- Article 17(c) of the SADC Protocol requires member states to agree to cooperate in the area of information in order to ensure 'the ... [d]evelopment and promotion of local culture by increasing local content in the media such as magazines, radio, television, video, film and new information technologies'.
- Article 17(e) of the SADC Protocol requires member states to agree to cooperate in the area of information in order to ensure 'the [e]ncouragement of the use of indigenous languages in the mass media as vehicles of promoting local, national and regional inter-communication'.
- Article III of the African Principles of Freedom of Expression Declaration states that '[f]reedom of expression imposes an obligation on the authorities to take positive measures to promote diversity, which include, among other things ... the promotion and protection of African voices, including through media in local languages ...'.
- Principle 53 of the WSIS Geneva Principles states in its relevant part that '[t]he creation, dissemination and preservation of content in diverse languages and formats must be accorded high priority in building an inclusive Information Society ... the development of local content suited to domestic or regional needs

will encourage social and economic development and will stimulate participation of all stakeholders, including people living in rural, remote and marginal areas’.

3.9.2 Summary

- Availability of content in a variety of languages is essential for building an inclusive information society.
- Local content is essential to the development of local culture.
- Developing local content encourages social and economic development, including in rural areas.
- Local content should be available in all media, both print and electronic.

3.9.3 Comment

- While Africa has many different languages and cultures, there is often insufficient reflection of this in the print and electronic media. All too often media is available largely (although admittedly not exclusively) in ‘colonial’ languages, such as English, French, Portuguese or German. Encouraging the use of indigenous local languages is important to opening up conversations in societies and ensuring that marginalised people who can speak only these languages are included in public debate and discussion. The media must reflect a society back to itself, and it cannot do this effectively if large numbers of people are ‘silenced’ in the media because their language is not used.
- Owing to widespread poverty and other developmental challenges, governments often do not prioritise the development of local cultures.

3.10 Principle 10: Ensuring states do not use their advertising power to influence content

3.10.1 Relevant provisions in international instruments

- Article XIV(2.) of the African Principles of Freedom of Expression Declaration provides that ‘[s]tates shall not use their power over the placement of public advertising as a means to interfere with media content’.
- The Dakar Declaration provides that it ‘condemns all forms of repression of African media that allows for ... the use of ... devices such as withholding advertising’.

- Principle 28.1 of the Access to the Airwaves Principles provides in its relevant part that '[a]ccess to State resources, including the placement of State advertisements, should always be provided in a fair and non-discriminatory manner ...'.

3.10.2 Comment

- This principle is of critical practical importance to a range of fundamental principles, including freedom of the press and independence of the media.
- This principle recognises that in many poor and underdeveloped countries in Africa, particularly those with small or weak private sectors, states wield enormous clout because of their advertising spend capabilities.
- If a newspaper or broadcaster is dependent upon state advertising to remain operational, it might do almost anything to secure the continuation of such revenue streams to ensure its economic survival.
- The media (public or private) must be protected from undue content influence that may result from the state's advertising muscle.
- The state should not be entitled to use its advertising spend to reward compliant media or to punish what it sees as hostile media. If this happens, freedom of the press is undermined, the public's right to be informed is jeopardised and society as a whole risks moving away from democracy. Sadly, this is a frequent occurrence in a number of Southern African countries.

4 THE EIGHT KEY PRINCIPLES OF DEMOCRATIC BROADCASTING REGULATION

The previous section examined a range of international instruments in order to understand the 10 key principles of democratic media regulation. These looked at the media generally, both the print and broadcast media. This section discusses certain of the international instruments, charters, protocols and declarations that focus exclusively on the broadcast media in order to discern the internationally recognised hallmarks of democratic broadcasting regulation.

4.1 Principle 1: National frameworks for the regulation of broadcasting must be set down in law

4.1.1 Relevant provisions in international instruments

- Article 1 of the African Charter on Broadcasting provides in its relevant part that

‘[t]he legal framework for broadcasting must include a clear statement of the principles underpinning broadcast regulation, including promoting respect for freedom of expression ... and the free flow of information and ideas’.

- Principle 14 of the Access to the Airwaves Principles provides in its relevant part that ‘[t]he powers and responsibilities of regulatory bodies, for example in relation to licensing or complaints, should be set out clearly in the legislation which establishes them ... These powers and responsibilities should be framed in such a way that regulatory bodies have some scope to ensure that the broadcasting sector functions in a fair, pluralistic and smooth manner and to set standards and rules in their areas of competence ...’.
- Principle 17.1 of the Access to the Airwaves Principles provides in its relevant part that ‘... [t]he framework for funding [of regulatory bodies] should be set out clearly in law ...’.

4.1.2 Summary

Broadcasting must be regulated in accordance with legislation that sets out:

- Principles underpinning broadcasting regulation, including freedom of expression
- Powers and duties of broadcasting regulatory bodies, which are necessary to ensure that the broadcasting sector is fair and pluralistic
- The funding framework for broadcasting regulatory bodies

4.1.3 Comment

- This principle is important as certain countries do not have broadcasting laws and instead allocate broadcasting as an area of responsibility to a particular ministry, such as internal affairs, communications or information. This means that the executive dominates broadcasting matters and ‘regulates’ broadcasting in accordance with the short-term interests of the government of the day rather than in the long-term public interest.

4.2 Principle 2: Independent regulation of broadcasting

4.2.1 Relevant provisions in international instruments

- Article 2 of Part I of the African Charter on Broadcasting states that ‘[a]ll formal

powers in the areas of broadcast ... regulation should be exercised by public authorities which are protected against interference, particularly of a political or economic nature, by, among other things, an appointments process for members which is open, transparent, involves the participation of civil society, and is not controlled by any political party’.

- Article V(2.) of the African Principles of Freedom of Expression Declaration states in its relevant parts that ‘the broadcast regulatory system shall encourage private and community broadcasting’ and that an ‘independent regulatory body shall be responsible for issuing broadcasting licences and for ensuring observance of licence conditions ...’.
- Article VII of the African Principles of Freedom of Expression Declaration provides:
 1. Any public authority that exercises powers in the areas of broadcast ... regulation should be independent and adequately protected against interference, particularly of a political or economic nature.
 2. The appointments process for members of a regulatory body should be open and transparent, should involve the participation of civil society, and shall not be controlled by any particular political party.
 3. Any public authority that exercises power in the areas of broadcast ... should be formally accountable to the public through a multi-party body.
- The Dakar Declaration calls on member states of UNESCO to ‘guarantee the independence of regulatory bodies for broadcasting’.
- Principle 11 of the Access to the Airwaves Principles provides in its relevant part that ‘[t]he independence of regulatory bodies ... should be specifically and explicitly provided for in the legislation which establishes them and, if possible, also in the constitution’.
- Principle 12 of the Access to the Airwaves Principles provides in its relevant part that ‘... [r]egulatory bodies should be required to ... act in the public interest at all times’.
- Principle 13.2 of the Access to the Airwaves Principles provides in its relevant part that ‘[o]nly individuals who have relevant expertise and/or experience should be eligible for appointment [to governing bodies of public entities which exercise powers in the areas of broadcast regulation]. Membership overall should be required to be reasonably representative of society as a whole’.

- Principle 17.2 of the Access to the Airwaves Principles provides in its relevant part that ‘[f]unding processes should never be used to influence decision-making by regulatory bodies’.

4.2.2 Summary

- Broadcasting must be regulated (including the granting and enforcement of broadcasting licences) by independent public authorities.
- The independence of the broadcasting regulator must be guaranteed in national legislation and, if possible, in the constitution.
- An independent public broadcasting authority is one which:
 - The members thereof are appointed in an open and transparent process characterised by public participation and which is not controlled by a single political party
 - Is formally accountable to the public through a multiparty body such as a parliament
 - Acts in the public interest
 - Is not subject to any political or commercial interference
 - Is not influenced by funding processes
- Governments must protect the independence of broadcasting regulatory bodies.
- The members of an independent broadcasting authority must have relevant expertise and/or experience and must be reasonably representative of society as a whole.

4.2.3 Comment

- It is particularly noteworthy that there are many African-focused international statements on the importance of having independent regulation of broadcasting. This is no doubt due to recognition of the role that broadcasting plays in poor, mainly rural, countries with high rates of illiteracy. Newspapers are often not available outside of urban areas, and when they are available they are often relatively expensive and usually not published in local languages. Furthermore, the availability and cost of print media are irrelevant if the ‘audience’ cannot read. Broadcasting, particularly radio, is often the only mass means of communication in Africa due to the problems of poverty, illiteracy and lack of print media distribution outside of urban areas.
- Owing to the centrality of broadcasting in assisting African people to access news

and current affairs, it is recognised that political control and manipulation of broadcasting services can severely limit citizens' rights, such as the rights to press freedom, an independent media and access to information.

- Independent broadcasting regulation is therefore in the public interest.
- It is noteworthy that an independent broadcasting authority is defined as one that is appointed by, and accountable to, a multiparty body such as a parliament, with public participation in the nominations process. This is important in guarding against the control (and abuse) of the broadcast media by a single (ruling) political party.

4.3 Principle 3: Pluralistic broadcasting environment that provides for a three-tier system for broadcasting: public, commercial and community services

4.3.1 Relevant provisions in international instruments

- Article 1(1) of Part I of the African Charter on Broadcasting provides in its relevant part that '[t]he legal framework for broadcasting must include a clear statement of the principles underpinning broadcast regulation, including ... diversity ... as well as a three-tier system for broadcasting: public service, commercial and community'.
- Article V.1 of the African Principles of Freedom of Expression Declaration provides in its relevant part that '[s]tates shall encourage a diverse, independent private broadcasting sector ...'.
- Article V.2 of the African Principles of Freedom of Expression Declaration provides in its relevant part that '[t]he broadcast regulatory system shall encourage private and community broadcasting in accordance with the following principles ... there shall be equitable allocation of frequencies between private broadcasting uses, both commercial and community'.
- Principle 20.1 of the Access to the Airwaves Principles provides in its relevant part that '[r]estrictions may be imposed on the extent of foreign ownership and control over broadcasters but these restrictions should take into account the need for the broadcasting sector as a whole to develop and for broadcasting services to be economically viable'.
- The UNESCO Media Development Indicators provide that states must take positive measures to promote a pluralistic media. States should pass 'specific

legislation on cross-ownership within broadcasting and between broadcasting and other media sectors to prevent market dominance’.

4.3.2 Summary

- A diverse broadcasting environment is characterised by three tiers of broadcasters: public, private and community broadcasters.
- There must be an equitable allocation of frequencies between the different types of broadcasters.
- States must pass laws to prevent market dominance, particularly in the area of cross-media ownership. States may pass laws regulating the extent of foreign ownership but these must take into account the developmental needs of the sector and the requirements of economic viability.

4.3.3 Comment

- Regulating media ownership and control is a critical aspect of ensuring plurality of voices in the media. Too often a sector is judged by how many media outlets there are rather than how many different voices or points of view are being put across. The aim of cross-media regulation is to prevent a particular media grouping from gaining market dominance over a range of media platforms (newspapers, radio and/or television) with a concomitant detrimental effect on the diversity of views and voices available to the public.

4.4 Principle 4: Public as opposed to state broadcasting services

4.4.1 Relevant provisions in international instruments

- Article 1 of Part I of the African Charter on Broadcasting states that the ‘legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation including ... a three-tier system for broadcasting: public service, commercial and community’.
- Article 1 of Part II of the African Charter on Broadcasting states that ‘[a]ll State and government controlled broadcasters should be transformed into public service broadcasters, that are accountable to all strata of the people as represented by an independent board, and that serve the overall public interest, avoiding one-sided reporting and programming in regard to religion, political belief, culture, race and gender’.

- Article 2 of Part II of the African Charter on Broadcasting states in its relevant part that ‘public service broadcasters should, like broadcasting ... regulators, be governed by bodies which are protected from interference’.
- Article 3 of Part II of the African Charter on Broadcasting states in its relevant part that ‘the public service mandate of public service broadcasters should be clearly defined’.
- Article 4 of Part II of the African Charter on Broadcasting states in its relevant part that ‘[t]he editorial independence of public service broadcasters should be guaranteed’.
- Article 5 of Part II of the African Charter on Broadcasting states in its relevant part that ‘[p]ublic service broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets’.
- Article 6 of Part II the African Charter on Broadcasting states in its relevant part that ‘[w]ithout detracting from editorial control over news and current affairs content and in order to promote the development of independent productions and to enhance diversity in programming, public service broadcasters should be required to broadcast minimum quotas of material by independent producers’.
- Article VI of the African Principles of Freedom of Expression Declaration provides in its relevant part the following principles governing public service broadcasters:
 - Public broadcasters should be governed by a board which is protected from interference, particularly of a political or economic nature.
 - Editorial independence of public service broadcasters should be guaranteed.
 - Public broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets.
 - Public broadcasters should strive to ensure that their transmission system covers the whole territory of the country.
 - The public service mandate of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.
- The Dakar Declaration calls on member states of UNESCO ‘to transform State and government media into public service media and to guarantee their editorial and financial independence’.

- Principle 35.1 of the Access to the Airwaves Principles provides in its relevant part that ‘[p]ublic broadcasters should be overseen by an independent body, such as a Board of Governors’. In particular, independence should be guaranteed and protected in law:
 - Specifically and explicitly in the legislation which establishes the body and, if possible, also in the constitution
 - By clear legislative statement of goals, powers and responsibilities
 - Through the rules relating to the appointment of members
 - Through formal accountability to the public via a multiparty body
 - By respect for editorial independence
 - In funding arrangements

- Principle 35.2 of the Access to the Airwaves Principles provides in its relevant part that ‘[t]he governing body should be responsible for appointing senior management of public broadcasters and management should be accountable only to this body which, in turn, should be accountable to an elected multi-party body’.

- Principle 35.3 of the Access to the Airwaves Principles provides in its relevant part that ‘[t]he independent governing body should not interfere in day to day decision-making, particularly in relation to broadcast content, should respect the principle of editorial independence and should never impose censorship’.

- Principle 37 of the Access to the Airwaves Principles provides in its relevant part that ‘... [p]ublic broadcasters should be required to promote diversity in broadcasting in the overall public interest by providing a wide range of informational, educational, cultural and entertainment programming’. Their remit should include, among other things, a service that:
 - Provides quality independent programming that contributes to a plurality of opinions and an informed public
 - Includes comprehensive news and current affairs programming, which is impartial, accurate and balanced
 - Provides a range of broadcast material that strikes a balance between programming of wide appeal and specialised programmes that serve the needs of different audiences
 - Is universally accessible and serves all the people and regions of the country, including minority groups
 - Provides educational programmes and programmes directed towards children
 - Promotes local programme production, including through minimum quotas for original productions and material produced by independent producers.

4.4.2 Summary

- State broadcasters must be transformed into public broadcasters that serve the public.
- Public broadcasting is one of the three tiers of broadcasting services, the others being commercial and community broadcasting.
- A public broadcaster must have a clearly defined public service mandate including:
 - Providing quality, independent programming that contributes to a plurality of opinions and an informed public
 - Comprehensive news and current affairs programming, which is impartial, accurate and balanced
 - Avoiding one-sided reporting and programming, particularly during election periods
 - Providing a range of broadcast material that strikes a balance between programming of wide appeal and specialised programmes that serve the needs of different audiences
 - Is universally accessible and serves all the people and regions of the country, including minority groups
 - Providing educational programmes and programmes directed towards children
 - Promoting local programme production, including through minimum quotas for original productions and material produced by independent producers
- A public broadcaster must enjoy editorial independence.
- A public broadcaster must be run by an independent board as follows:
 - The board must operate in the public interest
 - The board must not be subject to political or economic/commercial interference
 - The board's independence must be protected in legislation and, if possible, in the constitution too
- A public broadcaster must be accountable to the legislature (a multiparty body), not to government.
- Public broadcasters must be adequately funded in a manner that protects their independence.

4.4.3 Comment

- It is particularly noteworthy that there are many African-focused international statements on the importance of independent regulation of broadcasting. This is no doubt due to recognition of the role that broadcasting plays in poor, mainly rural, countries with high rates of illiteracy. Newspapers are often not available outside of urban areas, and when they are available they are often relatively expensive and usually not published in local languages. Furthermore, the availability and cost of print media are irrelevant if the ‘audience’ cannot read. Broadcasting, particularly radio, is often the only mass means of communication in Africa due to the problems of poverty, illiteracy and lack of print media distribution outside of urban areas.
- Owing to the centrality of broadcasting in assisting African people to access news and current affairs, it is recognised that political control and manipulation of broadcasting services can severely limit citizens’ rights, such as the rights to press freedom, an independent media and access to information.
- Having public broadcasters as opposed to state broadcasters is therefore in the public interest.
- The essential aspects of public as opposed to state broadcasting include:
 - Having an independent board
 - Being accountable to a multiparty body such as a parliament, with public participation in the nominations process
 - Being editorially independent and avoiding one-sided reportingThese aspects are important in guarding against the control (and abuse) of the public broadcaster by a single (ruling) political party.

4.5 Principle 5: Availability of community broadcasting

4.5.1 Relevant provisions in international instruments

- Article 1 of Part III of the African Charter on Broadcasting provides in its relevant part that ‘[c]ommunity broadcasting is broadcasting which is for, by and about the community, whose ownership and management is representative of the community, which pursues a social development agenda, and which is non-profit’.
- Article V.2 of the African Principles of Freedom of Expression Declaration provides that ‘community broadcasting shall be promoted given its potential to broaden access by poor and rural communities to the airwaves’.

4.5.2 Summary

- Non-profit community broadcasting has the potential to broaden access to the airwaves by poor and rural communities as it pursues a social development agenda, and is owned and managed by people who are representative of the community.

4.5.3 Comment

- Community broadcasting is generally based on two models:
 - Geographic communities – that is, a community living in a particular area or location
 - Community of interest – that is, a community bound by a common interest, such as a religious community broadcaster or a youth radio station
- Community broadcasting provides an important platform for citizen empowerment given that it is not operated along commercial lines.
- It is, however, important to note that the community broadcasting stations are often beset with long-term viability concerns due to funding constraints.

4.6 Principle 6: Equitable, fair, transparent and participatory licensing processes, inclusive of frequencies

4.6.1 Relevant provisions in international instruments

- Article V.2 of the African Principles of Freedom of Expression Declaration provides in its relevant part that ‘... licensing processes shall be fair and transparent, and shall seek to promote diversity in broadcasting ...’.
- Article 3 of Part I of the African Charter on Broadcasting provides that ‘[d]ecision-making processes about the overall allocation of the frequency spectrum should be open and participatory, and ensure that a fair proportion of the spectrum is allocated to broadcasting uses’.
- Article 4 of Part I of the African Charter on Broadcasting provides that ‘[t]he frequencies allocated to broadcasting should be shared equitably among the three tiers of broadcasting’.
- Article 5 of Part I of the African Charter on Broadcasting provides that ‘[l]icensing

processes for the allocation of specific frequencies to individual broadcasters should be fair and transparent, and based on clear criteria, which include promoting media diversity in ownership and content’.

- Principle 18 of the Access to the Airwaves Principles provides in its relevant part that ‘[b]roadcasters should be required to obtain a licence to operate’.
- Principle 19.1 of the Access to the Airwaves Principles provides in its relevant part that ‘[a]ll licensing processes and decisions should be overseen by an independent regulatory body’.
- Principle 20.1 of the Access to the Airwaves Principles provides in its relevant part that ‘[t]here should be no blanket prohibitions on awarding broadcasting licences to applicants except in relation to political parties, where such a ban may be appropriate’.
- Principles 21.1 and 21.2 of the Access to the Airwaves Principles provide in their relevant parts that ‘[t]he process [for obtaining a broadcasting licence] should be fair and transparent, include clear time limits within which decisions must be made and allow for effective public input and an opportunity for the applicant to be heard ... Licence applications should be assessed according to clear criteria set out in advance in ... law or regulations ... [which] criteria should ... be objective and should include promoting a wide range of viewpoints which fairly reflects the diversity of the population and preventing undue concentration of ownership, as well as an assessment of the financial and technical capacity of the applicant’.

4.6.2 Summary

- Broadcasters must have a licence to operate.
- Licensing decisions must be made by independent broadcasting regulatory bodies.
- Licensing processes, including the licensing of radio frequency spectrum, must be:
 - Fair, open, transparent and participatory, allowing for both the public and the applicant to be heard
 - Based on clear criteria set down in law, and which ought to include the technical and financial capabilities of the applicant
 - Subject to time limits for decisions
- The aim of licensing processes is to promote diversity of ownership and content in broadcasting.

- A fair proportion of the radio frequency spectrum must be allocated to broadcasting uses and these must be shared equitably among the three tiers of broadcasting services – public, commercial and community.
- The only appropriate blanket prohibition on awarding licences is in respect of political parties.

4.6.3 Comment

- As more and more countries pass broadcasting-specific legislation, these internationally accepted standards relating to licensing processes are becoming increasingly common.
- There are still a number of countries where the actual decision to grant a licence is made by or in conjunction with the relevant minister as opposed to being made entirely by an independent broadcasting regulatory authority.

4.7 Principle 7: Universal access to broadcasting services, and equitable access to signal distribution and other infrastructure

4.7.1 Relevant provisions in international instruments

- Article 7 of Part II of the African Charter on Broadcasting provides in its relevant part that '[t]he transmissions infrastructure used by public service broadcasters should be made accessible to all broadcasters under reasonable and non-discriminatory terms'.
- Article VI of the African Principles of Freedom of Expression Declaration provides in its relevant part that '... public broadcasters should strive to ensure that their transmission system covers the whole territory of the country'.
- Principle 7.1 of the Access to the Airwaves Principles provides in its relevant part that '[t]he State should promote the necessary infrastructure for broadcast development, such as sufficient and constant electricity supply and access to adequate telecommunications services'.

4.7.2 Summary

- The state must promote infrastructure for broadcast development including:
 - Reliable electricity supply
 - Telecommunications

- Universal access must be promoted by ensuring that public broadcasting transmission or signal distribution systems cover the whole country.
- Public broadcasting transmission systems must be made available to all licensed broadcasters on reasonable and non-discriminatory terms.

4.7.3 Comment

- Broadcasting requires infrastructure: telecommunications facilities and links; signal reception and distribution facilities; and, in particular, broadcasting transmitters.
- The public broadcaster must guarantee universal access to its services owing to the importance of public broadcasting for ensuring access to news and information.
- Public broadcasting infrastructure can and should be used by other licensed broadcasters on reasonable and non-discriminatory terms so as to avoid unnecessary costs in duplicating infrastructure and to ensure diversity of available services.

4.8 Principle 8: Regulating broadcasting content in the public interest

4.8.1 Relevant provisions in international instruments

- Article 6 of Part 1 of the African Charter on Broadcasting states that ‘[b]roadcasters should be required to promote and develop local content, which should be defined to include African content, including through the introduction of minimum quotas’.
- Article VI of the African Principles of Freedom of Expression Declaration provides in its relevant part that the principles governing public service broadcasters include that ‘... the public service ambit of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods’.
- Principle 2.1 of the Access to the Airwaves Principles provides in its relevant part that ‘[t]he principle of editorial independence, whereby programming decisions are made by broadcasters on the basis of professional criteria and the public’s right to know, should be guaranteed by law ...’.
- Principle 23.3 of the Access to the Airwaves Principles provides in its relevant part

that '[a]ny content rules should be developed in close consultation with broadcasters and other interested parties and should be finalised only after public consultation'.

- Principle 23.4 of the Access to the Airwaves Principles provides in its relevant part that '[r]esponsibility for oversight of any content rules should be by [an independent] regulatory body'.
- Principle 24.2 of the Access to the Airwaves Principles provides in its relevant part that 'positive content obligations may be placed on commercial and community broadcasters but only where their purpose and effect is to promote broadcast diversity by enhancing the range of material available to the public ... Such obligations may be imposed, for example, in relation to local content and/or languages, minority and children's programming, and news'.
- Principle 29.2 of the Access to the Airwaves Principles provides in its relevant part that 'Public broadcasters have a primary obligation [to ensure that the public receive adequate information during an election period] but obligations may also be placed on commercial and/or community broadcasters ... provided ... these obligations are not excessively onerous'.
- Principle 29.3 of the Access to the Airwaves Principles provides in its relevant part that 'broadcasters are required to ensure that all election coverage is fair, equitable and non-discriminatory'.
- Principle 29.4 of the Access to the Airwaves Principles provides in its relevant part that 'any obligations regarding election broadcasting should be overseen by an independent regulatory authority'.

4.8.2 Summary

GENERAL CONTENT REGULATION

- Editorial independence, whereby programming decisions are made by broadcasters on the basis of professional criteria and the public's right to know, must be guaranteed by law.
- Content rules must be developed in close consultation with broadcasters and other interested parties, and must be finalised only after public consultation.
- Positive content obligations may be placed on commercial and community

broadcasters, but only where their purpose and effect is to promote broadcast content diversity. Such obligations may be imposed, for example, in relation to local content and/or languages, minority and children’s programming, and news.

- Oversight of any content rules, including election broadcasting obligations, must be by an independent regulatory body.

LOCAL CONTENT REGULATION

- Governments should promote local content, including African content, by introducing minimum local content quotas for broadcasting services.

ELECTION-RELATED CONTENT REGULATION

- Public broadcasters have a primary obligation to provide adequate and balanced political reporting, particularly during election periods.
- Obligations to provide information during an election period may also be imposed upon commercial and/or community broadcasters, provided the obligations are not too onerous.
- All broadcasters are required to ensure that election coverage is fair, equitable and non-discriminatory.

4.8.3 Comment

- Owing to its immediacy and often passive nature, broadcasting has always been subject to far more stringent content restrictions than the print media, which requires one to actually read it. This is not problematic provided the safeguards set out above and in Chapter 3 on internationally accepted grounds for restricting the media are adhered to.
- The problem of insufficient investment in local culture is particularly acute in respect of broadcasting due to high production costs. Nevertheless, ensuring that people have access to content which is in their home language and which is reflective of their community is important for preserving local cultures and identities, as well as for ensuring that people’s information needs are met.
- Undoubtedly, the most serious challenge in respect of broadcasting content regulation is ensuring that broadcasters provide balanced, informative public interest information during election periods. All too often political parties

(particularly ruling parties) try to ensure that broadcasters (particularly public broadcasters) play a partisan role in the government's interest rather than in the public's interest.

NOTES

- 1 http://www.unesco.org/webworld/peace_library/UNESCO/HRIGHTS/327-331.HTM [accessed 29 February 2012]
- 2 <http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf> [accessed 29 February 2012]
- 3 <http://www.unctadxi.org/sections/DITC/SADC/docs/SADC%20Regional/SADCProtocolonCulture.pdf> [accessed 29 February 2012]
- 4 http://portal.unesco.org/ci/en/files/5628/10343523830african_charter.pdf/african%2Bcharter.pdf [accessed 29 February 2012]
- 5 <http://www.afrimap.org/english/images/treaty/africa-declaration-of-principles-on-foe.pdf> [accessed 29 February 2012]
- 6 <http://www.article19.org/data/files/pdfs/standards/accessairwaves.pdf> [accessed 29 February 2012]
- 7 <http://www.itu.int/wsis/docs/geneva/official/dop.html> [accessed 29 February 2012]
- 8 <http://www.unesco.org/new/en/communication-and-information/flagship-project-activities/world-press-freedom-day/previous-celebrations/worldpressfreedomday200900000/dakar-declaration/> [accessed 29 February 2012]
- 9 <http://www.un.org/democracyfund/Docs/AfricanCharterDemocracy.pdf> [accessed 29 February 2012]
- 10 <http://www.wan-ifra.org/articles/2011/02/16/the-declaration-of-table-mountain> [accessed 29 February 2012]
- 11 <http://unesdoc.unesco.org/images/0016/001631/163102e.pdf> [accessed February 2012]

3

Media law: Pitfalls and protections for the media



In this chapter you will learn:

- The internationally accepted grounds for regulating certain forms of expression by the media
- The internationally accepted grounds for prohibiting the publication of certain forms of expression by the media
- Laws that hinder the media in performing its various roles
- Laws that assist the media in performing its various roles

1 INTRODUCTION

It is clear that freedom of the press is not absolute. This chapter looks in some detail at the internationally accepted standards for restricting the media. It outlines the legitimate grounds upon which the media can be restricted and how such restrictions are implemented.

This chapter identifies 12 instruments, charters or declarations adopted by international bodies such as the UN, the EU, and the AU, or adopted at significant conferences held under the auspices of international bodies such as UNESCO. Others have been established by NGOs with long-standing records of work in the area of freedom of expression and freedom of the press, such as the international NGO Article 19. These instruments, many of which have a particular focus on Africa, deal with, among other things, legitimate grounds for regulating certain forms of expression.

Since this handbook is aimed at journalists and other media practitioners as opposed to lawyers, the content of the instruments, charters and declarations is not set out as a whole, as these typically deal with a wide range of topics other than the media. Instead, detail is given on the key grounds upon which expression, including by the media, may be regulated, as found in the media-related provisions thereof under the different headings for the grounds.

It is also important to note that the list of instruments referred to does not purport to contain every instrument, charter or declaration relevant to democratic media restriction. Rather it is a selection of the key instruments, charters or declarations made by bodies of international standing, some of which have particular (but not exclusive) relevance to Africa.

The selected instruments, charters, protocols and declarations to be discussed are listed in the order in which they were adopted:

- **The European Convention for the Protection of Human Rights and Fundamental Freedoms:**¹ The European Convention for the Protection of Human Rights and Fundamental Freedom was adopted in 1950 under the auspices of the Council of Europe.
- **The International Convention on the Elimination of All Forms of Racial Discrimination:**² The International Convention on the Elimination of All Forms of Racial Discrimination was adopted by the UN General Assembly in 1965 and came into force in 1969.
- **The International Covenant on Civil and Political Rights:**³ The ICCPR was adopted by the UN General Assembly in 1966 and came into force in 1976.
- **The American Convention on Human Rights:**⁴ The American Convention on Human Rights, otherwise known as the Pact of San José, was adopted by the nations of the Americas in 1969 and came into force in 1978.
- **The Johannesburg Principles:**⁵ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information were adopted in October 1995 by a panel of experts in international law, national security and human rights, and convened by Article 19, the International Centre Against Censorship and the Centre for Applied Legal Studies of the University of the Witwatersrand. The Johannesburg Principles have been endorsed by the UN Committee on Human Rights and the UN Special Rapporteur on Freedom of Opinion and Expression.
- **The African Charter on Broadcasting:**⁶ The African Charter on Broadcasting was adopted in 2001 by participants at a UNESCO conference to mark the 10th anniversary of the Windhoek Declaration. While the Windhoek Declaration focuses mainly on the print media, the African Charter on Broadcasting focuses on the broadcast media.
- **The African Principles of Freedom of Expression Declaration:**⁷ The Declaration

of Principles on Freedom of Expression in Africa was adopted in 2002 by the African Commission on Human and Peoples' Rights, a body established under the auspices of the AU.

- **The WSIS Geneva Principles:**⁸ The WSIS Geneva Principles were adopted in Geneva in 2003 at the World Summit on the Information Society (WSIS) held by the UN in conjunction with the International Telecommunications Union. While the WSIS Geneva Principles cover mainly issues concerning universal access to ICTs, they do contain some important statements on the media more generally.
- **The Dakar Declaration:**⁹ The Dakar Declaration was adopted in Senegal in 2005 by a UNESCO-sponsored World Press Freedom Day conference.
- **The Table Mountain Declaration:**¹⁰ The Table Mountain Declaration was adopted in 2007 by the World Association of Newspapers and the World Editors Forum. It contains a number of important statements on African media issues made by a civil society forum of newspaper publishers and editors.
- **UNESCO's Media Development Indicators:**¹¹ UNESCO's International Programme for the Development of Communications published a document in 2008 entitled 'Media Development Indicators: A Framework for Assessing Media Development'. This set of indicators clearly articulates appropriate grounds for limiting the media's freedom of expression.
- **The Camden Principles on Freedom of Expression and Equality:**¹² The Camden Principles on Freedom of Expression and Equality were prepared by Article 19 on the basis of an international conference held in 2009 to discuss freedom of expression and equality issues. They aim to promote greater consensus about the proper relationship between freedom of expression and the promotion of equality.

After reviewing the relevant instruments, charters, protocols and declarations, the chapter takes a closer look at media law itself and examines the kinds of laws that hinder the media when reporting on news and current affairs, as well as the kinds of laws that assist the media in performing its functions. This lays the basis for the chapters that follow, which deal with the media laws applicable to specific Southern African countries.

2 RESTRICTING FREEDOM OF EXPRESSION

This section looks at the international standards for restricting freedom of expression generally. It does not identify specific types of expression that are legitimate to

regulate or restrict; instead, it focuses on the manner in which expression may be legitimately regulated or restricted, and what kinds of interference or restrictions are illegitimate, or not, according to internationally accepted standards. The specific grounds for restriction are examined in the next section.

2.1 Relevant provisions in international instruments

- Article 3 of the American Convention provides that '[t]he right to freedom of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communications and circulation of ideas and opinions'.
- Article II(2) of the African Principles of Freedom of Expression Declaration provides that '[a]ny restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society'.
- Article XIII(1) of the African Principles of Freedom of Expression Declaration provides that '[s]tates shall review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society'.
- The Dakar Declaration calls upon member states to 'repeal criminal defamation laws and laws that give special protections to officials and institutions'.
- The Dakar Declaration 'condemns all forms of repression of African media that allows for banning of newspapers and the use of other devices such as levying of import duties on newsprint and printing materials ...'.
- The UNESCO Media Development Indicators provide that 'restrictions upon freedom of expression ... should be clear and narrowly defined in law and justifiable as necessary in a democratic society in accordance with international law and that such laws should be subject to a public interest override where appropriate'.
- The UNESCO Media Development Indicators provide that the state 'may not place unwarranted legal restrictions on the media such as legal provisions dictating who may practice journalism or requiring the licensing or registration of journalists'.
- The UNESCO Media Development Indicators provide that neither broadcasting nor print content may be 'subject to prior censorship, either by government or by

regulatory bodies’, and require that ‘sanctions for breaches of regulatory rules relating to content are applied only after the material has been broadcast or published’.

- The UNESCO Media Development Indicators provide that there can be no ‘explicit or concealed restrictions upon access to newsprint, to distribution networks or printing houses’.
- Principle 11 of the Camden Principles provides that states should not impose any restrictions on freedom of expression ‘... [unless these are] provided by law’ and ‘[are] necessary in a democratic society to protect [legitimate] interests. This implies ... that restrictions [must be]’:
 - Clearly and narrowly defined and respond to a pressing social need
 - The least intrusive measure available in the sense that there is no other measure which would be effective and yet less restrictive of freedom of expression
 - Not overbroad in the sense that they must not restrict speech in a wide or untargeted way or beyond the scope of harmful speech and rule out legitimate speech
 - Proportionate in the sense that the benefit to the protected interest outweighs the harm to freedom of expression, including in respect to the sanctions they authorise

2.2 Summary

- The right to freedom of expression may not be restricted by indirect methods, in particular by:
 - The abuse of control over access to media-related materials such as newsprint, printing materials, printing facilities, distribution networks, radio broadcasting frequencies and equipment, including through the imposition of import duties and other means
 - Requiring the licensing or registration of journalists
- Legitimate restrictions on freedom of expression must be clearly set down in law and must:
 - Be narrowly defined and targeted
 - Serve a legitimate interest. In other words, serve a pressing social need (these legitimate interests or social needs are dealt with in the next section)
 - Be necessary in a democratic society
 - Be the least intrusive measure available

- Be proportionate
 - Be in accordance with international law
 - Be subject to a public interest override where appropriate
- Illegitimate legal restrictions on freedom of expression include those that:
- Require prior censorship. In other words, a process of approval of content by a government or regulatory body prior to publication. (Although, as will be dealt with in more detail in the next section, there are certain limited circumstances when prior censorship would be acceptable, namely, to determine age restrictions for films or during wartime or a state of emergency)
 - Give special protections to officials and institutions

2.3 Comment

- One of the most important aspects to bear in mind is that the tests for determining whether or not a media restriction is legitimate, which are set out above, are objective. This means that a court can enquire as to whether or not there is or was, in reality, a genuine pressing social need for the restriction of the publication of information by the media. Consequently, laws that allow for officials to restrict publication of information by the media based on their ‘opinion’ as to, for example, whether or not there is a pressing social need for such restrictions, would not be legitimate. This is important as many national laws allow for officials (particularly in the security forces or elsewhere in the executive) to restrict the publication of information by the media on the mere say so of these officials without there being any requirement of an objective pressing social need. Needless to say, such national laws are not in accordance with internationally accepted standards for restricting the media.
- It is important to bear in mind that the cumulative tests for a legitimate restriction on the media’s right to publish or broadcast information are that the restriction must be clearly set down in law and must:
- Be narrowly defined and targeted
 - Serve a legitimate interest, that is, serve a pressing social need
 - Be necessary in a democratic society
 - Be the least intrusive measure available
 - Be proportionate
 - Be in accordance with international law
 - Be subject to a public interest override where appropriate

These tests apply in relation to every instance of such a restriction. Consequently, when reading the next section setting out pressing social concerns constituting

legitimate grounds for such restrictions, one needs to bear in mind that this is just one of the tests and that all the others must be present at all times for such restrictions to be legitimate.

3 REGULATING AND PROHIBITING THE DISSEMINATION OF CERTAIN FORMS OF EXPRESSION BY THE MEDIA

It was noted in the previous section that states must have legitimate grounds for regulating and restricting freedom of expression, including by the media. This section looks at the 14 internationally accepted specific grounds for such regulations or restrictions. These are the 14 grounds upon which there is broad international agreement on the legitimacy of restricting the media's publication of such content or otherwise regulating the media. Each ground is dealt with, setting out the relevant provisions of the applicable international instruments, statements and declarations. A summary and/or comment are provided where necessary.

The 14 legitimate grounds for regulating, including the prohibition of, the dissemination of certain forms of expression by the media, are:

- Licensing and regulation of broadcasting and cinema
- Protection of reputations
- Protection of rights of others generally
- Protection of privacy
- Obscenity and the protection of children and morals
- Propaganda for war
- Hate speech or discriminatory speech
- National security or territorial integrity
- War or state of emergency
- Protection of public order or safety
- Protection of public health
- Maintaining the authority and impartiality of the judiciary
- For the prevention of crime
- Preventing the disclosure of information received in confidence

3.1 Legitimate licensing and regulation of broadcasting and cinema

3.1.1 Relevant provisions in international instruments

Article 10(1) of the European Convention on Human Rights specifically provides that that article, which protects the right to freedom of expression, 'shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises'.

3.1.2 Comment

Although this restriction is mentioned in only one international instrument, it is important to note that a licensing requirement in respect of broadcasting (television or radio) or cinema enterprises is not, without more, an abuse of the media's right to disseminate information to the public. Indeed, as broadcast media in Africa generally makes use of a scarce and finite natural resource, namely the radio frequency spectrum (because cable broadcasting is not widely used in Africa), licensing is essential to avoid inevitable interference, which would result in no broadcast media being available to the public. Without licensing, it would be impossible to regulate the use of the radio frequency spectrum effectively, and the level of radio interference would be such that no one would be able see or hear any broadcasting service at all.

3.2 Protecting reputations

3.2.1 Relevant provisions in international instruments

- Article 10(2) of the European Convention on Human Rights specifically provides in its relevant part that freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation ... of others ...'.
- Article 19(3)(a) of the ICCPR specifically provides in its relevant part that the exercise of the right to freedom of expression 'may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of the ... reputations of others'.
- Article 2(a) of the American Convention provides that the right to freedom of expression 'shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure respect for the ... reputations of others'.
- Article XII(1.) of the African Principles of Freedom of Expression Declaration provides in its relevant part that '[s]tates should ensure that their laws relating to defamation conform to the following standards':
 - No one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances.
 - Public figures shall be required to tolerate a greater degree of criticism.
 - Sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.

- The Dakar Declaration provides in its relevant part that it calls on member states to ‘repeal criminal defamation laws and laws that give special protections to officials and institutions’.
- The Table Mountain Declaration provides that African states must abolish ‘insult and criminal defamation laws’.
- UNESCO’s Media Development Indicators provide that defamation laws must ‘impose the narrowest restrictions necessary to protect the reputation of individuals’. In this regard, UNESCO’s Media Development Indicators set out the characteristics of appropriate defamation laws, including that:
 - They do not inhibit public debate about the conduct of officials or official entities
 - They provide for sufficient legal defences such as:
 - The statement was an opinion not an allegation of fact
 - The publication/broadcasting was reasonable or in the public interest
 - That it occurred during a live transmission
 - That it occurred before a court or elected body
 - They provide for a regime of remedies that allow for proportionate responses to the publication or broadcasting of defamatory statements
 - The scope of defamation laws is defined as narrowly as possible, including as to who may sue
 - Defamation law suits cannot be brought by public bodies, whether legislative, executive or judicial
 - The burden of proof falls upon the plaintiff in cases involving the conduct of public officials and other matters of public interest
 - There is a reasonable cut-off date, after which plaintiffs can no longer sue for an alleged defamation

3.2.2 Summary

- While protecting the reputations of others is a legitimate ground for regulating or even prohibiting expression by the media, laws relating to defamation:
 - Must not:
 - Criminalise defamation but instead ought to impose post-publication civil sanctions, such as damages awards
 - Inhibit public debate about the conduct of officials or official entities who are required to tolerate a greater degree of criticism than ordinary members of the public

- Allow defamation law suits to be brought by public bodies, whether legislative, executive or judicial
- **Must:**
 - Provide for legal defences to a defamation suit including that:
 - The statement was true and was made in the public interest
 - The statement was an opinion not an allegation of fact
 - Publication/broadcasting was reasonable or in the public interest
 - It occurred during a live transmission
 - It occurred before a court or elected body
 - Provide for a range of appropriate and proportionate remedies for the publication of defamatory material
 - Ensure the burden of proof falls upon the plaintiff in cases involving the conduct of public officials and other matters of public interest
 - Ensure there is a reasonable cut-off period, after which plaintiffs can no longer sue for an alleged defamation

3.2.3 Comment

- A summary of the contours of internationally accepted standards for defamation law clearly lays out a progressive vision which puts the public interest ahead of the reputations of, particularly, public figures. The reality, however, is that most Southern African countries' defamation laws fall far short of these standards, as will be seen in the country chapters.

3.3 Protecting the rights of others generally

3.3.1 Relevant provisions in international instruments

- Article 10(2) of the European Convention on Human Rights specifically provides in its relevant part that freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the ... rights of others ...'.
- Article 19(3)(a) of the ICCPR specifically provides in its relevant part that the exercise of the right to freedom of expression 'may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of the rights ... of others.'

- Article 58 of the WSIS Geneva Principles provides that ‘[t]he use of ICTs and content creation should respect human rights and fundamental freedoms of others, including ... the right to freedom of thought, conscience and religion in conformity with relevant international instruments’.

3.3.2 Comment

- The wording of this ground is extremely vague and usually will be subsumed under other more specific grounds, such as reputation, privacy or morality. It is included here because it features in at least three international instruments.

3.4 Protecting privacy

3.4.1 Relevant provisions in international instruments

- Article XII(2) of the Principles of African Freedom of Expression Declaration provides that privacy laws ‘shall not inhibit the dissemination of information of public interest’.
- Article 58 of the WSIS Geneva Principles provides that ‘[t]he use of ICTs and content creation should respect human rights and fundamental freedoms of others, including personal privacy ... in conformity with relevant international instruments’.
- The UNESCO Media Development Indicators provide that ‘restrictions upon freedom of expression ... based on ... privacy ... should be clear and narrowly defined in law and justifiable as necessary in a democratic society in accordance with international law and that such laws should be subject to a public interest override where appropriate’.

3.4.2 Comment

- Public figures, particularly in government, have less reason for claiming a right to privacy due to the public nature of their chosen positions.

3.5 Regulating obscenity and protecting children and morals

3.5.1 Relevant provisions in international instruments

- Article 10(2) of the European Convention on Human Rights specifically provides in its relevant part that freedom of expression ‘may be subject to such formalities,

conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of ... morals ...’.

- Article 19(3)(b) of the ICCPR specifically provides in its relevant part that the exercise of the right to freedom of expression ‘may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for the protection of ... morals ...’.
- Article 2(b) of the American Convention provides in its relevant part that the right to freedom of expression ‘shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure ... the protection of ... morals’.
- Article 3 of the American Convention specifically provides that ‘public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence’.
- Article 59 of the WSIS Geneva Principles provides that ‘[a]ll actors in the Information Society should take appropriate actions and preventive measures as determined by law, against abusive uses of ICTs such as ... all forms of child abuse, including paedophilia and child pornography, and trafficking in, and exploitation of, human beings’.
- The UNESCO Media Development Indicators provide that ‘restrictions upon freedom of expression ... based on ... obscenity should be clear and narrowly defined in law and justifiable as necessary in a democratic society in accordance with international law and that such laws should be subject to a public interest override where appropriate’.

3.5.2 Summary

- While protecting children and morality are both legitimate grounds for regulating or even prohibiting expression, particularly of obscene materials, by the media, this cannot prevent the publication of information in the public interest.
- Regulating access to public entertainments (such as films, whether to be shown in cinemas or broadcast) to prevent access for the moral protection of children and adolescents is a legitimate ground for prior censorship. In other words, a government or regulatory body can rule on whether or not and, if so, how the publication or exhibition of public entertainments is to take place – for example, imposing age restrictions on films.

3.5.3 Comment

- Some of the international instruments are contradictory on the issue of prior censorship of materials – that is, approval of content prior to publication by a governmental official or regulatory agency. However, most countries have national laws that regulate obscene materials or materials aimed at children through some system of prior censorship.
- Many countries are moving away from regulating the publication or broadcasting of materials based on the ground of ‘morality’ due to the difficulty of setting a national standard for morality. This is often a highly subjective matter, particularly in multicultural societies.

3.6 Propaganda for war

3.6.1 Relevant provisions in international instruments

- Article 20(1) of the ICCPR provides that ‘[a]ny propaganda for war shall be prohibited by law’.
- Article 5 of the American Convention provides in its relevant part that ‘[a]ny propaganda for war ...’ shall be considered an offence punishable by law.

3.6.2 Summary

- Propaganda for war is prohibited and engaging therein is an offence.

3.6.3 Comment

- It is interesting to note that the international instruments use exceptionally strong language in relation to propaganda for war. This is not just content which governments may legitimately restrict; indeed, governments are required to prohibit such content and to make the publication thereof an offence.

3.7 Hate speech or discriminatory speech

3.7.1 Relevant provisions in international instruments

- Article 4(a) of the Convention on the Elimination of Racial Discrimination provides in its relevant part ‘[s]tates parties condemn all propaganda ... which ... [is] based on ideas or theories of superiority of one race or group of one colour

or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to ... such discrimination and to this end ... [s]hall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin ...’.

- Article 20(2) of the ICCPR provides that ‘[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’.
- Article 5 of the American Convention provides in its relevant part that ‘... any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law’.
- Article 59 of the WSIS Geneva Principles provides that ‘[a]ll actors in the Information Society should take appropriate actions and preventive measures, as determined by law, against abusive uses of ICTs, such as illegal and other acts motivated by racism, racial discrimination, xenophobia, and related intolerance, hatred, violence ...’.
- The UNESCO Media Development Indicators provide that ‘restrictions upon freedom of expression ... based on ... hate speech ... should be clear and narrowly defined in law and justifiable as necessary in a democratic society in accordance with international law and that such laws should be subject to a public interest override where appropriate’.
- Principle 12 of the Camden Principles provides that states ‘should adopt legislation prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’.

3.7.2 Summary

- Hate speech is the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.
- Discriminatory speech is propagating the idea of the superiority of one race or group of one colour or ethnic origin.

- Dissemination of hate or discriminatory speech should be an offence.
- Preventing hate speech or discriminatory speech are both legitimate grounds for regulating or even prohibiting expression by the media.

3.7.3 Comment

- As was the case for propaganda for war, the international community uses particularly strong language in relation to hate speech or discriminatory speech, and it requires that the dissemination of these be made an offence under national law.
- When considering how a particular country deals with hate speech restrictions, it is important to be aware that while hate speech can be, and often is, regulated in ordinary laws, it is also sometimes included in constitutions as an exception to the right to freedom of expression itself. Note, however, that this is not required by the international instruments that deal with this issue.

3.8 Protection of national security or territorial integrity

3.8.1 Relevant provisions in international instruments

- Article 10(2) of the European Convention on Human Rights specifically provides in its relevant part that freedom of expression ‘may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security [and] territorial integrity ...’.
- Article 19(3)(b) of the ICCPR specifically provides in its relevant part that the exercise of the right to freedom of expression ‘may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for the protection of national security ...’.
- Article 2(b) of the American Convention provides that the right to freedom of expression ‘shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure ... the protection of national security ...’.
- Principles 1(c) and (d) read together with principles 2(a) and (b) and Principle 6 of the Johannesburg Principles provide that the exercise of the right to freedom of expression ‘may be subject to restrictions ... for the protection of national security. No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that

the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restrictions rests with the government ... A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government. In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology or to suppress industrial unrest'.

- Principle 23 of the Johannesburg Principles provides that '[e]xpression shall not be subject to prior censorship in the interest of protecting national security, except in a time of public emergency which threatens the life of the country ...'.
- Article XIII(2) of the Principles of African Freedom of Expression Declaration provides that '[f]reedom of expression should not be restricted on ... national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression'.
- The UNESCO Media Development Indicators provide that 'restrictions upon freedom of expression ... based on ... national security ... should be clear and narrowly defined in law and justifiable as necessary in a democratic society in accordance with international law and that such laws should be subject to a public interest override where appropriate'.
- The UNESCO Media Development Indicators provide that 'national security restrictions must not inhibit public debate about issues of public concern'.

3.8.2 Summary

- Protecting national security or territorial integrity are both legitimate grounds for regulating or even prohibiting expression by the media. This cannot inhibit public debate on matters of public concern.
- Restricting the media's right to freedom of expression on the basis of a national security interest is not legitimate:

- Unless it can be shown that:
 - The restriction will protect a country's existence or its territorial integrity against the threat of force, whether external or internal
 - There is a causal link between the expression and the risk of the threat of force

- If it protects interests unrelated to national security, including, for example:
 - Protecting a government from embarrassment or exposure of wrongdoing
 - Concealing information about the functioning of its public institutions
 - Entrenching a particular ideology
 - Suppressing industrial unrest

3.8.3 Comment

- It is interesting to note that the international instruments go into a great deal of detail as to when resorting to a 'national interest' restriction would not be legitimate. This is undoubtedly due to the history of the near-systematic abuse of this otherwise legitimate ground for media restriction by many government officials, particularly in the security forces.

- It is noteworthy that the international instruments detail the nature of the threat to national security and its relationship to the proposed restricted expression that must exist before such a ground will be legitimate.

- Very few national laws, particularly in Southern African countries, comply with these requirements.

3.9 War or state of emergency

3.9.1 Relevant provisions in international instruments

- Article 15(1) of the European Convention on Human Rights provides that '[i]n a time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'.

- Article 27(1) of the American Convention provides in its relevant part that ‘[i]n a time of war, public danger or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation ...’.
- Principle 3 of the Johannesburg Principles provides that ‘[i]n time of public emergency which threatens the life of the country and the existence of which is officially and lawfully proclaimed in accordance with both national and international law, a state may impose restrictions on freedom of expression and information but only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government’s other obligations under international law’.
- Principle 23 of the Johannesburg Principles provides that ‘[e]xpression shall not be subject to prior censorship in the interest of protecting national security, except in a time of public emergency which threatens the life of the country ...’.
- The UNESCO Media Development Indicators expressly provide that laws must ‘not allow state actors to seize control of broadcasters during an emergency’.

3.9.2 Summary

- War or a state of emergency are both legitimate grounds for regulating or even prohibiting expression by the media, including by means of prior censorship, provided that this is done only for the period of time strictly necessary in the circumstances.
- Emergency laws must not allow state actors to seize control of broadcasters during an emergency.

3.9.3 Comment

- Comments are confined to the state of emergency ground.
- Many governments abuse emergency powers and use these to stifle dissent rather than to protect the population. One of the most important aspects of the internationally articulated standards for emergency restrictions is the requirement that these last for a limited period only. Consequently, states of emergency that are said to be ‘indefinite’, or which in practice last for years or decades, clearly do not meet international standards of legitimacy.

- Another noteworthy aspect is the requirement that emergency laws not allow state organs to seize control of broadcasters during an emergency. Many national broadcasting laws allow for broadcasters to be required to broadcast public service announcements by government during public emergencies. This is obviously very different from governments taking over a broadcaster altogether.

3.10 Protection of public order or safety

3.10.1 Relevant provisions in international instruments

- Article 10(2) of the European Convention on Human Rights specifically provides in its relevant part that freedom of expression ‘may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of ... public safety ... [and] for the prevention of disorder ...’.
- Article 19(3)(b) of the ICCPR specifically provides in its relevant part that the exercise of the right to freedom of expression ‘may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for the protection of ... public order ...’.
- Article 2(b) of the American Convention provides that the right to freedom of expression ‘shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure the protection of ... public order ...’.
- Article XIII(2) of the Principles of African Freedom of Expression Declaration provides that ‘[f]reedom of expression should not be restricted on public order ... grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression’.

3.10.2 Summary

- Protecting public order or public safety are both legitimate grounds for regulating or even prohibiting expression by the media, provided there is a real risk to public order or public safety, and there is a close causal link between the risk of harm and the expression.

3.10.3 Comment

- As is the case with emergency provisions, governments often abuse the grounds of

public order or public safety to restrict the publication of legitimate expressions of dissent. National laws often do not comply with internationally articulated standards in regard to these grounds.

3.11 Protection of public health

3.11.1 Relevant provisions in international instruments

- Article 10(2) of the European Convention on Human Rights specifically provides in its relevant part that freedom of expression ‘may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of health ...’.
- Article 19(3)(b) of the ICCPR specifically provides in its relevant part that the exercise of the right to freedom of expression ‘may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for the protection of ... public health ...’.
- Article 2(b) of the American Convention provides that the right to freedom of expression ‘shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure the protection of ... public health ...’.

3.11.2 Summary

- Protecting public health is a legitimate ground for regulating or even prohibiting expression by the media.

3.12 Maintaining the authority and impartiality of the judiciary

3.12.1 Relevant provisions in international instruments

- Article 10(2) of the European Convention on Human Rights specifically provides in its relevant part that freedom of expression ‘may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for maintaining the authority and impartiality of the judiciary ...’.
- The UNESCO Media Development Indicators provide that ‘restrictions upon freedom of expression ... based on ... contempt of court laws ... should be clear and narrowly defined in law and justifiable as necessary in a democratic society in

accordance with international law', and that such laws should be subject to a public interest override where appropriate.

3.12.2 Summary

- Maintaining the authority and impartiality of the judiciary is a legitimate ground for regulating or even prohibiting expression by the media.

3.12.3 Comment

Generally, the authority and impartiality of the judiciary is maintained legally through contempt of court laws, which are made up of two aspects:

- *The rule against scandalising the court:* This is where attacks on the judiciary are such that they undermine the administration of justice. This obviously goes far beyond fair and reasonable comment and criticism of judgments and judges which does not undermine the administration of justice.
- *The sub judice rule:* This is where the outcome of a judicial proceeding is effectively preempted or prejudiced through the publication of information which also undermines the administration of justice.

3.13 For the prevention of crime

- Article 10(2) of the European Convention on Human Rights specifically provides in its relevant part that freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the prevention of ... crime ...'.

3.14 Prevent the disclosure of information received in confidence

- Article 10(2) of the European Convention on Human Rights specifically provides in its relevant part that freedom of expression 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for preventing the disclosure of information received in confidence ...'.

4 LAWS THAT HINDER THE MEDIA IN PERFORMING ITS ROLE

The kinds of laws that hinder the media are those that do not comply with internationally accepted standards for:

- Democratic media regulation
- Democratic broadcasting regulation
- Restricting publication or broadcasting by the media

Consequently, it is difficult to give a definitive or even comprehensive list of the kinds of laws that hinder the media. Nevertheless, ten examples are given of laws that are commonly seen as hindering the media's role of providing news and information in the public interest. These are laws that:

- Unreasonably restrict market entry – that is, which act as a barrier to establishing independent media sources
- Provide for prior censorship
- Favour individual rights, particularly of public officials, over the public's right to know
- Do not comply with internationally accepted restrictions upon the publication of obscene materials
- Do not comply with internationally accepted restrictions upon the publication of propaganda for war or hate speech
- Do not comply with internationally accepted restrictions upon the publication of information which threatens national security, territorial integrity and public order
- Do not comply with internationally accepted restrictions upon the publication of information which threatens law enforcement
- Provide for indefinite states of emergency
- Do not comply with internationally accepted restrictions upon the publication of information which undermines the judiciary
- Criminalise defamation

4.1 Laws that unreasonably restrict market entry

Governments that are not media friendly often enact (or deliberately fail to repeal) laws which require journalists or newspapers to be registered or licensed prior to

operation. Often such laws directly or indirectly require government approval of the journalist or media house in question before such licences or registration will be granted. This acts as a clear barrier to establishing independent media sources and a professional cadre of journalists in a country.

Note that licensing is in fact required in respect of broadcasting due to the need to regulate frequency spectrum use effectively.

4.2 Laws that provide for prior censorship

Any law that provides for a government or regulatory body to determine, prior to publication, whether or not information ought to be published by the media is obviously an enormous threat to the media and hinders the performance of its roles. Prior censorship laws should be very carefully drafted to ensure that they meet internationally accepted standards, such as being limited to determining age restrictions for films to be shown on circuit or broadcast.

4.3 Laws that favour individual rights, particularly of public officials, over the public's right to know

In an effort to guard against embarrassing public revelations in the media, governments sometimes enact (or deliberately fail to repeal) laws which provide a great deal of protection for private and even public figures at the expense of the media's right to publish or broadcast and the public's right to know.

Thus, criminal defamation laws, insult laws or civil defamation laws – whether provided for in a statute or in the common law, as determined by the judiciary – that do not comply with internationally accepted standards for laws protecting privacy or reputations, or the rights of others hinder the media greatly in its operations.

Not only is the media threatened with damages awards but these laws often make publication an offence, with a potential prison sentence or heavy fine as a sanction. Even if such 'punishment' does not occur, these kinds of laws have a chilling effect on newsrooms as journalists, editors, owners and publishers try to avoid falling foul of the law. This can lead to self-censorship, whereby the media fails to publicise the full story in order to guard against potential liability.

4.4 Laws that do not comply with internationally accepted restrictions upon the publication of obscene materials

Generally, the mainstream media does not often fall foul of laws that regulate

obscenity, morality or which aim at protecting children. However, in the recent past, there have been a number of examples in Africa where obscenity laws have been invoked by officials to try to prevent the publication of news and information that is clearly in the public interest.

In one instance, a journalist who was working on a story about the state of public health care in Zambia faced obscenity charges for circulating to public officials (not even publishing) photographs of a woman giving birth on the pavement outside a hospital.

Obscenity laws that are drafted loosely and not in accordance with universally accepted standards can be abused to prevent the publication of material that is clearly in the public interest.

4.5 Laws that do not comply with internationally accepted restrictions upon the publication of propaganda for war or hate speech

Although one generally associates the passage of hate speech legislation with progressive governments anxious to protect citizens from racism or other discrimination, governments have made, and sometimes do make, use of such legislation to stifle dissent and prevent the publication of material in the public interest.

4.6 Laws that do not comply with internationally accepted restrictions upon the publication of information which threatens national security, territorial integrity and public order

Unfortunately, governments often confuse national security with government popularity. Thus, a threat to a government's standing or popularity among citizens is seen as a threat to 'national security' or 'public order'. This means that governments often abuse the legitimate grounds for limiting media expression of national security or territorial integrity for their own, as opposed to the public's, interests.

Unfortunately, a large number of national laws relating to security issues – such as defence, intelligence, classified information, terrorism and the like – often do not comply with internationally accepted standards for such legislation, which standards have been set out chapters 1 and 2.

Security laws prohibiting the publication of information on these grounds, and which do not comply with such standards, hinder the media's work enormously as they:

- Prohibit the publication of information that the public ought to know about
- Often provide for stiff penalties, including criminal sanctions such as fines or jail sentences

4.7 Laws that do not comply with internationally accepted restrictions upon the publication of information which threatens law enforcement

As is the case with laws relating to national security, laws that restrict media publication in order to prevent crime, but which do not comply with internationally accepted standards for these kinds of laws, can harm the media. Sometimes laws relating to policing, prosecutorial bodies, criminal procedure and other administration of justice matters contain unreasonable restrictions upon the publication of information. Furthermore, they sometimes contain provisions that require journalists to divulge confidential sources of information without any of the internationally accepted safeguards. Clearly, these kinds of laws hinder the media.

4.8 Laws that provide for indefinite states of emergency

Internationally, the ability of governments to restrict the media during a time of national crisis, such as a state of emergency, is widely recognised. However, this is subject to a set of clearly specified internationally agreed requirements. Unfortunately, many governments abuse so-called emergency powers. Perhaps the worst such abuse is the indefinite state of emergency that lasts for years, sometimes even decades. States of emergency and freedom of the press are largely incompatible. The media therefore has very little space within which to operate in countries with ongoing states of emergency. Needless to say, enormous damage is done to the independent media, with dangerous consequences for democracy and social development.

4.9 Laws that do not comply with internationally accepted restrictions upon the publication of information which undermines the judiciary

As a general rule it is rare that the judiciary acts in such a way as to unreasonably prevent the media from publishing information in the public interest. However, laws such as the *sub judice* rule in common law can be abused in ways that harm the media and prevent it from carrying out its functions.

For example, sometimes public officials involved in court proceedings cite the *sub judice* rule as a reason for providing no information to the media, even if the case is on a matter of public importance and the publication of information would not prejudice the outcome of the case.

4.10 Laws that criminalise defamation

Although many Southern African countries continue to have criminal defamation laws on their statute books, it is important to note that international best practice standards clearly indicate that the most appropriate way of protecting against defamation is through civil sanctions, such as damages awards, rather than criminal sanctions such as imprisonment.

5 LAWS THAT ASSIST THE MEDIA TO PERFORM ITS VARIOUS ROLES

The kinds of laws that assist the media are those that comply with internationally accepted standards for:

- Democratic media regulation
- Democratic broadcasting regulation
- Restricting publication or broadcasting by the media

There are also other kinds of laws that greatly assist the media, if only indirectly, in its day to day operations, as well as in terms of building long-term support for media freedom.

While it is difficult to give a definitive or even comprehensive list of the kinds of laws that assist the media, seven types of laws have been selected, which are commonly seen as supporting the functioning of the media, namely:

- Constitutions
- Laws that comply with internationally accepted standards for democratic media regulation
- Laws that comply with internationally accepted standards for democratic broadcasting regulation
- Laws that comply with internationally accepted standards for restricting publication or broadcasting by the media
- Access to information legislation
- Whistleblower protection or anti-corruption laws
- Laws that establish independent bodies to act in the public interest

5.1 Constitutions

One of the most important laws in relation to the media is, of course, a constitution. A constitution that contains a number of provisions and is the supreme law (that is, it takes precedence over national laws) provides a level of institutional protection and safety for the media, which greatly increases the media's ability to perform its roles effectively. These provisions include the following:

- The right to freedom of expression, including freedom of the press and other media, should be enshrined in a bill of rights. In addition, this right ought not to be subject to specific internal limitations on the right itself, but rather ought to be subject to a general limitations clause that allows for rights to be limited, provided this is necessary and justifiable in an open and democratic society.
- The right of access to information, whether held by the state or by private bodies, should be enshrined in a bill of rights.
- The right to administrative justice, including the right to procedurally fair administrative action and to written reasons for administrative action, should be enshrined in a bill of rights.
- The independence of the broadcasting regulatory authority and the need for it to act in the public interest ought to be specifically guaranteed in constitutional provisions.
- The independence of the public broadcaster and the fact that it is to act in the public interest ought to be specifically guaranteed in constitutional provisions.
- An independent judiciary that has the final say over the legal interpretation of the provisions of the constitution should be provided for in the constitution.
- General public watchdog bodies to protect the public from abuses of power and to preserve constitutional values should be established by the constitution. Bodies that can perform these roles include human rights commissions, public protectors or a public ombudsman.

5.2 Laws that comply with internationally accepted standards for democratic media regulation

If all laws that regulate the media generally comply with internationally accepted standards for democratic media regulation (set out in Chapter 2), this will assist the media to perform its roles effectively by:

- Ensuring that regulation does not result in the public being unreasonably denied access to news and information in the public interest
- Ensuring a media environment that supports values such as diversity, independence, freedom of expression and of the press, and professionalism in the media

5.3 Laws that comply with internationally accepted standards for democratic broadcasting regulation

If all laws that regulate broadcasting comply with internationally accepted standards for democratic broadcasting regulation (set out in Chapter 2), this will assist the broadcast media to perform its roles effectively, including through guaranteeing:

- A public as opposed to a state broadcaster
- An independent broadcasting regulator
- A diverse range of broadcasting services: public, commercial and community

5.4 Laws that comply with internationally accepted standards for restricting publication or broadcasting by the media

If all laws that restrict what the media may publish or broadcast were to comply with internationally accepted standards for restricting publication or broadcasting by the media (set out previously in this chapter), this will assist the media to perform its roles effectively by ensuring that regulation does not result in the public being unreasonably denied access to news and information in the public interest.

5.5 Access to information legislation

One of the most useful pieces of legislation for any journalist or media institution is access to information legislation. Typically, an access to information law grants any person (including the media) the right to access information held by public authorities. Where the information is needed to exercise or protect a right, access to information laws may also provide for this right of access to information to be extended to information held by private bodies or persons too. This kind of law is particularly useful for investigative journalists.

Access to information statutes almost always provide for grounds upon which disclosure of the information or access to the records requested can be denied. Generally, these grounds are there to protect important societal interests, such as crime prevention, national security, privacy or information provided in confidence.

Progressive access to information laws will contain a public interest override clause, allowing for the information to be disclosed if there is an overwhelming public interest in the information being made public (for example, if this will provide evidence of a crime or public wrongdoing), even if the information falls within one of the grounds for non-disclosure.

Furthermore, such laws usually allow for internal appeals against refusals to provide the information requested, as well as for access to the courts to challenge a refusal to disclose information.

5.6 Whistleblower protection or anti-corruption laws

Other laws that are often particularly useful for journalists are statutes designed to promote good governance by supporting anti-corruption measures. Thus, anti-corruption statutes or statutes that provide ‘whistleblower’ protection for those who alert the authorities (or the media) to public wrongdoing, particularly criminal activities by public officials, help to provide an environment in which the media is able to access sources of public interest information without those sources suffering abuse or retaliation as a result.

5.7 Laws that establish independent bodies to act in the public interest

Sometimes laws are passed to establish bodies that are aimed at supporting constitutional democracy and the public interest more generally, such as a public protector, public ombudsman, human rights commission or independent electoral authority. While not directly established to assist the media, these bodies can and often do play important roles in protecting the media from governmental harassment, or in supporting the media generally by encouraging access to information or freedom of expression. These bodies can play a particularly crucial role during election periods.

NOTES

- 1 http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf [accessed 29 February 2012]
- 2 <http://www2.ohchr.org/english/law/cerd.htm> [accessed 29 February 2012]
- 3 <http://treaties.un.org/doc/db/survey/CovenantCivPo.pdf> [accessed 29 February 2012]
- 4 http://www.wunrn.com/reference/pdf/American_convention_Human_Rights.PDF [accessed 29 February 2012]
- 5 <http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf> [accessed 29 February 2012]

- 6 http://portal.unesco.org/ci/en/files/5628/10343523830african_charter.pdf/african%2Bcharter.pdf [accessed 29 February 2012]
- 7 <http://www.afrimap.org/english/images/treaty/africa-declaration-of-principles-on-foe.pdf> [accessed 29 February 2012]
- 8 <http://www.itu.int/wsis/docs/geneva/official/dop.html> [accessed 29 February 2012]
- 9 <http://www.unesco.org/new/en/communication-and-information/flagship-project-activities/world-press-freedom-day/previous-celebrations/worldpressfreedomday200900000/dakar-declaration/> [accessed 29 February 2012]
- 10 <http://www.wan-ifra.org/articles/2011/02/16/the-declaration-of-table-mountain> [accessed 29 February 2012]
- 11 <http://unesdoc.unesco.org/images/0016/001631/163102e.pdf> [accessed 29 February 2012]
- 12 <http://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf> [accessed 29 February 2012]

4

Botswana



1 INTRODUCTION

The Republic of Botswana is a large country with a small population – approximately 1.8 million people. The country was a British protectorate from 1885–1966, when it gained full independence from the United Kingdom. Botswana has maintained a multiparty democracy since independence and is generally considered a model of peace and democracy in Southern Africa.

Despite its strong democratic credentials when it comes to political stability, there is little doubt that the media environment in Botswana is not in accordance with international standards for democratic media regulation. An old-style state broadcaster operates out of the President’s Office, and it is yet to be transformed into a public broadcaster. Recent legislation has introduced a system of registration for all media practitioners and has set up a media complaints committee, which comprises only ministerial appointees. The broadcasting regulator, the National Broadcasting Board (NBB), is not a particularly independent body. Nevertheless, there is a level of media diversity in both the broadcasting and print media.

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

- Media and the constitution
- Media-related legislation

- Broadcasting-related regulations
- Media self-regulation
- Media-related common law based on decided cases

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

2 THE MEDIA AND THE CONSTITUTION

In this section you will learn:

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

2.1 Definition of a constitution

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

The Constitution of Botswana is notable because it has been in place since Botswana’s independence in 1966. The constitutions of some other Southern African countries were enacted much more recently as these countries embarked on democratic constitutional reforms only in the 1990s. The Botswana Constitution sets out the foundational rules of Botswana. These are the rules upon which the entire country operates.

2.2 Definition of constitutional supremacy

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

The Constitution of Botswana does not make specific provision for constitutional supremacy; however, constitutional supremacy is implied in two important ways:

- The provisions of Chapter II, ‘Protection of fundamental rights and freedoms of the individual’, section 3 of the Constitution of Botswana, specifically provide that ‘the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms [listed in Chapter II] subject to such limitation of that protection as *are contained in those provisions*’ (emphasis added). The effect of this is that fundamental rights can only be limited to the extent that is allowed by the Constitution itself. This indicates that the Constitution is the supreme law and that, with regard to fundamental rights and freedoms, no other law can limit rights beyond the limitations set out in the constitutional rights themselves.
- The Constitution of Botswana contains specific provisions regarding altering the Constitution, which requires voting majorities and various other procedures (including a national plebiscite in respect of certain types of amendments) that are far more onerous than is required for the passage of mere legislation. Again, this points to the supremacy of the Constitution.

2.3 Definition of a limitations clause

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

The Constitution of Botswana makes provision for legal limitations on the exercise

and protection of rights that are contained in Chapter II of the Constitution of Botswana, ‘Protection of fundamental human rights and freedoms of the individual’. Section 3(1) specifically provides that the various rights provided for in Chapter II are subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:

- (a) life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for the privacy of his or her home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

This is an interesting provision that requires some explanation.

- It is clear that limitations of rights can be done on two main bases, namely:
 - To protect the rights and freedoms of other individuals
 - To protect the public interest
- While limitations to protect the rights and freedoms of others are worded broadly, the following are key justifications for limiting rights: life, liberty, security of the person; freedom of conscience, expression, assembly and association; and protection of privacy and property, including not being deprived of property without compensation.
- While limitations to protect the public interest are worded broadly, the following are, again, key justifications for limiting rights upon the basis of public interest: life, liberty, security of the person and protection of the law; freedom of conscience, expression, assembly and association; and protection of privacy and property, including not being deprived of property without compensation.
- While section 3 of the Constitution of Botswana contains the general criteria for constitutional limitations, it is not in itself a generally applicable limitations provision because it states that rights are ‘subject to such limitations of that protection as are contained in those provisions’. Thus, the actual limitations of rights and fundamental freedoms are set out in the provisions of the relevant right or fundamental freedom itself.

Consequently, it is clear that the rights contained in Chapter II of the Constitution of Botswana are subject to the limitations that are contained within the provisions of the right itself. The limitations in respect of each right are dealt with below.

2.4 Constitutional provisions that protect the media

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

2.4.1 Freedom of expression

The most important provision that protects the media is section 12(1), ‘Protection of freedom of expression’, which states:

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

This provision needs some explanation.

- The freedom applies to all persons and not just to certain people, for example, citizens. Hence everybody (including both natural persons and juristic persons, such as companies) enjoys this fundamental right.
- The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many examples of this, including physical expression (such as mime or dance), photography or art.
- Section 12(1) specifies that the right to freedom of expression includes the ‘freedom to hold opinions without interference’, thereby protecting the media’s right to write opinion pieces and commentary on important issues of the day.
- Section 12(1) specifies that the right to freedom of expression includes the ‘freedom to receive ideas and information without interference’. This freedom of everyone’s to receive information is a fundamental aspect of freedom of

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

- Section 12(1) specifies that the right to freedom of expression includes the ‘freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons)’. This is a central provision because it protects the right to communicate information and ideas *to the public* – a critically important role of the press, and the media more generally. Therefore, although the Constitution of Botswana does not specifically mention the press or the media, the freedom to perform that role – namely, to communicate information to the public – is protected.
- Section 12(1) specifies that the right to freedom of expression includes the ‘freedom from interference with his or her correspondence’. This protection of correspondence (which would presumably include letters, emails and telefaxes) is an important right for working journalists.

As discussed, constitutional rights are never absolute. Section 12(2) sets out the basis upon which the right to freedom of expression detailed in section 12(1) may be limited.

Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits the right to freedom of expression will not violate section 12(1) of the Constitution, provided that it:

- Is reasonably required in the interests of defence, public safety, public order, public morality or public health
- Is reasonably required for:
 - The purposes of protecting the:
 - Reputations, rights and freedoms of other persons
 - Private lives of persons concerned in legal proceedings
 - Protecting information received in confidence
 - Maintaining the authority and independence of the courts
 - Regulating educational institutions in the interests of persons receiving instruction therein
 - Regulating the technical administration or operation of telephony, telegraphy, posts, wireless, broadcasting or television

- Imposes restrictions upon public officers, employees of local government bodies or teachers
- Is reasonably justifiable in a democratic society

Although the limitations provisions in section 12(2) are lengthy (indeed, the provision is much longer than the right itself), it is generally (see exceptions immediately below) in accordance with internationally accepted standards. In this regard, it is important to note that the requirement that the limitation be ‘reasonably justifiable in a democratic society’ qualifies each of the separate grounds for limiting a right. Thus, any law that intends to limit a right on one of the stipulated grounds must also be reasonably justifiable in a democratic society. This is an objective test that a court can apply and is not dependent upon a governmental official’s view on whether or not the limitation is justifiable.

Notwithstanding this, there are at least two provisions in the limitations set out in section 12(2) that stand out as not being internationally acceptable grounds for limiting speech, namely:

- *The restriction imposed upon public officers:* Clearly, many public officials do have secrecy obligations, particularly in defence, intelligence and policing posts. Nevertheless, the general ability of whistleblowers in the public service to bring illegal conduct, including corruption, to the attention of the media in the public interest is a critical part of a functioning democracy. Consequently, such limitations provisions could well have a chilling effect on public servants, unduly preventing the disclosure of official misconduct.
- *The restrictions upon educational institutions:* The rationale behind this limitation is unclear. Indeed, academic freedom is often specifically mentioned as a subset of the right to freedom of expression precisely due to the essential role that freedom of expression plays in the search for truth – one of the key rationales for protecting freedom of expression.

2.4.2 Privacy of home and other property

A second right that protects the media is contained in section 9(1) of the Constitution of Botswana. This right provides that ‘[e]xcept with his or her own consent, no person shall be subjected to the search of his or her person or his or her property or the entry by others on his or her premises’. Being free from searches of notebooks, computer flash disks, rolls or disks of film and other tools of a journalist’s trade, as well as the offices of media houses, is an important right – but it can be limited.

As discussed, constitutional rights are never absolute. Section 9(2) sets out the basis upon which the right to protection for privacy of home and other property set out in section 9(1) may be limited.

Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits the protection of privacy will not violate section 9(1) of the Constitution, provided that it:

- Is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources, for the purposes of any census or in order to secure the development or utilisation of any property for a purpose beneficial to the community
- Is reasonably required for the purpose of protecting the rights or freedoms of others
- Authorises a government (or parastatal company) officer to access property and inspect premises or anything on the property for tax purposes, or to carry out work connected with any governmental (or parastatal) property on the premises
- Authorises compliance with a court order
- Is reasonably justifiable in a democratic society

2.4.3 Deprivation of property

This right is linked to the right to protection of property and deals with property seizures. It is wordy and very legalistic, but section 8(1) of the Constitution of Botswana provides in its relevant part that:

[n]o property of any description shall be compulsorily acquired, except where:

(a) the taking of possession is necessary or expedient –

(i) in the interests of defence, public safety, public order, public morality, public health, town and country planning or land settlement; and

....

(b) provision is made in the law –

(i) for the prompt payment of adequate compensation; and

(ii) securing to any person having an interest in ... the property a right of access to the High Court ... for ... a determination of ... the legality of the taking of possession ... of the property ...

It is clear from the provisions of section 8 that it is generally intended to allow for expropriation of land for purposes such as the exploitation of mineral rights, conservation, development and the like. However, strictly speaking, section 8(1) could be used by a journalist or media house to prevent the confiscation of media-related property, such as computers, cameras and notebooks.

Note that subsections 8(4)–(6) contain a range of limitations on the right. These are not particularly relevant to the media and are therefore not included here.

2.4.4 Freedom of conscience

Section 11(1) of the Constitution of Botswana provides in its relevant part that ‘[e]xcept with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought’. Freedom of thought is important for the media as it provides additional protection for commentary on issues of public importance.

As discussed previously, constitutional rights are never absolute. Section 11(2) sets out the basis upon which the right to freedom of conscience detailed in section 11(1) may be limited. Although the wording is complicated and legalistic, the essence of these provisions is that a law which limits freedom of conscience will not violate section 11(1) of the Constitution, provided that it:

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

2.4.5 Freedom of assembly and association

A fifth protection is provided for in section 13(1) of the Constitution of Botswana, which provides that:

[e]xcept with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of assembly and association, that is to say, his or her right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his or her interests.

This right not only guarantees the rights of journalists to join trade unions, but also the rights of the press to form press associations and of entrepreneurs to form media houses and conduct media operations.

As discussed previously, constitutional rights are never absolute. Section 13(2) sets out the basis upon which the right to freedom of association contained in section 13(1) may be limited. Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits freedom of conscience will not violate section 13(1) of the Constitution, provided that it:

- Is in the interests of defence, public safety, public order, public morality or public health
- Protects the rights of others
- Imposes restrictions on public officers
- Makes provision for the registration of trade unions (including various conditions relating to issues such as membership and representivity)
- Is reasonably justifiable in a democratic society

2.4.6 Protection of law

A sixth protection is provided in section 10(10) of the Constitution of Botswana, which provides that:

[e]xcept with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public.

The formulation of this right to ‘open justice’ in the Constitution of Botswana is interesting because it effectively allows the parties to a case to agree to the proceedings not being public. This is an unusual formulation and detracts from the openness of the proceedings because the right to a public trial is not just important for the protection of litigants but also to secure public faith in the judiciary. In other words, the public (and, as part of that, the media) generally ought to have a right to attend judicial proceedings.

As discussed previously, constitutional rights are never absolute. Besides the

limitation already contained in section 10(10) allowing the exclusion of the public by the parties involved in the litigation, section 10(11) provides that the above general right to open court hearings shall not prevent a court (or similar body) from limiting public access:

- To the extent that the court considers this necessary or expedient in circumstances where publicity would prejudice the interests of justice
- Where this is empowered by the law in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of 18 years, or the protection of the private lives of persons involved in the proceedings

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

Just as there are certain rights or freedoms that protect the media, other rights or freedoms can protect individuals and institutions *from* the media. It is important for journalists to understand which provisions in the Constitution can be used against the media. The Constitution of Botswana does not in fact contain many provisions that ordinarily are used against the media, such as a right to dignity or privacy. However, there are provisions that allow for the derogation from fundamental rights and freedoms, as well as declarations relating to emergencies, which may affect the media.

It is important to note the provisions of sections 16 and 17 of Chapter II in the Constitution of Botswana, which deal respectively with derogations from fundamental rights and freedoms, and declarations relating to emergencies. In terms of section 17, the president may by proclamation published in the Gazette declare that a ‘state of public emergency exists’, which declaration shall cease to have effect after:

- Seven days (if Parliament is sitting or has been summoned to meet within seven days) or
- 21 days in all other circumstances

If the National Assembly approves the declaration, it will remain in force for six months (although this can be extended for up to six months at a time).

It is important to note that the Constitution of Botswana’s emergency provisions are not in accordance with international best practice standards. This is because there are no objective preconditions to such a declaration. In other words, there is nothing in

the Constitution which requires that a real threat to the public must exist before a declaration of public emergency can be made by the president.

Importantly, section 16 of the Botswana Constitution specifically allows laws passed when Botswana is at war or under a state of emergency to derogate from the rights to personal liberty and equality. Note, however, that the right to freedom of expression cannot be derogated from, although the limitations already contained in the right itself would allow for wide discretion to regulate the media in the interests of, for example, defence and public order.

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

As the Constitution of Botswana came into effect in the mid-1960s, it does not contain a number of institutions that are sometimes found in the constitutions of other Southern African countries, such as an ombudsman, a human rights commission or an independent broadcasting authority.

Nevertheless, there are two important institutions in relation to the media that are established under the Constitution, namely, the judiciary and the Judicial Service Commission (JSC).

2.6.1 The judiciary

Chapter VI of the Constitution of Botswana, ‘The judicature’, establishes two superior courts: the High Court and the Court of Appeal. In terms of section 95(1) of the Constitution, the Botswana High Court shall have ‘unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law’. Effectively, this ambit allows the High Court to enquire into any matter of law in Botswana.

- Section 105(1) of the Constitution provides that where a substantial question of law involving constitutional interpretation arises in any subordinate court (such as a magistrate’s court), the question must be referred to the High Court.
- Section 95(5) specifies that the High Court has jurisdiction to supervise any civil or criminal proceedings before any subordinate court or any court martial, and make such orders as it considers appropriate for the purpose of ensuring that justice is administered by such court.
- Section 95(6) authorises the chief justice to make the practice and procedure rules of the High Court.

The Court of Appeal has a narrower jurisdiction – namely, powers conferred by the Constitution itself or any other law.

Note that in terms of section 106 of the Constitution of Botswana, there is a right of appeal (other than in respect of frivolous or vexatious cases) to the Court of Appeal from any decision of the High Court involving constitutional interpretation, except with regard to section 69(1) of the Constitution, which gives the High Court the right to determine whether any person has been validly elected as a member or speaker of the National Assembly.

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

In terms of sections 96, 99 and 100 of the Constitution of Botswana, the key judicial appointment procedures are as follows:

- The High Court is made up of the chief justice and judges of the High Court.
- The Court of Appeal is made up of the president of the Court of Appeal, such number of justices of appeal as may be prescribed by Parliament, as well as the chief justice and the other judges of the High Court. Furthermore, Parliament can make provision for the Office of the President of the Court of Appeal to be held by the chief justice of the High Court on an ex officio basis.
- The chief justice of the High Court and the president of the Court of Appeal (unless that office is held by the chief justice) are appointed by the president acting alone.
- The other judges of the High Court and the justices of appeal, if any, are appointed by the president acting in accordance with the advice of the JSC.

In terms of sections 97(2) and 101(2) of the Constitution of Botswana, a judge of the High Court and Court of Appeal, respectively, can be removed from office only for inability to perform the functions of his or her office or for misbehaviour. The removal of any of these judges by the president requires a prior finding by a presidentially appointed tribunal recommending removal.

2.6.2 The Judicial Service Commission

The JSC is a constitutional body that is established to:

- Participate in the appointment of judges to the High Court and justices to the Appeal Court
- Be responsible for exercising disciplinary control (together with the president) over the registrars of the two superior courts, magistrates and members of courts, as prescribed by Parliament in terms of section 104(2).

The JSC is relevant to the media because of its critical role in the judiciary, the proper functioning and independence of which are essential for democracy. In terms of section 103(1), the JSC is made up of the chief justice (the chairman), the president of the Court of Appeal or the most senior justice of the Court of Appeal (if the chief justice is the ex officio president of the Court of Appeal), the attorney-general, the chairman of the Public Service Commission, a member of the Law Society nominated by the Law Society, and a person ‘of integrity and experience not being a legal practitioner’ appointed by the president.

Importantly, section 103(4) specifically protects the independence of the JSC by stating that it ‘shall not be subject to the direction or control of any other person or authority in the exercise of its functions under this Constitution’.

2.7 Enforcing rights under the Constitution

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

Section 18 of the Constitution of Botswana, ‘Enforcement of protective provisions’, deals specifically with contraventions of the rights contained in sections 3–16 of Chapter II of the Constitution. It allows a person to apply to the High Court when a provision of those sections of Chapter II ‘has been, is being, or is likely to be’ contravened.

Perhaps one of the most effective ways in which rights are protected under the Constitution is through the provisions of the Constitution that entrench the rights contained in Chapter II, ‘Protection of fundamental rights and freedoms of the individual’. Section 89(3)(a) of the Constitution requires that a constitutional amendment of Chapter II needs to be passed by a two-thirds majority of all members

of the National Assembly. Furthermore, any amendment to the entrenchment provision (that is, of section 89 itself) requires the support of a majority vote of the entire electorate, in addition to it having been passed by Parliament, before it can be sent to the president for his assent, in terms of section 89(3)(b). Effectively, this requires a national referendum on any such constitutional amendment.

2.8 The three branches of government and separation of powers

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

2.8.1 Branches of government

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

THE EXECUTIVE

Section 47(1) of the Constitution of Botswana provides that the executive power of Botswana shall vest in the president and shall be exercised by him or her directly or through officers subordinate to him or her.

Section 30 of the Constitution of Botswana provides that the president of the Republic of Botswana is the head of state. In terms of section 32(1) of the Constitution, the president is elected whenever Parliament is dissolved. The election procedure is set out in section 32. The president is the person who is supported by the majority of persons elected to Parliament.

Section 44 of the Constitution of Botswana provides for a Cabinet consisting of the president, the vice-president and ministers. The main role of Cabinet is to advise the president with respect to the policy of the government. Cabinet is responsible to the National Assembly for all things by or under the authority of the president, vice-president or any minister in the executive of his office, in terms of section 50 of the Constitution of Botswana.

The vice-president is appointed by the president from among the elected members of the National Assembly. This appointment must be endorsed by the members of the National Assembly, in terms of section 39(1) of the Constitution of Botswana. The role of the vice-president is to be the principal assistant to the president, in terms of section 49 of the Constitution of Botswana.

In terms of section 42(1) of the Constitution of Botswana, the other offices of minister (and there must be no more than six of these or such other number as set by Parliament) must be established by Parliament or by the president (subject to the provisions of any act of Parliament). In terms of section 42(2) of the Constitution of Botswana, the offices of assistant minister (and there must be no more than three of these or such other number as set by Parliament) must be established by Parliament or by the president (subject to the provisions of any act of Parliament).

The president generally makes appointments to the office of minister or assistant minister from among the members of the National Assembly. Note that up to four persons who are not members of the National Assembly may be appointed as minister or assistant minister, but they must be qualified for election as such.

THE LEGISLATURE

In terms of section 86 of the Constitution of Botswana, legislative or law-making power in Botswana ‘for the peace, order and good government of Botswana’ vests in Parliament.

In terms of section 57 of the Constitution of Botswana, Parliament consists of the president and the National Assembly. In terms of section 58(2), the National Assembly consists of 57 elected members and four specially elected members.

The process for the election of the four specially elected members is set out in the First Schedule to the Constitution of Botswana:

- The president nominates four candidates for special election and any elected member of the National Assembly nominates four candidates for special election.
- A list of candidates nominated by the president and elected members of the National Assembly is prepared.
- Each elected member of the National Assembly votes for four candidates. The ballot is secret and no candidate may be voted for more than once.
- The four candidates securing the highest number of votes are duly elected.

A similar procedure is followed for by-elections should a vacancy arise in the number of specially elected members.

Ordinary elected members of the National Assembly are elected in terms of a

constituency system (see section 63 of the Botswana Constitution). In terms of section 64, the JSC appoints a Delimitation Commission after every census, or when Parliament has changed the number of seats in the National Assembly, to determine the boundaries of each constituency. Section 65 of the Constitution of Botswana requires the boundaries of each constituency to be such that the number of inhabitants therein is nearly equal to the population quota (that is, the number obtained by dividing the inhabitants of Botswana by the number of constituencies). Although there are certain exceptions, the basic requirements to be registered as a voter in terms of section 67 of the Botswana Constitution are being at least 18 years of age and having citizenship of and residing in Botswana.

THE JUDICIARY

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

2.8.2 Separation of powers

It is important in a functioning democracy to divide governmental power between different organs of the state in order to guard against the centralisation of power, which may lead to abuses of power. This is known as the separation of powers doctrine. The aim is to separate the functions of the three branches of government – the executive, the legislature and the judiciary – so that no single branch is able to operate alone, assume complete state control and amass centralised power. While each branch performs a number of different functions, each also plays a ‘watchdog’ role in respect of the other. This helps to ensure that public power is exercised in a manner that is accountable to the general public and in accordance with the constitution.

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

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

2.9.1 Remove internal limitations to certain rights

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

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

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

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

2.9.2 Provide for an independent broadcasting regulator and for a public broadcaster

Given the fact that the Constitution of Botswana came into effect in the mid-1960s, it is not surprising that it does not provide constitutional protection for an independent broadcasting regulator or for a public broadcaster. However, given the importance of both these institutions for ensuring access to news and information by the public, it is suggested that such amendments to the Constitution would be in the public interest, and would serve to strengthen both the media and democracy more generally in Botswana.

3 THE MEDIA AND LEGISLATION

In this section you will learn:

- What legislation is and how it comes into being
- Key legislative provisions governing the publication of print media
- Key legislative provisions governing the making of films
- Key legislative provisions governing media practitioners
- Key legislative provisions governing the broadcasting media generally
- Key legislative provisions governing the state broadcasting sector

- Key legislative provisions governing broadcasting signal distribution
- Generally applicable statutes that threaten a journalist's duty to protect sources
- Generally applicable statutes that prohibit the publication of certain kinds of information
- Generally applicable statutes that prohibit the interception of communication
- Generally applicable statutes that specifically assist the media in performing its functions

3.1 Legislation: An introduction

3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed by parliament, which is the legislative authority. As we know, legislative authority in Botswana vests in Parliament, which is made up of the president and the National Assembly. It is important to note, however, that in certain limited cases, legislation must also be referred to a body called *Ntlo ya Dikgosi*. In terms of section 88(2) of the Constitution of Botswana, the National Assembly may not proceed on any bill that would alter the provisions of the Constitution or would have a bearing on traditional matters (including powers of *Dikgosi* and *Dikgosana*, traditional courts, customary law, or tribal organisation or property) unless a copy of the bill has been with *Ntlo ya Dikgosi* for at least 30 days.

In terms of section 77, the *Ntlo ya Dikgosi* comprises 33–35 members made up mostly of members selected by traditional authorities or appointees of the president.

As a general rule, the National Assembly and the president are ordinarily involved in passing legislation. There are detailed rules in sections 87–89 of the Constitution of Botswana, which set out the different law-making processes that apply to different types of legislation. It is important for journalists and others in the media to be aware that the Constitution of Botswana requires different types of legislation to be passed in accordance with particular procedures. The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the Constitution of Botswana, there are four kinds of legislation, each of which has particular procedures and/or rules applicable to it. These are:

- Legislation that amends the Constitution – the procedures and/or applicable rules are set out in section 89 of the Constitution
- Ordinary legislation – the procedures and/or applicable rules are set out in section 87 of the Constitution

- Legislation that deals with financial measures – the procedures and/or applicable rules are set out in section 88(1) of the Constitution
- Legislation that would affect traditional matters (including the powers of *Dikgosi* and *Dikgosana*, traditional courts, customary law, or tribal organisation or property) – the procedures and/or applicable rules are set out in section 88(2) of the Constitution.

3.1.2 The difference between a bill and an act

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

In terms of section 87(5) of the Constitution of Botswana, if a bill is passed by Parliament in accordance with the various applicable procedures required for different types of bills, as set out above, it becomes an act once it is assented to by the president. An act must be published in the Gazette and, in terms of section 87(6) of the Constitution of Botswana, becomes law only when it has been so published. Note, however, that it is possible for Parliament to make retrospective laws in terms of section 87(6).

It is important to note that some of the laws governing certain media-related aspects came into force prior to the coming into effect of the 1966 Constitution of Botswana. As they were passed by the governing authority of the time and have yet to be repealed, they are still law.

3.2 Statutes governing the print media

Unfortunately, in terms of the Printed Publications Act, Act 15 of 1968, there are a number of constraints on the ability to operate as a print media publication in Botswana. In particular, Botswana requires the registration of newspapers (in some instances, even newspapers that are published outside of Botswana), which is out of step with international best practice.

Even though these kinds of restrictions constitute bureaucratic and administrative requirements rather than outright restrictions, they effectively impinge upon the public's right to know by setting barriers to print media operations.

There are certain key requirements laid down by the Printed Publications Act in respect of a 'newspaper' or other 'publications'. The definition of a newspaper is extremely broad and includes:

any publication containing news, intelligence, reports of occurrences, or any remarks, observations or comments on such news or on any other matters of public interest or of a political nature in relation to Botswana, which is printed or published for sale or free distribution at regular or irregular intervals within Botswana.

The effect of this definition is that any publication which contains, for example, a report on any occurrence, or any comment on matters of public interest or of a political nature that is intended for distribution to the public or any section of the public (even if such distribution is free or irregular) constitutes a newspaper for the purposes of the Printed Publications Act. The key aspects of the Printed Publications Act are as follows:

3.2.1 Registration of newspaper

- Section 3 of the Printed Publications Act requires the minister in charge of the Printed Publications Act to appoint a registrar of newspapers by notice in the Gazette.
- Section 4 of the Printed Publications Act requires the registrar of newspapers to establish and maintain a register of newspapers.
- Section 5(5) of the Printed Publications Act makes it an offence to print or publish a newspaper without having registered the newspaper prior to printing and publication, and, if found guilty, the perpetrator will be liable to a fine, a period of imprisonment or both, in terms of section 13 of the Printed Publications Act.
- In terms of section 5(2) of the Printed Publications Act, the particulars required for registration are: title of the newspaper; name and residential address of the editor; name and residential and business addresses of the proprietor (owner), publisher and printer. Furthermore, any change to a newspaper's title, editor or ownership interests must be lodged with the registrar of newspapers. Supplying false information or publishing a newspaper without having filed changes in the relevant registered information is an offence, and, if found guilty, the perpetrator will be liable to a fine, a period of imprisonment or both, in terms of section 13 of the Printed Publications Act.

3.2.2 Publication of details of the publisher

Besides the newspaper registration requirements set out above, section 6(1) of the Printed Publications Act also requires all publications (defined extremely broadly to

mean ‘a document intended to be issued for distribution, by sale or otherwise, to the public or any section thereof in Botswana’) to have printed on one of its pages, in legible type, the name and addresses of the printer and publisher and the year of publication. Any person who prints a publication without complying with the requirements of section 6(1) is guilty of an offence and liable to a fine, a period of imprisonment or both, in terms of section 13 of the Printed Publications Act.

3.2.3 Duty to keep copies of publications and to produce them on demand

Section 7 of the Printed Publications Act requires the printer of any publication to keep a copy of the publication and to produce it upon demand by a police officer of the rank of inspector or above. Again, any person who fails to comply with section 7 is guilty of an offence and is liable to a fine, a period of imprisonment or both, in terms of section 13 of the Printed Publications Act.

3.2.4 Foreign application of the act

An interesting provision in the Printed Publications Act is section 8, which provides that if the minister is satisfied that any publication printed outside of Botswana would constitute a ‘newspaper’ if had been printed and published in Botswana, and is of the opinion that the publication is intended primarily for circulation within Botswana, he may order the publication to be a newspaper under the Printed Publications Act, and ‘thereupon the provisions of this Act shall apply to such publication’ even though it is printed and published outside of the country.

3.2.5 Seizures of publications

Section 11 authorises any police officer with the rank of inspector or above to seize any publication or newspaper which he or she ‘reasonably suspects’ has been published or printed in contravention of the Printed Publications Act. This section also empowers magistrates to issue search and seizure warrants for publications and newspapers printed in contravention of the Printed Publications Act.

3.3 Statutes governing the making of films

Unfortunately, there are a number of constraints on the making of films in Botswana – something that obviously affects the visual media, such as television. Key aspects of the main piece of legislation governing film, namely the Cinematograph Act, Act 73 of 1970, are as follows:

- In terms of section 3 of the Cinematograph Act, no film for public exhibition or

sale either inside or outside of Botswana shall be made in Botswana, except under and in accordance with a filming permit issued by the minister (presumably the minister responsible for the administration of the Cinematograph Act). If a film is made without such a permit, the person making the film (or the person(s) in control of or managing the affairs of a company, if the film is being made by a corporate entity) is guilty of an offence in terms of section 3, and, in terms of section 29, is liable to a fine, imprisonment or both. In addition, the court may order the confiscation and destruction of the film.

- Section 4 of the Cinematograph Act requires an application for a filming permit to be made in writing and to be accompanied with a full description of the scenes in and the full text of the spoken parts (if any) of the entire film which is to be made, even if parts of the film are made outside of Botswana. Note, however, that the minister may accept an application that is otherwise incomplete if the minister has been given such other information as he requires for the determination of the application.
- Section 5 of the Cinematograph Act empowers the minister to issue a filming permit subject to conditions. Indeed, the minister may even order a person appointed by him to be present at the making of the film. Section 8 of the Cinematograph Act provides that any person appointed by the minister to be present at the making of a film has the authority to intervene and order the cessation of any scene which, in his opinion, endangers any person or property (other than the film producer's property), is cruel to animals or is being made in contravention of the conditions of a film permit.
- Note, however, that section 9 of the Cinematograph Act empowers the minister to exempt any film or class of film from the above provisions of the Cinematograph Act.
- There are also a number of restrictions regarding the exhibition of films. These are dealt with elsewhere in this chapter.

3.4 Statutes governing media practitioners

3.4.1 Statutes that regulate media practitioners generally

A recent piece of legislation that has been enacted in Botswana ostensibly to 'preserve the maintenance of high professional standards within the media' is the Media Practitioners Act (MPA), Act 29 of 2008. Section 6 requires every resident media practitioner (defined in section 1 as 'a person engaged in the writing, editing or

transmitting of news and information to the public, and includes a broadcaster ... a journalist, editor or publisher of a publication and the manager or proprietor of a publication or broadcasting station’) to be registered and accredited by the Executive Committee of the Media Council established under the MPA. Failure to register is an offence punishable by a fine, imprisonment or both, in terms of section 7(5) of the MPA.

3.4.2 Institutions established under the MPA

The MPA establishes the Media Council and other subsidiary or related bodies:

- Section 3 establishes the Media Council, and, in terms of section 18, the governing body of the Media Council is its executive committee.
- Section 11 provides for the establishment of a complaints committee.
- Section 15 provides for the establishment of an appeals committee.

3.4.3 Functions of the institutions

THE MEDIA COUNCIL

In terms of section 5, the objects of the Media Council are to:

- Preserve media freedom
- Uphold standards of professional conduct and promote good ethical standards and discipline among media practitioners
- Promote the observance of media ethics in accordance with the Media Council’s code of ethics
- Promote public awareness of the rights and responsibilities of the media
- Establish links with similar organisations
- Monitor activities of media practitioners
- Receive complaints against media practitioners
- Register and accredit media practitioners

- Bring media practitioners and other media stakeholders together to exchange information
- Issue accredited media practitioners with identity cards
- Maintain a media register
- Seek financial and other assistance for its operations
- Sponsor and advise on the training of media practitioners
- Undertake research into the performance of the media

The Media Council is also required to issue a code of ethics, which is to include the following provisions, in terms of section 9 of the MPA:

- Duties and obligations of media practitioners
- Protection of minors
- Protection of persons suffering from physical or mentally disabilities
- Advertising content
- Fair competition in the media industry
- Protection of privacy
- Unlawful publication of defamatory matter

Note that in terms of section 9(4) of the MPA, the minister must be provided with prior notice of any changes to the Code of Ethics.

THE COMPLAINTS COMMITTEE

The main functions of the Complaints Committee are to:

- Investigate and hear complaints against media practitioners regarding:
 - Contraventions of the Code of Ethics – section 9(1) of the MPA
 - Acts or omissions which have aggrieved any person – section 12 of the MPA
- Make rulings on the complaints, in terms of section 14 of the MPA, including:
 - Dismissing the complaint
 - Criticising the conduct of the media practitioner, where warranted
 - Directing that a correction or apology be published
 - Taking disciplinary action. In terms of section 14(2) this could include:

- A warning or a reprimand
 - A fine
 - Suspension of registration for a specific period
 - Removing the media practitioner's name from the register
- Making any supplementary rulings

THE APPEALS COMMITTEE

The main function of the Appeals Committee is to hear appeals against the decisions of the Complaints Committee. According to section 15 of the MPA, it may dismiss, enhance, reduce or vary a decision of the Complaints Committee. Note that in terms of section 15(6) of the MPA there is a further appeal from the Appeals Committee to the High Court.

3.4.4 Establishment of the institutions

THE MEDIA COUNCIL

- The Media Council is a corporate body, in terms of section 3(2) of the MPA.
- Section 4 of the MPA provides that the Media Council 'shall operate without any political or other bias or interference, and shall be wholly independent and separate from the government, any political party or other body'.
- Membership of the Media Council consists of 'all publishers of news and information, whether or not in the private or public sector', in terms of section 7(1). Importantly, in terms of the definitions contained in section 1 of the MPA:
 - A 'publisher' is a person 'responsible for a publication'
 - 'Publication' includes 'all print, broadcast and electronic information which is published'
 - Published means 'issued for distribution, by sale or otherwise'
- Furthermore, any person 'having a legitimate interest in the development of the local media industry' may apply for associate membership, in terms of section 7(3) of the MPA.

THE EXECUTIVE COMMITTEE OF THE MEDIA COUNCIL

The Executive Committee is made up of a chairperson, a vice-chairperson, a treasurer and six additional members, elected at a general meeting of the members of the Media Council, in terms of subsections 18(1) and (2) of the MPA. It is important to

note, however, that in terms of section 35 of the MPA, the minister may dissolve the Executive Committee if it fails to submit an annual report and, in terms of section 36 of the MPA, may appoint an interim Executive Committee until such time as the Media Council elects a replacement Executive Committee.

THE COMPLAINTS COMMITTEE

The Complaints Committee is made up of a chairperson and eight other members who have a serious interest in the furtherance of the communicative value of the media, but who do not have financial interests in the media and are not employed in the media (section 11(1) of the MPA).

Unfortunately, this critically important body – which in name appears to be a sub-committee of the Media Council – is not appointed by the Media Council at all but rather solely by the minister responsible for the administration of the MPA.

THE APPEALS COMMITTEE

The Appeals Committee is made up of the chairperson, who is required to be a legal practitioner recommended by the Law Society of Botswana, a member of the public, and a representative of the media recommended by the Media Council (section 15(1) of the MPA). Again, this critically important body – which in name appears to be a subcommittee of the Media Council – is not appointed by the Media Council but rather solely by the minister, albeit on the recommendation of other bodies in respect of two of three appointments.

3.4.5 Funding for the institutions

THE MEDIA COUNCIL

In terms of section 32(1) of the MPA, funds of the Media Committee come from:

- Members' voluntary contributions, bequests and subscription fees
- Fees and other monies paid for services rendered by the Media Council
- Monies from the rental or sale of any property by the Media Council
- Grants, gifts or donations from lawful organisations or sources

THE EXECUTIVE COMMITTEE

Allowances paid to members of the Executive Committee are paid from funds generated by the Media Council, in terms of section 22(1) of the MPA.

THE COMPLAINTS AND APPEALS COMMITTEES

Members of these committees are paid allowances determined by the minister and paid for from monies appropriated by the National Assembly (that is, out of the national budget), in terms of section 22(2) of the MPA.

3.4.6 Regulations made in terms of the MPA

The MPA makes provision for the making of regulations by the Executive Committee and the minister.

THE EXECUTIVE COMMITTEE

Regulations made by the Executive Committee in terms of section 37 of the MPA are binding upon all members of the Media Council – that is, all media practitioners resident in Botswana. These regulations deal largely with administrative issues, including the:

- Manner of application for registration and accreditation of media practitioners
- Manner of application for membership of the Executive Council

THE MINISTER

In terms of section 38 of the MPA, the minister has wide regulation-making powers, including:

- Dissolving the Executive Committee of the Media Council for failure to submit an annual report
- Any matter intended to safeguard the interests of the public and promote professional standards in the media
- Giving effect to the code of ethics issued by the Media Council
- Any matter relating to the registration and accreditation of non-resident media practitioners (for example, members of the foreign press)

3.4.7 Amending the legislation to strengthen the media generally

The MPA is not in accordance with international best practice and there are a number of problems with its provisions:

- The MPA is not a genuine industry self-regulatory body because membership of the Media Council is not voluntary but rather mandated under the MPA. Failure to be a member is a criminal offence that brings with it penalties, namely, a fine, a period of imprisonment or both.
- From a media freedom perspective, the most important body that is established under the MPA is the Complaints Committee, which is clearly a governmental body appointed solely by the minister. This body is given enormous powers, including the power to prevent a journalist from being able to practise his or her profession by being stripped of his or her accreditation with the Media Council. Having a governmental body in charge of the disciplinary affairs of journalists runs contrary to democratic principles of media regulation.
- The premise of the MPA is unjustifiable. Regulation of broadcasting is recognised as legitimate due to the technical nature of broadcasting. As such, licensing of frequencies must be coordinated, and stricter content regulation is in order due to the differences between the print media (where the intake of content requires action – reading on the part of the reader) and the broadcast media (where the impact is much more immediate and does not require the same intentional action on the part of the listener or viewer). Internationally, executive regulation of the conduct of the print media (as is effectively provided for in the MPA) is seen as not being consistent with a commitment to freedom of expression and, particularly, to a free press.

3.5 Statutes governing the broadcast media generally

3.5.1 Statutes regulating broadcasting generally

Broadcasting in Botswana is regulated in terms of the Broadcasting Act 2000, Act 6 of 1998. Prior to this, broadcasting was regulated by the Telecommunications Authority in terms of the Telecommunications Act, 1994.

3.5.2 Botswana's National Broadcasting Board

Section 3 of the Broadcasting Act establishes the National Broadcasting Board (NBB) to perform the functions conferred on it by the Broadcasting Act or any other enactment. Section 4 provides that the NBB comprises 11 members.

3.5.3 Main functions of the NBB

In terms of section 10(1) of the Broadcasting Act, the NBB's functions are to:

- Issue broadcasting licences
- Exercise control over and supervise broadcasting activities. It is important to note that section 10(1)(b) specifically mentions the need to exercise control over the cross-border relaying of radio and television programmes to or from Botswana
- Allocate available spectrum resources to ensure the widest possible diversity of programming and optimal utilisation of spectrum resources

3.5.4 Appointment of NBB members

All 11 members of the NBB are appointed by the minister. (Although the specific minister responsible is not stated in the Broadcasting Act, it is presumably the minister responsible for the administration of the Broadcasting Act.) However, the Broadcasting Act does not give the minister a great deal of discretion on many of the appointments. Subsections 5(a)–(d) of the Broadcasting Act provide that four of the appointees must consist of:

- An officer from the Office of the President
- An officer from the Ministry of Commerce and Industry, who is responsible for administering copyright legislation
- An officer from the Department of Cultural and Social Welfare in the Ministry of Labour and Home Affairs
- A representative of the Telecommunications Authority

In addition, the minister must appoint seven persons, one of whom must be designated as chairman of the NBB from a list of 10 candidates nominated by the Nominating Committee. In this regard:

- Section 8(2) establishes that the Nominating Committee is made up of:
 - The chairman, who must be a member of the Law Society nominated by the Council of the Law Society
 - The vice-chancellor of the University of Botswana or his or her nominee
 - A representative of the Office of the President
- Section 8(5) requires the Nominating Committee to invite candidates to apply to be interviewed for nomination in the Gazette but also in a local newspaper.

- Subsections 8(4) and (6) require every candidate to be interviewed, and that the interviews be conducted transparently and openly.
- Section 8(3) requires the Nominating Committee to nominate 10 candidates, by consensus, to the minister.

Interestingly, no criteria for either qualification or disqualification of NBB members are provided for in the Broadcasting Act.

3.5.5 Funding for the NBB

This is an interesting issue. The NBB members are, in terms of section 7 of the Broadcasting Act, paid such allowances as the minister may determine after consulting with the Ministry of Finance and Development Planning. However, it is clear from section 9 of the Broadcasting Act that the NBB has no human resources capacity of its own. Section 9(1) specifically provides that it is the Telecommunications Authority which acts as the ‘secretariat’ of the NBB and which is to discharge functions assigned to it by the board. Furthermore, the Telecommunications Authority must designate to the NBB ‘such officers of the [Telecommunications] Authority as may be necessary for the performance of the functions of the [NBB] and the administration of this Act’, in terms of section 9(2). Consequently, it appears that while the NBB has been created specifically to deal with broadcasting licensing and spectrum issues, the bulk of the necessary resources will continue to come from the Telecommunications Authority.

3.5.6 Making broadcasting regulations

In terms of section 23 of the Broadcasting Act, the minister makes regulations on matters relating to the Broadcasting Act.

3.5.7 The licensing regime for broadcasters in Botswana

BROADCASTING LICENCE REQUIREMENT

Section 12(1) of the Broadcasting Act prohibits any person from carrying out any broadcasting or rebroadcasting activities except under and in accordance with a licence issued under section 12.

Anyone who does not comply with section 12(1) (or indeed any other provision of the Broadcasting Act) is guilty of an offence and, upon conviction, shall be liable to a fine, imprisonment or both, in terms of section 22(b) of the Broadcasting Act.

CATEGORIES OF BROADCASTING LICENCES

Section 10(2) of the Broadcasting Act makes reference to three categories of broadcasting services:

- *Private*: This is defined in section 1 as ‘a broadcasting service operated for profit and controlled by a person who is not a public or community broadcasting licensee’.
- *Community*: This is defined in section 1 as a broadcasting service which:
 - (a) is fully controlled by a non-profit entity and carried on for non-profitable purposes
 - (b) serves a particular community
 - (c) encourages members of the community serviced by it or persons associated with or promoting the interests of such community to participate in the selection and provision of programmes to be broadcast
 - (d) may be funded by donations, grants, sponsorship, advertising, or membership fees or by any combination of them.

It is also important to note that the Broadcasting Act defines a ‘community’ in section 1 as including ‘a geographically founded community’ or ‘any group of persons having a specific, ascertainable, common interest’.

- *Public*: This is defined in section 1 as ‘a broadcasting service provided by any statutory body which is funded either wholly or partly through State revenues’.

Besides these three categories, there are other types of broadcasting licences or services, such as a special event licence and a cable service, as provided for in the Broadcasting Regulations. These are dealt with elsewhere in this section.

BROADCASTING LICENSING PROCESS

Section 10(2) of the Broadcasting Act authorises the NBB to establish different application and assessment procedures for the three types of broadcasting services, namely private, community and public. These procedures include invitations to tender, and the NBB is required ‘to the maximum extent possible, consistent with safety, efficiency and economy, [to] give preference to enterprises which are owned by citizens or in which citizens have significant shareholding’.

The licensing process itself is fairly simple. In terms of section 12(2), an application

for a broadcasting or rebroadcasting service licence is made to the secretariat of the NBB and must include:

- The name of the service
- The name and place of residence of directors or producers of the service
- The name and place of business and residence of the owner
- The prescribed fee
- Any other information which the secretariat may require or as may be prescribed

In terms of section 13, the board may issue a licence to the applicant if it is satisfied that the applicant has fulfilled all the requirements for a grant of licence, and subject to the availability of frequencies.

FREQUENCY SPECTRUM LICENSING

The process of frequency spectrum licensing is not clearly set out in the Broadcasting Act. While one of the NBB's legislated functions is to allocate spectrum resources, the actual process for doing this is unclear. Indeed, the processes for awarding broadcasting service and spectrum licences appear quite different.

Subsections 12(3)(b) and (d) of the Broadcasting Act provide that regulations (which are made by the minister, not the NBB) may provide for the frequencies used in the operation of a station, the power limitations in respect of a station and any other technical specifications, the location of the transmitter station, as well as the geographical area to which the broadcast or rebroadcast may be made. This is the kind of information that is more commonly found in a frequency spectrum licence as opposed to a regulation. Hence, in terms of the wording of the Broadcasting Act it appears that the minister plays a significant role in the effective licensing of frequency spectrum.

3.5.8 Responsibilities of broadcasters in Botswana

ADHERENCE TO LICENCE CONDITIONS

Section 13(2) of the Broadcasting Act provides that a broadcasting or rebroadcasting licence may be issued subject to such conditions and restrictions, including geographic restrictions, as the NBB considers necessary. Broadcasting licences often contain a number of different conditions depending on the type of service. Public broadcasting licences contain conditions setting, among other things, local content quotas, language requirements, educational programming requirements and requiring impartial news coverage.

In terms of section 17(1) of the Broadcasting Act, '[w]here a licensee has failed to comply with any material condition included in his or her licence ... the [NBB] may by notice in writing revoke the licence'. However, in terms of section 17(2) of the Broadcasting Act, the licensee must be given an opportunity to be heard by the NBB prior to the revocation of a licence. And in terms of section 17(3) of the Broadcasting Act, any person aggrieved by such a revocation may appeal to the High Court.

REPORTING OBLIGATIONS

Section 15(1) of the Broadcasting Act requires the owner of any broadcasting or rebroadcasting service to lodge notice with the secretariat of the NBB any of the following changes in regard to a broadcasting or rebroadcasting service:

- Change of name
- Change in ownership or any interest in ownership
- Change of director, producer or owner

Importantly, in terms of section 15(2), no changes in the register of licensees that is established and maintained by the NBB may be effected unless the chairman of the NBB has approved the proposed change.

In terms of section 15(3), where the chairman of the NBB is of the opinion that such a change would be detrimental to the development of the broadcasting sector, he or she shall refer the matter in full to the NBB for determination.

In terms of section 15(4) of the Broadcasting Act, the NBB can either:

- Approve the change, in which case the secretariat must make the consequential changes in the register of licences, or
- Refuse to approve the change and revoke the licence

Record-keeping obligations

In terms of section 19 of the Broadcasting Act, a licensee shall keep and store sound and video recordings of all programmes broadcast or rebroadcast for a minimum of three months after the date of broadcasting, and shall produce such material on demand by the NBB.

Audience advisories

Where a programme to be broadcast or rebroadcast is not suitable for children, the licensee must, in terms of section 20, advise members of the public.

Adherence to broadcasting regulations

Clearly, broadcasters will be subject to regulations made in terms of the Broadcasting Act (these are dealt with later in this chapter). Indeed, section 21 of the Broadcasting Act specifically provides that regulations may be prescribed a code of practice, which shall be observed by all licensees.

3.5.9 Is the NBB an independent regulator?

The NBB cannot be said to be independent. Indeed, nowhere in the Broadcasting Act does it indicate that the NBB is independent.

Effectively, the NBB operates as an arm of the minister in the following ways:

- All the NBB's board members are appointed by the minister. Even though the nominating committee is involved with regard to seven of the NBB's 11 members, this does not render the NBB a body that is independent of government.
- The minister is responsible for making broadcasting regulations.
- While the NBB is responsible for broadcast licensing, the minister is responsible for prescribing the radio frequency aspects for each service, thereby giving him a significant role.

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

3.5.10 Amending the legislation to strengthen the broadcast media generally

There are a number of problems with the legislative framework for the regulation of broadcasting generally:

- The overriding problem is that the NBB is not an independent body.
- The Broadcasting Act ought to be amended to deal with the following issues:
 - The criteria for appointment to the NBB (as well as grounds for disqualification) should be clearly set out and should focus on relevant skills and experience, as well as on a commitment to freedom of expression and acting in the public interest.
 - NBB members ought to be appointed by the president, acting on the advice of the National Assembly, after the National Assembly has drawn up a list of recommended appointees. As part of this process,

the National Assembly should call for public nominations and should conduct public interviews.

- The NBB should have its own staff, independent of the staff of the Telecommunications Authority, and should be funded out of licence fees and monies appropriated by Parliament (that is, provided for in the national budget).
- The NBB should be empowered to make its own regulations, including with respect to radio frequency allocations and assignments.
- The minister's role ought to be limited to developing appropriate governmental policy. The minister should be involved in matters that are part of the functionality of a regulator, for example making regulations, particularly where these deal with licensing issues, such as the technical specifications of individual frequency assignments.
- The mandate of the NBB ought to be more fully set out. It should be to act in the public interest to ensure that the citizens of Botswana have access to a diverse range of high-quality public, commercial and community broadcasting services, as well as to ensure that freedom of expression is appropriately protected from commercial and governmental interference.

3.6 Statutes that regulate the state broadcast media

Sadly, Botswana does not have legislation to create a public broadcaster. Both Botswana TV and Botswana Radio are operated by the Department of Broadcasting Services, which falls under the Office of the President. Both services operate as arms of government. Given how they operate, these services are clearly state broadcasters and cannot be said to be public broadcasters. It is important to note that the relevant licence conditions of Botswana TV and Botswana Radio do contain public service requirements; however, these are insufficient to change the fundamental nature of the services that remain state as opposed to public broadcasting services.

3.7 Statutes governing broadcasting signal distribution or transmission

The Telecommunications Act, Act 38 of 2004, is relevant to broadcasting signal distribution or transmission, which is the technical process of ensuring that the content-carrying signal of a broadcaster is distributed such that it can be heard and/or viewed by its intended audience. The definitions of, among other things, 'telecommunications service' and 'telecommunications system' in the Telecommunications Act make it clear that broadcasting signal distribution or transmission is a form of telecommunications service which would require to be licensed under the

Telecommunications Act, and would be required to comply with all relevant statutory provisions, including in relation to tariffs and other matters.

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

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

3.8.1 Criminal Procedure and Evidence Act, Act 52 of 1938

The Criminal Procedure and Evidence Act (CPEA) was enacted prior to Botswana's independence, but has been amended numerous times since then. A number of provisions of the CPEA might be used to compel a journalist to reveal confidential sources:

- Section 54 of the CPEA allows a judicial officer presiding in any criminal proceedings to issue an order directing a police officer to take possession of any book, document or thing which is required in evidence in the proceeding. Failure to comply with an order to hand over any book, document or thing is an offence punishable by fine or, if the fine is not paid, to a period of imprisonment.
- Section 214 of the CPEA provides that every person is compelled to give evidence in any criminal case in any court in Botswana or before a magistrate on a preparatory examination, except those who are expressly excluded (for example, 'lunatics', the insane or the spouse of an accused).
- Section 65 of the CPEA allows a public prosecutor or magistrate to require the clerk of the court to subpoena any person to attend a preparatory examination to give evidence or to produce any book or document. In this regard:
 - If any persons fail to obey the subpoena, then the magistrate in charge of the preparatory examination can issue a warrant for their arrest, in terms of section 66 of the CPEA
 - If a person refuses to answer any questions or produce any document

at a preparatory examination, then the magistrate may order that the person be imprisoned for up to eight days at a time until the person consents to answer the question or produces the document, in terms of section 68 of the CPEA

- Similarly, section 201 of the CPEA allows the court to subpoena any person to attend court to give evidence or to produce any book or document during the course of a criminal trial. In this regard, if a person refuses to answer any questions or produce any document at a trial, then the court may order that the person be imprisoned for up to eight days at a time until the person consents to answer the question or produce the document, in terms of section 202 of the CPEA.

It is, however, extremely important to note the provisions of section 257 of the CPEA, which provide that no witness shall be compelled or permitted to give evidence in any criminal proceeding if, as a matter of public policy and with regard to the public interest, such a case were being held in the Supreme Court of the Jurisdiction in England and it was found that the evidence would be privileged from disclosure. This allows for reference to English legal practice on matters of public policy regarding compelling witnesses to give evidence.

3.8.2 Penal Code, Law 2 of 1964

The Penal Code was enacted prior to Botswana's independence but has been amended numerous times since then. Part II of the Penal Code sets out a list of crimes. Division II of Part II contains 'Offences against the administration of lawful authority', the second part of which is headed 'Offences relating to the administration of justice'. Section 123 of the Penal Code falls under that heading and deals with offences relating to judicial proceedings. In terms of section 123(1)(b), it is an offence to refuse to answer a question or produce a document if one has been called upon to give evidence in a judicial proceeding. The penalty is imprisonment for up to three years and, if this takes place before the court, an additional fine.

3.8.3 National Security Act, Act 11 of 1986

Section 13(1) of the National Security Act provides that where the director of public prosecutions is satisfied that there are reasonable grounds for suspecting that an offence under the National Security Act has been or is about to be committed and that a particular person is able to furnish information about the matter, he or she may require a named police officer, in writing, to compel that person to give such information to the police officer. Failure to disclose the information to the named

police officer is an offence, and anyone found guilty of either failing to comply with or giving false information is liable to a period of imprisonment of up to 12 years (section 18).

3.8.4 Cybercrime and Computer Related Crimes Act, Act 22 of 2007

Section 22 of the Cybercrime Act empowers a police officer or any person authorised by the commissioner of police or by the director of the Directorate on Corruption or Economic Crime to apply in writing to a judicial officer for an order compelling, among other things, a person to submit specified data in that person's possession, which is stored on a computer or computer system.

Clearly, these provisions might well conflict with a journalist's ethical obligation to protect his or her sources. However, it is important to note that whether or not requiring a journalist to reveal a source is in fact an unconstitutional violation of the right to freedom of expression depends on the particular circumstances in each case, particularly on whether the information is available from any other source. Consequently, it is extremely difficult to state that these provisions are, by themselves, a violation of the right to freedom of expression under the Constitution.

3.9 Statutes that prohibit the publication of certain kinds of information

A number of statutes contain provisions which, looked at closely, undermine the public's right to receive information and the media's right to publish information. These statutes target or prohibit the publication of certain kinds of information, including:

- Information regarding legal proceedings
- Information relating to defence, security, prisons, the administration of justice, public safety, public order, sedition, 'alarming' information, defamation of foreign princes or insults to Botswana
- Expression which is obscene or contrary to public morality
- Expression which constitutes criminal defamation
- Expression which poses a danger to public health
- Expression which promotes hatred
- Expression which incites violence or disobedience of the law

- Expression which wrongfully induces a boycott
- Expression with intent to wound religious feelings
- Expression that relates to economic crime
- Expression by public officials
- Expression that the speaker of the National Assembly has ruled ‘out of order’

3.9.1 Prohibition on the publication of information relating to legal proceedings

In terms of section 123(1)(e) of the Penal Code, Law 2 of 1964, it is an offence to publish a report of the evidence taken in any judicial proceeding which has been directed to be held in private. The penalty is imprisonment for up to three years.

3.9.2 Prohibition on the publication of state security–related information

PENAL CODE, LAW 2 OF 1964

Division I of Part II of the Penal Code contains ‘Offences against public order’, which is divided into three parts:

- Treason and other crimes against the state’s authority
- Offences affecting relations with foreign states and external tranquillity
- Unlawful societies, unlawful assemblies, riots and other offences against public tranquillity

The prohibitions upon publication relating to the above grounds are dealt with in turn.

Treason and other crimes against the state’s authority

Prohibited publications

In terms of section 47(1) of the Penal Code, if the president believes that a publication is contrary to the public interest (defined in section 47(8) as including being in the interests of defence, public safety and public order), he may, in his absolute discretion, declare it to be a prohibited publication. Note that:

- The order must be published in the Gazette and such local newspapers as he considers necessary

- The order can declare the following to be prohibited publications:
 - A particular publication
 - A series of publications
 - All publications published by a particular person or association
- If the order specifies the name of a periodical publication, then all subsequent issues and any substitution thereof will also be prohibited publications (unless a contrary intention is expressly stated) – section 47(2)
- If the order prohibits all the publications of any class published by a specified person, then the order applies to all publications published after the date of the order too – section 47(3)
- Any person who prints, imports, publishes, sells, supplies or even possesses a prohibited publication is guilty of an offence and is liable, upon conviction, to imprisonment for up to three years – section 48
- Section 49 empowers any police or administrative officer to seize any prohibited publication

A clear problem with the provisions of section 47 of the Penal Code is that they are not objective. In other words, the publication does not have to pose a genuine, realistic or objective threat to defence, public safety or public order – the president just has to believe this is the case before he makes an order prohibiting a publication. This does not comply with internationally accepted standards for prohibiting the publication of information.

Seditious publications

Section 51(c) of the Penal Code provides, among other things, that any person who prints, publishes, sells or distributes a seditious publication is guilty of an offence and is liable to imprisonment for up to three years.

Furthermore, any seditious publication is to be forfeited to the state. Note that:

- In terms of section 50(1), a seditious intention is an intention, among others, to:
 - Excite disaffection against the president or government of Botswana
 - Excite the inhabitants of Botswana to procure the alteration, by illegal means, of any matter established by law
 - Excite disaffection against the administration of justice in Botswana
 - Promote feelings of ill-will or hostility between different classes of the population of Botswana

- Raise discontent or disaffection among the inhabitants of Botswana
- Section 50(1) also explicitly provides that a publication is not seditious by reason only that it intends to:
 - Show the president has been misled or is mistaken in any of his measures
 - Point out errors or defects in the government or Constitution of Botswana, or in the legislation or administration of justice in Botswana, with a view to remedying these
 - Persuade the inhabitants of Botswana to attempt to procure changes by lawful means
 - Point out, with a view to their removal, any matters which are producing feelings of ill-will between different classes in the population

Alarming publications

Section 59(1) of the Penal Code provides, among other things, that any person who publishes any false statement, rumour or report that is likely to cause fear and alarm to the public, or to disturb the public peace, is guilty of an offence. Note, however, that section 59(2) specifically provides a defence to this offence, namely, that prior to publication, the person took ‘such measures to verify the accuracy of such statement, rumour or report as to lead him reasonably to believe that it was true’.

Defamation of foreign princes

Section 60 of the Penal Code falls under the heading ‘Offences affecting relations with foreign states and external tranquillity’. It makes it an offence to publish anything tending to degrade, revile, expose to hatred or contempt any foreign prince, potentate, ambassador or other foreign dignitary, with intent to disturb the peace and friendship between Botswana and that person’s country.

Insults to Botswana

Section 91 of the Penal Code falls under the heading ‘Unlawful societies, unlawful assemblies, riots and other offences against public tranquillity’. It makes it an offence to publish any writing with intent to insult, or bring into contempt or ridicule, the arms or ensigns armorial, the national flag, the standard of the president or the national anthem of Botswana. The penalty for this offence is a fine.

NATIONAL SECURITY ACT, ACT 11 OF 1986

The National Security Act contains a number of provisions that not only prohibit the publication of certain information, but which could also hinder the media’s ability to perform its news-gathering functions. In this regard:

Activities prejudicial to Botswana

Section 3 of the National Security Act sets out a list of activities that are prejudicial to Botswana if they are for ‘any purpose prejudicial to the safety or interests of Botswana’. The penalty for violating this provision is a term of imprisonment for up to 30 years. The activities that are particularly relevant to the media include:

- Being in or in the vicinity of a ‘prohibited place’. Note that this means a place where any work of defence is taking place or any place declared to be a prohibited place by the president
- Making a sketch or note that might be useful to a foreign power or disaffected person (that is, someone carrying on ‘seditious activity’)
- Obtaining or publishing any secret official codes, passwords, documents or information that might be useful to a foreign power or disaffected person (that is, someone carrying on ‘seditious activity’)

Wrongful communication of information

Section 4 of the National Security Act sets out a list of prohibited communication-related activities. The penalty for violating this provision is a term of imprisonment for up to 25 or 30 years. The activities that are particularly relevant to the media include the following:

- Having in one’s possession secret official codes, passwords, documents or information that relate to a prohibited place or which has been obtained in contravention of the National Security Act, and communicating the code, password, document or information to any unauthorised person or retaining it when having no right to do so – section 4(1).
- Having in one’s possession secret official codes, passwords, documents or information that relate to munitions of war, and communicating same to any person for any purpose prejudicial to the safety or interests of Botswana – section 4(2).
- Receiving any secret official codes, passwords, documents or information knowing or having reasonable grounds to believe that the codes, passwords, documents or information have been communicated in contravention of the National Security Act – section 4(3).
- Communicating any information relating to the defence or security of Botswana to any person other than someone to whom he is authorised by an authorised

officer to communicate it to or to whom it is, in the interests of Botswana, his duty to communicate it to – section 4(4).

Protection of classified information

Section 5 of the National Security Act prohibits the communication of any classified matter to any person other than someone to whom he is authorised by an authorised officer to communicate it to or to whom it is, in the interests of Botswana, his duty to communicate it to.

INTELLIGENCE AND SECURITY SERVICE ACT, ACT 16 OF 2007

Although not directed at the media itself, certain of the provisions of the Intelligence and Security Service Act relate to the unauthorised disclosure of intelligence-related information and could indirectly hamper the media's reporting ability. However, it is important to note that the provisions do comply with internationally accepted grounds for preventing the disclosure of security-related information:

- Section 19 prohibits the disclosure by any intelligence or security service officer (or someone who has held such a position) of the identity of a confidential source of information to the Directorate of Intelligence and Security or someone who is involved in covert operational activities of the directorate.
- Section 20 prohibits, among other things, the disclosure by an officer or a member of the support staff of the intelligence or security services of any information gained by virtue of his or her employment.
- Failure to comply with sections 19 or 20 is an offence, and the penalty is a term of imprisonment not exceeding 12 years.

3.9.3 Prohibition on the publication of expression that is obscene or contrary to public morality

PENAL CODE, LAW 2 OF 1964

Expression contrary to public morality

Part II, Division I of the Penal Code contains 'Offences against public order', the first part of which is 'Treason and other crimes against the state's authority'. Section 47 of the Penal Code falls under that heading and deals with prohibited publications.

In terms of section 47(1), if the president is of the opinion that a publication is contrary to the public interest (defined in section 47(8) as including being in the

interests of public morality), he may, in his absolute discretion, declare it to be a prohibited publication. Note that:

- The order must be published in the Gazette and such local newspapers as he considers necessary
- The order can declare the following to be prohibited publications:
 - A particular publication
 - A series of publications
 - All publications published by a particular person or association
- If the order specifies the name of a periodical publication, then all subsequent issues and any substitution thereof will also be prohibited publications (unless a contrary intention is expressly stated) – section 47(2)
- If the order prohibits all the publications of any class published by a specified person, then the order also applies to all publications published after the date of the order – section 47(3)
- Any person who prints, imports, publishes, sells, supplies or even possesses a prohibited publication is guilty of an offence and is liable, upon conviction, to imprisonment for up to three years – section 48
- Section 49 empowers any police or administrative officer to seize any prohibited publication

A clear problem with the provisions of section 47 of the Penal Code is that they are not objective. In other words, the publication does not have to pose a genuine, realistic or objective threat to public morality – the president just has to believe that this is the case before he makes an order prohibiting a publication. This does not comply with internationally accepted standards for prohibiting the publication of information.

Traffic in obscene publications

Division III of Part II of the Penal Code contains ‘Offences injurious to the public in general’, the fourth part of which is headed ‘Nuisances and offences against health and convenience’. Section 178 of the Penal Code falls under that heading and deals with traffic in obscene publications. In terms of section 178(1)(a), it is an offence ‘for the purpose of distribution’ to produce or have in one’s possession ‘any one or more obscene writings ... printed matter ... photographs, cinematograph films ... tending to corrupt morals’. The penalty is a fine or imprisonment not exceeding two years.

CYBERCRIME AND COMPUTER RELATED CRIMES ACT, ACT 22 OF 2007

Section 16 of the Cybercrime Act regulates the electronic traffic in pornographic and obscene material. In terms of section 16(2), any person who, among other things:

- Publishes pornographic or obscene material through a computer or computer system
- Possesses pornographic or obscene material in a computer or computer system or on a computer data storage medium
- Accesses pornographic or obscene material through a computer or computer system

commits an offence and the penalty is a fine, imprisonment or both. Note that in terms of section 16(3), where the material relates to child pornography, the penalty fines are higher and periods of imprisonment longer.

3.9.4 Prohibitions on the publication of expression that constitutes criminal defamation

Part II, Division III of the Penal Code contains ‘offences injurious to the public in general’, the fifth part of which is headed ‘Defamation’ and makes criminal defamation an offence.

DEFINITION OF CRIMINAL DEFAMATION

Section 192 of the Penal Code provides for the offence of criminal defamation, which is, in the part that is relevant for the media, the unlawful publication by print or writing of any defamatory matter (defined in section 193 as matter ‘likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation’) concerning another person, with the intent to defame that person.

WHEN IS THE PUBLICATION OF DEFAMATORY MATTER UNLAWFUL?

Section 195 provides that any publication of defamatory matter will be unlawful unless:

- The matter is true and publication was in the public interest
- Publication is privileged

There are two types of privilege recognised under the Penal Code: absolute privilege and conditional privilege.

ABSOLUTE PRIVILEGE

In terms of section 196 of the Penal Code, the publication of defamatory matter is absolutely privileged in the following cases:

- Publications published under the authority of the president in any official document
- Publications in the National Assembly or *Ntlo ya Dikgosi* by any member thereof
- Publications by order of the National Assembly
- Publications to and by a person having authority over an individual who is subject to naval, military or air force discipline about that person's conduct
- Publications arising out of judicial proceedings
- Fair reports of anything said, done or published in the National Assembly or the *Ntlo ya Dikgosi*
- If the publisher was legally bound to publish the matter

Once the publication of defamatory matter is absolutely privileged, it is immaterial if the matter is false or published in bad faith.

CONDITIONAL PRIVILEGE

In terms of section 197 of the Penal Code, the publication of defamatory matter is conditionally privileged provided:

- It is published in good faith
- The relationship between the parties by and to whom the publication is made is such that the persons publishing and receiving the matter are under a legal, moral or social duty to publish/receive same or have a legitimate personal interest in publishing/receiving same
- Publication does not exceed, either in extent or subject matter, what is reasonably sufficient for the occasion

In addition, the publication of defamatory matter is conditionally privileged if the matter published:

- Is a fair and substantially accurate report of court proceedings which were not being held in camera
- Is a copy or a fair abstract of any matter which has previously been published and which was absolutely privileged
- Is an expression of opinion in good faith as to the conduct of a person of a judicial, official or other public capacity or as to his personal character, in so far as it appears in such content
- Is an expression of opinion in good faith as to the conduct of a person as disclosed by evidence given in a public legal proceeding, or as to the conduct or character of any person as a party or witness in any such proceeding
- Is an expression of opinion in good faith as to the merits of any book, writing, painting, speech or other work, performance or act published or publicly made or otherwise submitted by the person to the judgment of the public, or as to the character of the person in so far as it appears in such work
- Is a censure passed by a person in good faith on the conduct or character of another person in any matter where he or she has authority over that person
- Is a complaint or accusation about an individual's conduct or character made by a person of good faith to a person having authority over the individual and having authority to hear such complaints
- Is in good faith for the protection of the rights or interests of the person:
 - Publishing it
 - To whom it was published

DEFINITION OF GOOD FAITH

In terms of section 198 of the Penal Code, a publication of defamatory matter will not be deemed to have been made in good faith if it appears that either:

- The publication was made with an intention to injure to a substantially greater degree than was necessary in the public interest, or for a private interest in respect of which a conditional privilege is claimed, or
- The matter was untrue and he did not believe it to be true (unless there was a duty to publish, irrespective of whether it was true or false)

However, in terms of section 199 of the Penal Code, there is a presumption of good faith if defamatory matter was published on a privileged occasion, unless the contrary is proved.

3.9.5 Prohibition on the publication of expression that poses a danger to public health

Part II, Division I of the Penal Code contains ‘Offences against public order’, the first part of which is headed ‘Treason and other crimes against the state’s authority’. Section 47 of the Penal Code falls under that heading and deals with prohibited publications. In terms of section 47(1), if the president is of the opinion that a publication is contrary to the public interest (defined in section 47(8) as including being in the interests of public health), he may, in his absolute discretion, declare it to be a prohibited publication. Note that:

- The order must be published in the Gazette and such local newspapers as he considers necessary
- The order can declare the following to be prohibited publications:
 - A particular publication
 - A series of publications
 - All publications published by a particular person or association
- If the order specifies the name of a periodical publication, then all subsequent issues and any substitution thereof will also be prohibited publications (unless a contrary intention is expressly stated) – section 47(2)
- If the order prohibits all the publications of any class published by a specified person, then the order also applies to all publications published after the date of the order – section 47(3)
- Any person who prints, imports, publishes, sells, supplies or even possesses a prohibited publication is guilty of an offence and is liable, upon conviction, to imprisonment for up to three years – section 48
- Section 49 empowers any police or administrative officer to seize any prohibited publication

A clear problem with the provisions of section 47 of the Penal Code is that they are not objective. In other words, the publication does not have to pose a genuine, realistic or objective threat to public health – the president just has to believe that this is the case before he makes an order prohibiting a publication. This does not comply

with internationally accepted standards for prohibiting the publication of information.

3.9.6 Prohibition on the publication of expression that promotes hatred

Part II, Division I of the Penal Code II contains ‘Offences against public order’, which is divided into three parts, one of which is ‘Unlawful societies, unlawful assemblies, riots and other offences against public tranquillity’. Section 92 of this part makes it an offence to publish any writing expressing ridicule or contempt for any person mainly because of their race, tribe, place of origin, colour or creed. The penalty is a fine.

3.9.7 Prohibition on the publication of expression that incites violence or disobedience of the law

Part II, Division I of the Penal Code contains ‘Offences against public order’, which is divided into three parts, one of which is ‘Unlawful societies, unlawful assemblies, riots and other offences against public tranquillity’. Section 96 of this part makes it an offence to publish any words implying that it is desirable to:

- Bring about the death or physical injury to any person or class, community or body of persons
- Damage or destroy any property
- Defeat by violence, or other unlawful means, the enforcement of any written law
- Defy or disobey any written law or lawful authority

The penalty is a period of imprisonment not exceeding three years.

A clear problem with the provisions of section 96 of the Penal Code is that they go far beyond internationally accepted grounds for prohibiting expression. This is particularly so with the prohibition against words implying that it is desirable to disobey written laws.

3.9.8 Prohibition on the publication of expression that wrongfully induces a boycott

Part II, Division I of the Penal Code II contains ‘Offences against public order’, which is divided into three parts, one of which is ‘Unlawful societies, unlawful assemblies, riots and other offences against public tranquillity’. Section 98(2) of this part makes it an offence to further any designated boycott. Section 98(1) contains the provisions setting out what a designated boycott is. Essentially, it is one declared to be such by the president if he is satisfied that it is intended, among other things, to:

- Excite disaffection against the government
- Endanger public order
- Jeopardise economic life
- Raise discontent or disaffection among the inhabitants of Botswana
- Engender feelings of hostility between different classes or races of the population

The penalty is a period of imprisonment not exceeding six months.

One problem with the provisions of section 98 of the Penal Code is that they go far beyond internationally accepted grounds for prohibiting expression. Most democracies accept that boycotts are, generally speaking, a legitimate form of non-violent direct protest action. As such, it should not be an offence for a publication to merely support a boycott.

Another problem with the provisions of section 98 of the Penal Code is that they are not objective. In other words, the boycott does not have to pose a genuine, realistic or objective threat to, for example, public order or to Botswana's economic life – the president just has to be satisfied that this is the case before he makes an order designating the boycott. This does not comply with internationally accepted standards for prohibiting the publication of information.

3.9.9 Prohibition on the publication of expression that intends to wound religious feelings

Part II, Division III of the Penal Code contains 'Offences injurious to the public in general', the first part of which is headed 'Offences relating to religion'. Section 140 of the Penal Code falls under that heading and deals with '[w]riting or uttering words with intent to wound religious feelings'. In terms of section 140, it is an offence to '[write] any word' with 'the deliberate intention of wounding the religious feelings of any other person'. The penalty is a period of imprisonment not exceeding one year.

3.9.10 Prohibition on the publication of expression that relates to economic crime

Section 44 of the Corruption and Economic Crime Act, Act 13 of 1994, makes it an offence to publish, without lawful authority or reasonable excuse:

- The identity of any person who is the subject of an investigation in respect of an offence suspected to have been committed by that person under the act
- Any details of an investigation in respect of an offence under the act

The penalty upon conviction is a fine, imprisonment not exceeding one year or both.

3.9.11 Prohibition on the publication of expression by public officials

Section 21 read with section 38 of the Public Service Act, Act 13 of 1998, requires every public officer to comply with certain rules of conduct. Some of these rules have an extremely negative affect on the media's ability to report on significant public interest issues. Section 21(b) prohibits any public officer, unless he or she has 'due authority' (which, in section 38(1), is defined as the written permission of the minister), to allow him- or herself 'to be interviewed on questions or connected with any matter affecting or relating to the public policy, defence, military or economic interests or resources of Botswana'.

This extremely broad prohibition effectively renders government unable to communicate with the media, except through official channels or spokespeople. The prohibition is rendered more draconian by the fact that failure to comply is an offence which carries a penalty of a fine or imprisonment not exceeding six months, or both.

3.9.12 Prohibition on the publication of expression that the speaker of the National Assembly has ruled out of order

Section 29 of the Powers and Privileges Proclamation 24 of 1961, provides that where the speaker of the National Assembly rules that any words used by a member of the National Assembly are out of order, he or she may also order that such words, or any words out of which they arose, or arising out of them, shall not be published in any matter. Publication thereof is an offence, and upon conviction the person concerned would be liable to a fine or a term of imprisonment.

3.10 Legislation prohibiting interception of communication

The legality of intercepting communications is becoming an increasingly important issue for the media. This issue is governed by the Cybercrime and Computer Related Crimes Act, Act 22 of 2007.

Section 9 of the Cybercrime Act makes it an offence to intentionally (and without lawful excuse or justification) intercept (defined as acquiring the content of any communication through the use of any device):

- Any non-public transmission to, from or within a computer or computer system
- Electro-magnetic emissions that are carrying data from a computer or computer system

The penalty is a fine, imprisonment or both.

3.11 Legislation that specifically assists the media in performing its functions

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

Botswana has yet to enact access to information or whistleblower protection legislation. However, Botswana does have the National Assembly (Powers and Privileges), Proclamation 24 of 1961. Section 25 of the Powers and Privileges Proclamation provides that in any proceedings instituted for publishing a report, summary or abstract of any proceedings in the National Assembly, a defence is that this was done in good faith and without malice. Although this provision is somewhat unclear, it allows the media to report (in good faith) on the activities of the National Assembly without fear of litigation as a result.

4 REGULATIONS AFFECTING THE BROADCAST MEDIA

In this section you will learn:

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

4.1 Definition of regulations

Regulations are subordinate legislation. They are legal rules made in terms of a statute. Broadcasting regulations and rules are legal mechanisms for allowing a body other than parliament to make legally binding rules governing an industry or sector, without parliament having to pass a specific statute thereon. As is more fully set out elsewhere in this chapter, the empowering statute – in this case section 23 of the Broadcasting Act, 1998 – allows the minister to make regulations to give effect to the provisions of the Broadcasting Act.

4.2 Key regulations governing broadcasting content

The Broadcasting Regulations were made by the minister responsible for broadcasting and are dated 29 October 2004. This is the key set of rules governing broadcasting

in Botswana. Failure to comply with the Broadcasting Regulations is an offence, and a person found guilty may be liable to pay a fine if convicted. There are certain harsher penalties for violations of specific aspects, as set out more fully below. This section focuses on the key content and licensing aspects of the Broadcasting Regulations.

4.2.1 Effective code of practice

Although it is not specifically called a code of practice, sections 11–22 of the Broadcasting Regulations lay down content restrictions or requirements on all broadcasters, which is styled in the same way as a code of practice would be. The main aspects of these provisions include the following:

- *Broadcasting Standards – section 11*: A licensee (or any of its employees) shall not broadcast content which, measured by contemporary community standards:
 - Offends against good taste or decency
 - Contains the frequent use of offensive language, including blasphemy
 - Presents sexual matters in an explicit and offensive manner
 - Glorifies violence or depicts it in an offensive manner
 - Is likely to incite crime or lead to disorder
 - Is likely to incite or perpetuate hatred or vilify any person or section of the community on account of race, ethnicity, nationality, gender, sexual preference, age, disability, religion or culture

- *Protection of children – section 12*: When broadcasting programmes at times where a large number of children may be expected to be watching or listening (taking account of available audience research as well as the time of broadcast), a licensee shall exercise due care in avoiding content that may disturb or be harmful to children, including:
 - Offensive language
 - Explicit sexual or violent materials, including music with violent or sexually explicit lyrics

- *Fairness, accuracy and impartiality in news and information programming – section 13*: Licensees (including employees or agents) shall report news and information accurately, fairly and impartially:
 - News and information shall be presented in a balanced manner without intentional or negligent departure from the facts, including through:
 - Distortion, exaggeration or misinterpretation

- Material omissions
 - Excessive summarising or editing
- A licensee (including employees or agents) shall broadcast a fact fairly, having regard to its context and importance.
- Opinions must be clearly presented as such.

- *Broadcast of unconfirmed reports – section 14:*
 - A licensee shall not broadcast any report that is not based on fact, or that is founded on opinion, supposition, rumour or allegation unless the broadcast is carried out in a manner that indicates these circumstances clearly.
 - Where any doubt exists as to the accuracy of a report and verification is not possible, this fact must be mentioned in the report.
 - A licensee shall not broadcast any report where there exists sufficient reason to doubt the accuracy thereof, and it is not possible to verify the accuracy of the report before it is broadcast.

- *Correction of errors in broadcast – section 15:* A licensee shall broadcast the correction of any factual error:
 - Without reservation, as soon as it is reasonably possible after the error has been committed
 - With such degree of prominence and timing as may be adequate and fair so as to easily attract attention, and shall include an apology where appropriate

- *Reporting on controversial issues – section 16:*
 - When reporting on controversial issues, a licensee shall ensure that a wide range of views and opinions is reported, either within a single programme or a series of programmes.
 - Similarly, phone-in programmes on these issues must allow for a wide range of opinions to be represented.
 - Any person or organisation whose views have been criticised in a programme on a controversial issue of political, industrial or public importance is entitled to a reasonable opportunity to reply.
 - A reply to criticism must be given a similar degree of prominence to the original criticism, and shall be broadcast during a similar time slot as soon as possible after the original criticism.

- *Conduct of interviews – section 17:*
 - Written parental or guardian permission must be obtained before interviewing children.

- Persons who are to be interviewed by a licensee must be advised of the subject of the interview and informed beforehand as to whether or not it is to be recorded or broadcast live.
 - Due sensitivity must be exercised when interviewing bereaved persons or witnesses of traumatic incidents.
- *Comments – section 18:* Comment must be clearly indicated and must be made on facts that are clearly stated.
- *Invasion of privacy – section 19:* A licensee shall not present material which invades a person’s privacy unless there is a justifiable reason in the public interest for doing so.
- *Consent to broadcast – section 20:* A licensee shall not broadcast any information acquired from a person without that person’s consent, unless the information is essential to establish the credibility and authority of a source, or where the information is clearly in the public interest.
- *Sexual offences – section 21:*
- A licensee (and its employees or agents) shall not disclose, in a broadcast, the identity of a victim of a sexual offence without his or her written consent. The identities of child victims of sexual offences may not be broadcast under any circumstances.
 - A licensee shall avoid gratuitous and repetitive detail in covering sexual offences.
 - Importantly, a violation of this provision is an offence and, if found guilty, a broadcaster would be liable to a fine, imprisonment or both.
- *Payment of criminals – section 22:* A licensee shall not pay anyone involved in, or who has been convicted of, a crime in order to obtain information, unless there is a compelling public interest in doing so.

4.2.2 Provisions on advertisement and sponsorship

Sections 5–8 and 32 of the Broadcasting Regulations deal with advertising-related issues. Key aspects of these provisions are the following:

- *Fairness in advertising – section 5:*
 - A licensee shall ensure that broadcast advertisements are lawful, honest and decent, and conform to the principles of fair competition in business.

- A licensee shall ensure that advertisements do not contain any misleading descriptions or claims.
 - A licensee must ensure that advertisements do not unfairly attack or discredit other products or advertisements.
 - A licensee must be satisfied that the advertiser has substantiated all descriptions or claims prior to broadcasting the advertisement.
 - A licensee shall not unreasonably discriminate against or in favour of any particular advertiser.
- *Scheduling of advertisements – section 6:*
- A licensee must exercise responsible judgment in the scheduling of advertisements that may be unsuitable for children, when children may be expected to be watching or listening.
 - Advertisements must be clearly distinguishable from programming.
 - A broadcaster's presenters must make a clear distinction between programming material and advertisements when reading advertisements.
- *Sponsorship of programmes – section 7:*
- A licensee shall not accept sponsorship for news broadcasts.
 - A licensee may accept sponsorship of weather broadcasts, financial broadcasts or traffic reports, provided it retains editorial control of the sponsored programmes.
 - A licensee must ensure that sponsorship of an informative programme does not compromise the impartiality and accuracy of the programme.
 - A licensee must not unreasonably discriminate against or in favour of any particular sponsor.
 - A licensee shall not broadcast any programme which has been sponsored by a political party.
 - Sponsorships must be clearly acknowledged before and after the sponsored programme, and any link between the programme's subject matter and the sponsor's commercial activities must be clear.
- *Infomercials – section 8:*
- An infomercial shall not be broadcast:
 - For a period exceeding three hours of the performance period (6 am to 12 am) in any day
 - During prime time
 - During any break in the transmission of a children's programme

- Infomercials must be distinguishable (by visual or audio form) from any programme material broadcast.
 - Note that where a channel broadcasts infomercials exclusively, the above requirements do not comply.
 - A licensee shall ensure that all infomercials are lawful, honest and decent, and conform to the principles of fair competition in business.
- *Advertising restrictions applying only to commercial broadcasters – section 32:* Section 32 sets out a number of restrictions and requirements on commercial broadcasters in respect of advertising. The key ones are as follows:
- Licensees must ensure that advertisements are broadcast in allotted breaks or between programmes.
 - There shall be no more than four advertising breaks per hour on television.
 - Advertising content of any programme shall not exceed:
 - Thirty seconds of a five-minute programme
 - Two minutes of a 10-minute programme
 - Three minutes of a 15-minute programme
 - Five minutes of a 35-minute programme
 - Twelve minutes of a 60-minute programme, except where:
 - The licensee broadcasts the programme as a public service
 - There is a national broadcast that interrupts a scheduled programme and results in the loss of advertising time, in which case the allowable minutes of advertising can be increased to 14 minutes
 - Section 32(6) sets out detailed record-keeping obligations for licensees in respect of programmes and advertisements broadcast.

4.2.3 Ownership restrictions

Besides the ownership restrictions that are implied in the Broadcasting Act, section 3 of the Broadcasting Regulations prohibits a single person from owning a television station and a radio station which serve the same local market.

4.2.4 Local content requirements

Section 10 of the Broadcasting Regulations sets out various local content (defined in section 1 of the Broadcasting Regulations as programmes that ‘have been produced using material gathered in Botswana, and which mostly use Botswana personnel and services in Botswana’) requirements, which are the same across all categories of

broadcasters. These are subject to the specific conditions imposed by the NBB in a broadcasting licence.

- Minimum local content for television broadcasts: 20%
- Minimum local content for radio broadcasts: 40%
- Local news shall constitute the majority of a licensee's news broadcast content.

4.2.5 Public notices of emergencies or public disaster announcements

In terms of section 23 of the Broadcasting Regulations, a licensee shall, free of charge, provide broadcast notice of an emergency service or a public disaster announcement made by any government department.

4.2.6 Obligations of public broadcasters

As discussed elsewhere in this chapter, there is no specific legislation establishing and governing a public broadcaster. Publicly funded radio and television broadcasters are operated directly by the government and are state broadcasters. The Broadcasting Regulations, at section 33, set out general content requirements for public broadcasters. These appear to be a public service mandate – namely, that their programmes:

- Consist of a wide range of subject matter
- Serve the needs of different audiences
- Are transmitted at appropriate times to take into account that children may be in the audience
- Are accurate, fair and impartial
- Do not contain any matter expressing the opinions of the broadcaster on current affairs or matters of public policy
- Do not cause offence to religious communities
- Reflect the diverse cultural activities in Botswana
- Provide coverage of sporting and other leisurely interests
- Contain educational material

- Provide a public service for the dissemination of information, education and entertainment

4.2.7 Other licensing matters

The Broadcasting Regulations contain other licensing-related provisions, the most important of which are the following:

- Section 24 provides for the granting of special event licences, which are valid for only seven days.
- Section 25 provides for the licensing of external satellite feeds. Note that in terms of section 25(5), where the NBB rejects an application to operate an external satellite feed, a right of appeal exists to the minister, who has discretion to grant the licence.
- Section 30 requires cable broadcasters to re-transmit the terrestrial television broadcasts of a local public television service. If the cable service consists of three or fewer channels, then the broadcasts of Botswana Television (the state broadcaster) must be transmitted.

5 MEDIA SELF-REGULATION

The Press Council of Botswana (a voluntary self-regulatory body distinct from the Media Council, discussed earlier in this chapter) has published a code of ethics, which is to govern the conduct and practice of all media practitioners, media owners, publishers and media institutions, and which is to be enforced by the Press Council of Botswana. The key elements contained in the code are highlighted under the headings as they appear in the code:

5.1 General duties

- **General standards**
 - To maintain the highest professional and ethical standards.
 - To inform, educate and entertain the public professionally and responsibly.
 - To disseminate accurate and balanced information, and that comments are genuine and honest.
 - Never to publish information known to be false, or maliciously make unfounded allegations about others, intending to harm their reputations.

■ General duties

- To maintain the highest professional and ethical standards by being honest, fair and courageous in news-gathering, reporting and interpreting information.
- To defend the principle of freedom of the press and other mass media by striving to eliminate news suppression and censorship.

5.2 Good practice

■ Accuracy

- Check facts when compiling reports.
- Editors and publishers must take proper care not to publish inaccurate material.
- Both reporter and editor must ensure that all reasonable steps have been taken to check the accuracy of a report.
- Facts should not be distorted by out-of-context reporting.
- Special care must be taken when reports could harm individuals, organisations or the public interest.
- Before publishing a story of alleged wrongdoing, all reasonable steps must be taken to obtain responses from the named individual or organisation.

■ Correction of inaccuracy or distortion

- Upon discovering the publication of a significant distortion of the facts, a media institution must publish a correction promptly and with comparable prominence. If a person's reputation has been damaged, an apology must also be published promptly and with comparable prominence.
- Any finding by the Press Council on its performance must be reported on fairly and accurately by the media institution concerned.

■ Right of reply/rebuttal

- A fair opportunity to reply must be given to a person or organisation that is the subject of an inaccurate or unfairly critical report.

■ Comment, conjecture and fact

- Clear distinctions must be made between comment, conjecture and fact.
- Comment must be a genuine expression of opinion relating to fact.
- Comment or conjecture must not be presented in such a way as to create the impression that it is fact.

5.3 Rules of the profession

■ Undue pressure or influence

- There can be no suppression or distortion of information that the public has a right to know due to pressure or influence from advertisers or others who have a corporate, political or advocacy interest in the media institution concerned.
- A media practitioner must not succumb to cultural, political or economic intimidation intended to influence reporting.

■ Public interest

- A media practitioner must act in the public interest without undue interference from any quarter.

■ Payment for information

- No report may be published, suppressed, omitted or altered in return for payment of money or other gift or reward.
- No person can be paid to act as an information source unless there is a demonstrable public interest in the information, and the resulting report must indicate that information has been paid for.

■ Reporting of investigations

- While reports may inform the public about arrests of suspects by the police, they should not contain the names of suspects until the police have filed formal charges, unless it is in the public interest to do so.

■ Privacy

- It is normally wrong for a person's private life to be intruded into and reported upon without his or her consent.
- Such reporting can only be justified when this would be in the public interest, such as:
 - Detecting or exposing criminal conduct
 - Detecting or exposing anti-social conduct
 - Protecting public health and safety
 - Preventing the public from being misled by the public statements or actions of an individual, which is contradicted by his or her private conduct

■ Intrusions into grief or shock

- In cases involving personal grief or shock, enquiries and approaches must be made with sympathy and discretion.

- **Interviewing or photographing children**
 - Interviewing or photographing a child under the age of 16 should not normally be done without the consent of a parent or guardian.
 - When interviewing or photographing a child in difficult circumstances or with disabilities, special sympathy and care must be exercised.
 - Children must not be approached or photographed at schools without the permission of the school authorities.

- **Children in criminal cases**
 - The names of any child offender under the age of 16 arrested by the police or tried in the criminal courts must not be published.

- **Victims of crime**
 - Victims of gender violence must not be identified unless they have consented to such publications and the law authorises them to do so.
 - Where such consent is given subject to conditions, these conditions must be respected.

- **Innocent relatives or friends**
 - The relatives and friends of a person accused or convicted of a crime should not be identified unless this is necessary for the full, fair and accurate reporting of the crime or the criminal proceedings.

- **Gathering of information**
 - Gathering information should be done openly, and media practitioners should identify themselves as such.
 - Information and pictures should, as a general rule, not be obtained by misrepresentation, subterfuge or undercover techniques.
 - Surreptitious methods of information gathering may be used only where open methods have failed to yield information. This must be in the public interest – for example, to detect or expose criminal activity, or to bring to light information that will protect the public.

5.4 Editorial rules

- **Hatred and disadvantaged groups**
 - Material that is intended or likely to cause hostility or hatred towards persons on the grounds of their race, ethnic origins, nationality, gender, physical disabilities, religion or political affiliation must not be published.

- Utmost care must be taken to avoid contributing to the spread of ethnic hatred or to the dehumanisation of disadvantaged groups when reporting events and statements of this nature.
 - Dehumanising and degrading pictures of a person may not be published without his or her consent.
- **National security**
- Material must not be published that will prejudice the legitimate national security interests of Botswana in regard to military and security tactics and strategy, or intelligence material held for defence.
 - However, the above does not prevent the media from exposing corruption in security, intelligence and defence agencies, or from commenting on their levels of expenditure and overall performance.
- **Plagiarism**
- Plagiarism (making use of another person’s words or ideas without proper acknowledgement and attribution of the source of those words or ideas) must not be engaged in.
- **Protection of sources**
- When sources are promised confidentiality, that promise shall be honoured unless released by the source.

6 COMMON LAW AND THE MEDIA

In this section you will learn:

- The definition of common law
- How Botswana’s courts have dealt with defamation matters
- What Botswana’s courts have said about the constitutionality of government withdrawing advertisements from newspapers as a response to press criticism

6.1 Definition of common law

The common law is judge-made law. It is made up of judgments handed down in cases adjudicating upon disputes brought by people, whether natural (individuals) or juristic (for example, companies). In common law legal systems such as Botswana’s, judges are bound by the decisions of higher courts and also by the rules of precedent. This requires that rules laid down by the court in previous cases be followed, unless they were clearly wrongly decided. Legal rules and principles are therefore decided on an incremental, case-by-case basis.

This section focuses on a number of judgments in relation to defamation, as well as on an important judgment on the constitutionality of a withdrawal of government advertisements as a response to press criticism.

6.2 Defamation

This chapter has already dealt extensively with the general issue of defamation as it arises in respect of criminal defamation. It is important to note, however, that defamation is more usually dealt with in the civil contexts, where a person who has been defamed seeks damages to compensate for the defamation. All the cases dealt with in this section arise in the context of civil cases of defamation.

6.2.1 Defences to an action for defamation

There are several defences to a claim based on defamation.¹ These defences include:

- Truth in the public interest
- Absolute privilege – for example, a member of the National Assembly speaking in Parliament
- Qualified privilege – statements made in the discharge of a duty. For example, the duty to provide information in connection with the investigation of a crime, enquiries as to the creditworthiness of a person, etc.

Besides the above, which constitute defences to a charge of criminal defamation, there are other defences available in a civil defamation claim, including:

- Fair comment upon true facts and which are matters of public interest
- Self-defence (to defend one's character, reputation or conduct)
- Consent

Below are two cases that deal with defences to an action for defamation.

In *Khimbele v Sebenego and Others; Caphers v Sebenego and Others* 2001 (2) BLR 105 (HC), a defamation action was brought by two people named in a newspaper report as having been bribed by an attorney. In fact, the people had received unsolicited cash from the attorney but had immediately handed the money over to their superior, and acted entirely appropriately and honestly. The newspaper raised a number of defences, two of which merit particular attention because of how the court analysed the journalist's conduct:

- The first defence was that the report was comment. The court rejected this, saying that in order to be justifiable as ‘fair comment’, the comment ‘must appear as comment and must not be mixed up with the facts that the reader cannot distinguish between what is a report and what is comment. Care should therefore be taken to keep such comments as are made separate from the fact reported so that readers may be able readily to distinguish between the two’ [at page 114]. The court found that it did not appear ‘that the allegation [was] intermingled with any opinion’ and that in its view the statement that the attorney corruptly gave money to the plaintiffs was ‘a statement of fact and not a comment’ [at page 115].
- The second defence was that the report contained a fair and accurate report of proceedings in a court – that is, was subject to qualified privilege. However, the court did not accept this, saying that the statement that the attorney corrupted (as opposed to attempted to corrupt) the plaintiffs by giving them money was a ‘substantial inaccuracy and not privileged at common law’ [at page 117].

In *Tibone v Tsodilo Services (Pty) Ltd t/a The Sunday Sun and Others* Case No. CVHLB-000235-7 (as yet unreported) the then-minister of minerals, energy and water resources brought a defamation action against the *Sunday Sun* regarding allegations that he was involved in corruption regarding a tender. The newspaper raised a defence of privilege, saying it was reporting on a debate that had taken place in Parliament. This was rejected by the court, which found correctly that:

- ‘Honest, balanced and responsible journalism demands that the readership is presented with a balanced picture of what is reported and where a report or article deals with debate, especially debate of national importance such as we are dealing with here, then the readership is presented with the negative and positive aspects of the debate’ [at page 32]. The judge went on to find on the facts that he ‘cannot accept ... that the articles represented balanced reporting’ and that ‘the manner of reporting brings into focus my concern that imputations of corruption are made against the plaintiff ... without any factual basis whatsoever as the allegations of corruption [made in Parliament] were not aimed at anyone in particular’ [at page 33]
- The journalists involved had, among other things:
 - Interviewed only those MPs who had made adverse comments
 - Not published the press statement released by the permanent secretary of the relevant department
 - Not published the press statement released by the Directorate of Corruption and Economic Crimes that its investigation had revealed no corruption

- Produced no hard evidence that the minister in question had ‘apologised’, as he was alleged to have done in the report

The court found that the defendants had acted in bad faith and maliciously. The defence of qualified privilege regarding the reporting on events in Parliament failed in this case.

6.2.2 Remedies for defamation

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

PUBLICATION OF A RETRACTION AND AN APOLOGY BY THE MEDIA ORGANISATION CONCERNED

Very often a newspaper or broadcaster will publish a retraction of a story or allegation in a story, together with an apology, where it has published a false defamatory statement. Whether or not this satisfies the person who has been defamed will depend on a number of factors, including: the seriousness of the defamation; how quickly the retraction and apology is published; and the prominence given to the retraction and apology (this is a combination of the size of the retraction, its positioning in the paper and on the particular page concerned).

ACTION FOR DAMAGES

This is where a person who has been defamed sues for monetary compensation. It takes place after the publication has occurred and damages (money) are paid to compensate for the reputational damage caused by the defamation in circumstances where there are no defences to defamation. The quantum of damages (the amount to be paid in compensation) will depend on a number of factors, including whether or not an apology or retraction was published and also the standing or position in society of the person being defamed.

In *Dibotelo v Sechele and Others* 2001 (2) BLR 588 (HC), the plaintiff in the action for damages for defamation was a senior judge who had been defamed by a newspaper, which had alleged (wrongly) that he had misappropriated funds. In making a substantial damages award, the judge made a number of important statements, namely, that:

- The only way of impressing upon ‘all concerned that ... unfounded attacks are not to be made is by awarding exemplary damages’ [at page 594]
- He was ‘anxious not to create the impression that the courts, by their protection

of a person's right to unsullied reputation, unwittingly whittle down the press's freedom of speech' [at page 595]

- Any damages awarded to the plaintiff 'should reflect the delicate balance between the two competing interests' [at page 595]

This has been echoed in *Tibone v Tsodilo Services (Pty) Ltd t/a The Sunday Sun and Others* Case No. CVHLB-000235-7 (as yet unreported) in which the judge held that while he was 'mindful of the effect of robust or excessive damages on freedom of speech, courts should not ... be seen to condone irresponsible journalism or malicious reporting by an award of damages so low as to embolden rather than discourage errant publications' [at page 38].

PRIOR RESTRAINTS

This is where the alleged defamatory material is prevented from being published in the first place. Where a person is aware that defamatory material is going to be published, he or she may be able to go to court to, for example, obtain an interdict prohibiting the publication, thereby preventing the defamation from occurring. Prior restraints are dangerous because they deny the public (readers of a publication or audiences of a broadcaster) the right to receive the information that would have been publicised had it not been for the interdict. Prior restraints are seen as being a last resort mechanism. The legal systems of countries that protect the right to freedom of expression usually prefer to allow publication and to deal with the matter through damages claims – in other words, using 'after publication' remedies.

6.3 Withdrawal of government advertising as a response to press criticism

In a critically important case, *Media Publishing (Pty) Ltd v The Attorney-General and Another* 2001 (2) BLR 485 (HC), the Botswana High Court, in an application for an interim interdict, granted the applicant – the owner of two newspapers – an interdict declaring that a government directive banning all government advertising in the two newspapers was wrongful and unlawful. The directive had been issued by the president shortly after the newspaper had published a number of articles that were critical of the president and the vice-president. In reaching its decision, the court made a number of extremely important statements, including:

Government cannot act with a view to taking away an individual's benefits as an expression of its displeasure for the individual's exercise of a constitutional right as this would tend to inhibit the individual in the full exercise of that freedom for fear of incurring punishment ... The message implicit in the directive is that

an individual, being a beneficiary to governmental patronage, who in the exercise of its freedom of expression goes beyond what the government is comfortable with, faces the possible unpleasant consequence of losing certain benefits which it would otherwise have received. This hinders the freedom to express oneself freely [at page 496].

The court found on the facts that the applicant had established a *prima facie* right ‘that the executive’s act of withdrawing advertisement patronage from the applicant’s papers in order to express its displeasure regarding what it perceived to be exceeding the limit of editorial freedom amounts to an infringement of the ... applicant’s freedom of expression’ [at page 497].

NOTE

- 1 See FDJ Brand, ‘Defamation’, *LAWSA*, 2nd ed., Volume 7, paras 245ff. Note that the common law of South Africa is frequently cited and followed in Botswana’s courts.

5

Malawi



1 INTRODUCTION

The Republic of Malawi is a densely populated country of approximately 13 million people. The country was a British protectorate from 1891–1964, when it gained full independence from the United Kingdom. Malawi became a republic with a one-party system of government in 1966, when a range of constitutional changes were made. The then-president, Dr Hastings Kamuzu Banda, remained in power until the early 1990s when, bowing to intense local and international pressure, a national referendum was held in which nearly two-thirds of voters pushed for a multiparty system. A new constitution was enacted in 1994, and it includes a chapter on human rights, essentially a bill of rights.

The mid-1990s also heralded a new era of press freedom in Malawi, with independent newspapers and radio broadcasters flourishing in the urban centres. There have been significant changes in the regulation of the national broadcaster and, more broadly, through the establishment of the Malawi Communications Regulatory Authority. It is, however, true that a number of laws continue to limit the ability of the press to inform the public about matters of the day. There is little doubt that in certain respects the media environment in Malawi is not in accordance with international standards for democratic media regulation.

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

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

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

2 THE MEDIA AND THE CONSTITUTION

In this section you will learn:

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

2.1 Definition of a constitution

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

The Constitution of Malawi was published in 1994 and came into force permanently in 1995. The Constitution of Malawi sets out the foundational rules for Malawi. These are the rules upon which the entire country operates. The Constitution

contains the underlying principles, values and laws of Malawi. A key constitutional provision in this regard is section 12, which sets out the underlying values upon which the Malawi Constitution is founded. In brief these are the following:

- The authority of the state derives from the people of Malawi, and state authority is exercised only to serve and protect their interests.
- The authority of the state is conditional upon the sustained trust of the people of Malawi, which trust can be maintained only through open, accountable and transparent government and informed democratic choice.
- The inherent dignity and worth of all human beings requires the state to recognise and protect fundamental human rights.
- The only justifiable limitations on lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society.
- All institutions and persons shall observe and uphold the Constitution and the rule of law, and no institution or person shall stand above the law.
- Every individual has duties towards, among other things, other individuals, his or her family and society, and the state. This includes the duty to respect others without discrimination, and exercising individual rights and freedoms with due regard to the rights of others, collective security, morality and the common interest.

Importantly, section 13 of the Constitution of Malawi also sets out principles of national policy that the state is to implement through legislation and other means. These are a statement of aspirational goals in areas including gender equality, nutrition, health, the environment, rural life, education, for persons with disabilities, children, the family, the elderly, international relations, peaceful settlement of disputes, the administration of justice, economic management, public trust and good governance.

2.2 Definition of constitutional supremacy

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

The Constitution of Malawi makes provision for constitutional supremacy. Section 5 specifically states that '[a]ny act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid'.

2.3 Definition of a limitations clause

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

The Constitution of Malawi makes provision for two types of legal limitations on the exercise and protection of rights contained in Chapter IV of the Constitution of Malawi, 'Human rights'.

2.3.1 State of emergency derogations

Section 45(4) of the Constitution of Malawi specifically provides for the derogation of human rights contained in Chapter IV during a state of emergency, save for a list of non-derogable rights set out in section 45(2). It is important to note that freedom of expression and access to information rights are not listed as non-derogable.

Rights may be derogated from during a declared state of emergency, provided this is not inconsistent with Malawi's obligations under international law and is strictly required:

- To prevent the lives of defensive combatants and civilians as well as legitimate military objectives from being placed in direct jeopardy in war or threat of war
- For the protection and relief of people in a widespread natural disaster

2.3.2 General limitations

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

The general limitations clause applicable to the chapter on human rights is found in section 44 of the Constitution of Malawi, 'Limitations on rights'. Section 44(2) provides that '[n]o restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society'.

2.4 Constitutional provisions that protect the media

The Constitution of Malawi contains a number of important provisions in Chapter IV, 'Human rights', which directly protect the media, including publishers, broadcasters, journalists, editors and producers. There are other provisions elsewhere in the Constitution that assist the media as it goes about its work of reporting on issues in the public interest. These are included in this section too.

2.4.1 Rights that protect the media

FREEDOM OF EXPRESSION

The most important basic provision that protects the media is section 35, which states that '[e]very person shall have the right to freedom of expression'. This provision needs some explanation.

- This freedom applies to 'every person' and not just to certain people, such as citizens. Hence, everybody enjoys this fundamental right.
- The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many different examples of this, including physical expression (such as mime or dance), photography or art.

FREEDOM OF THE PRESS

Linked to the right to freedom of expression but of more explicit importance for the media is section 36, which provides that '[t]he press shall have the right to report and publish freely, within Malawi and abroad, and be accorded the fullest possible facilities for access to public information'.

This provision is very important because:

- It specifically and explicitly protects both the reporting rights and the publishing rights of the press

- These reporting and publishing rights extend not only to national media but also to the international media reporting on Malawi, both inside and outside of the country
- The political role of the press in providing information to the public is recognised in the injunction that the press be provided with access to public information

ACCESS TO INFORMATION

Another critically important provision that protects the media is section 37, which enshrines the right of access to information. Section 37 provides that '[e]very person shall have the right of access to information held by the State or any of its organs at any level of government in so far as such information is required for the exercise of his or her rights'. This right requires some explanation.

- The right of access is in relation to state-held information and does not apply to information held by private individuals or corporations.
- The right exists only where the information is required for the exercise of another right. So there is no standalone right of access to state-held information. A person (or a member of the press) does not have an inherent right of access to state-held information, and would have to show that the information is required for the exercise of some other right before being entitled to that information.

In an information age, where states wield enormous power, particularly with regard to the distribution of resources, the right of access to information is one of the most important rights in ensuring transparency and holding public power – that is, government – accountable. If one considers that the media plays an enormous role in ensuring transparency and government accountability through providing the public with information, having this right of *access* to information is critical to enable the media to perform its functions properly. It is unfortunate that the right of access to information in the Malawi Constitution is limited in the respects set out above, but it has to be said that these limitations are not uncommon.

RIGHT TO ADMINISTRATIVE JUSTICE

Another important provision that protects the media is section 43, 'Administrative justice'. Section 43(a) provides that '[e]very person shall have the right to lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened'. Section 43(b) provides that '[e]very person shall have the right to be

furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interest are affected'. This right requires explanation.

- The reason why this provision is important for journalists and the media is that it protects them (as it does all people) from administrative officials who act unfairly and unreasonably and who do not comply with legal requirements. It also entitles them to written reasons when administrative action affects their rights or interests.
- An administrative body is not necessarily a state body. Indeed, these bodies are often private or quasi-private institutions. These constitutional requirements would therefore apply to non-state bodies too.
- Many decisions taken by such bodies are 'administrative' in nature. This requirement of administrative justice is a powerful one, which prevents or corrects unfair and unreasonable conduct on the part of administrative officials. Furthermore, having a constitutional right to written reasons is a powerful tool in ensuring rational and reasonable behaviour on the part of administrative bodies, and aids in ensuring transparency and, ultimately, accountability.

PRIVACY

A fifth protection is contained in section 21 of the Constitution of Malawi, 'Privacy'. Section 21 specifies that every person has the right to personal privacy, which includes the right not to be subject to:

- Searches of his or her person, home or property
- The seizure of private possessions
- Interference with private communications, including mail and all forms of telecommunications.

In particular, the protection against seizure (of notebooks and cameras, for example) and the protection of communications (including letters, emails, telefaxes and telephone conversations) is an important right for working journalists.

FREEDOM OF OPINION

A sixth protection is contained in section 34, which guarantees every person the right to freedom of opinion, including the right to hold, receive and impart opinion

without interference. The freedom to hold and impart opinion is critical for the media as it protects commentary on public issues of importance. Importantly, the right also protects the public's right to receive opinions held by others, including the media.

FREEDOM OF ASSOCIATION

A seventh protection is provided for in section 32, which grants every person the right to freedom of association, including the right to form associations.

This right therefore guarantees the rights of the press to form press associations, but also to form media houses and operations.

2.4.2 Other constitutional provisions that assist the media

There are provisions in the Constitution of Malawi, apart from the human rights provisions, that assist the media in performing its functions.

PROVISIONS REGARDING THE FUNCTIONING OF PARLIAMENT

A number of provisions in the Constitution regarding the functioning of Parliament are important for the media. These include the following:

- Section 56(4), which specifically provides that the National Assembly shall provide access to the press and members of the public, except where a motion is passed with reasons prohibiting public access in the national interest.
- Section 60(1), which specifically protects the speaker, any deputy speaker and every member of the National Assembly. Effectively, they cannot be arrested, charged or sued civilly or criminally in respect of any utterance that forms part of the proceedings of the National Assembly.
- Section 60(2), which specifically gives 'privileged' status to all official reports and publications or proceedings of Parliament and any of its committees.

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

PROVISIONS REGARDING NATIONAL POLICY ON TRANSPARENCY AND ACCOUNTABILITY

One of the important principles of national policy is section 13(o), which requires the state '[t]o introduce measures which will guarantee accountability, transparency, personal integrity and financial probity and which by virtue of their effectiveness and visibility will strengthen confidence in public institutions'.

There can be little doubt that the media plays a crucial role in assisting to make governmental action accountable and transparent, as well as in educating the population to participate meaningfully in a democracy. These provisions could therefore be interpreted as requiring media-friendly policies on the part of the state.

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

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

2.5.1 Right to dignity

The right to human dignity is provided for in section 19(1), which states that '[t]he dignity of all persons shall be inviolable'. Dignity is a right that is often raised in defamation cases because defamation, by definition, undermines the dignity of the person being defamed. This right is one that is often set up against the right to freedom of the press, requiring a balancing of constitutional rights.

2.5.2 Right to privacy

Similarly, the right to privacy (discussed above) is often raised in litigation involving the media, with subjects of press attention asserting their rights not to be photographed, written about, followed in public, etc. The media does have to be careful in this regard and should be aware that there are always 'boundaries' in respect of privacy that need to be respected and which are dependent on the particular circumstances, including whether the person is a public figure or holds public office, as well as the nature of the issue being dealt with by the media.

2.5.3 States of emergency provisions

It is also vital to note the provisions of section 45 of the Constitution of Malawi,

which section deals with derogations and public emergencies, and which have already been dealt with above under the discussion on limitations.

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

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

2.6.1 The judiciary

In terms of section 103(2) of the Constitution of Malawi, the judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue is within its competence.

Chapter IX of the Constitution of Malawi sets out the hierarchy of courts in the country. In brief these are the:

- Supreme Court of Appeal (the apex court) – section 104
- High Court – section 108
- Magistrates' courts, and any other court established in terms of an act of Parliament – section 110

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

Section 103(1) specifically provides that '[a]ll courts and all persons presiding over those courts shall exercise their powers, functions and duties independent of the influence and direction of any other person or authority'.

Judges are appointed by the president, acting on the recommendation of the JSC (section 111(2)). However, the chief justice is appointed by the president and confirmed by the National Assembly by two-thirds majority vote (section 111(1)).

Magistrates are appointed by the chief justice on the recommendation of the JSC (section 111(3)).

Judges are removed by the president in consultation with the JSC and after a motion passed by a majority of the National Assembly calling for the judge to be removed on the grounds of incompetence or misbehaviour (section 119(3)).

2.6.2 The Judicial Service Commission

The JSC is a constitutional body established to participate in the appointment and removal of judges. The JSC is relevant to the media because of its critical role in the judiciary, the proper functioning and independence of which are essential for democracy.

In terms of section 117 of the Constitution of Malawi, the JSC is made up of the chief justice, the chairperson of the Civil Service Commission, a judge or judge of appeal designated by the president after consultation with the chief justice, and such legal practitioner or magistrate designated by the president after consultation with the chief justice. Unfortunately, the president (albeit after consultation with the chief justice) has an enormous amount of say as to who sits on the JSC. The JSC in Malawi is therefore not particularly independent of executive influence.

2.6.3 The Ombudsman

The Ombudsman is important for the media because it, too, is aimed at holding public power accountable. The Ombudsman is established in terms of Chapter X of the Constitution of Malawi. The main function of the Ombudsman is to ‘investigate any and all cases where it is alleged that a person has suffered injustice and it does not appear that there is any remedy reasonably available by way of proceedings in a court ... or where there is no other practicable remedy’ (section 123(1)).

In terms of section 125(c) of the Malawi Constitution, the Ombudsman is entitled to similar protection and privileges as are enjoyed by MPs. In terms of section 122, an ombudsman is appointed by the Public Appointments Committee of the National Assembly, after a public nominations process.

2.6.4 The Human Rights Commission

The Human Rights Commission is an important organisation in respect of the media. It is established in terms of Chapter XI of the Constitution of Malawi. In terms of section 129 of the Malawi Constitution, its primary functions are ‘the protection and

investigation of violations of the rights accorded by this Constitution or any other law’.

Members of the Human Rights Commission are the ombudsman, the law commissioner (also a constitutional office) and such persons nominated by organisations, which both the law commissioner and the ombudsman believe to be reputable organisations representative of Malawian society and which are concerned with human rights issues. Such persons are officially appointed by the president after having been referred by the law commissioner and the ombudsman (section 131).

2.7 Enforcing rights under the Constitution

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

Section 15(1) of the Constitution of Malawi provides that ‘[t]he human rights and freedoms enshrined in this Chapter [being Chapter IV] shall be respected and upheld by the executive, legislature, judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Malawi and shall be enforceable in the manner prescribed in this Chapter’.

Section 15(2) provides that ‘[a]ny person or group of persons with sufficient interest in the promotion, protection and enforcement of rights under this Chapter shall be entitled to the assistance of the courts, the Ombudsman, the Human Rights Commission and other organs of Government to ensure the promotion, protection and enforcement of those rights and the redress of grievance in respect of those rights’.

Section 15(1) of the Constitution makes it clear that the chapter on human rights applies to all branches of government and all organs of government. Furthermore, it makes it clear that Chapter IV also binds a natural (an individual) or juristic person (such as a company) if a particular right is applicable in the circumstances.

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

Perhaps one of the most effective ways in which rights are protected under the Constitution of Malawi is through the provisions of the Malawi Constitution that entrench human rights. Section 196 of the Constitution requires that a constitutional amendment to any of the provisions of Chapter IV either:

- Be ratified by a majority vote in a referendum of the people of Malawi, as certified by the Electoral Commission, or
- Be ratified by a two-thirds vote of the members of the National Assembly, where the speaker of the National Assembly has certified that the amendment would not affect the substance or effect of the Constitution.

The effect of this is that amendments, for example, to clarify wording in Chapter IV could be passed by a two-thirds National Assembly vote. However, where Parliament wanted to take away a right altogether or to diminish its protections, a national referendum supporting the proposed amendment would need to take place.

2.8 The three branches of government and separation of powers

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

2.8.1 Branches of government

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

THE EXECUTIVE

In terms of section 88 of the Constitution of Malawi, executive power vests in the president. Practically, the president exercises executive power with the Cabinet. In terms of section 92 of the Constitution, the Cabinet consists of the president, the first and second vice-presidents, and such ministers and deputy ministers as are appointed by the president.

Section 89 sets out the functions of the president as:

- Assenting to and promulgating bills passed by Parliament
- Conferring honours
- Making appointments
- Granting pardons
- Proclaiming referenda
- Referring constitutional disputes to the High Court
- Answering questions in Parliament
- Generally exercising powers of his office

Section 96 sets out the functions of the Cabinet as:

- Advising the president
- Directing, coordinating and supervising the activities of government departments
- Directing, coordinating and supervising the activities of parastatal bodies
- Initiating bills for submission to Parliament
- Preparing the state budget
- Answering questions in Parliament
- Being responsible for the implementation and administration of laws

Section 7 of the Malawi Constitution summarises the role of the executive as being ‘responsible for the initiation of policies and legislation and for the implementation of all laws which embody the express wishes of the people of Malawi and which promote the principles of this Constitution’.

THE LEGISLATURE

Legislative (that is, law-making) power in Malawi vests, in terms of section 48(1) of the Constitution of Malawi, in Parliament. In terms of section 49(1), Parliament consists of the National Assembly and the president.

It is important to note the provisions of section 8 of the Constitution of Malawi, which specify that the legislature, when enacting laws, ‘shall ensure that its deliberations reflect the interests of all the people of Malawi and that the values expressed or implied in this Constitution are furthered by the laws enacted’.

In terms of section 48(2) of the Malawi Constitution, ‘[a]n Act of Parliament shall have primacy over other forms of law, but shall be subject to the Constitution’.

In terms of section 62 of the Malawi Constitution, the National Assembly consists of such number of seats representing every constituency in Malawi, as determined by the Electoral Commission. Furthermore, each constituency freely elects a person to represent it as a member of the National Assembly.

THE JUDICIARY

As already discussed in this chapter, judicial power in Malawi vests in the courts. Section 9 of the Malawi Constitution summarises the role of the judiciary as having the ‘responsibility of interpreting, protecting and enforcing this Constitution and all laws in accordance with this Constitution and in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of the law’.

2.8.2 Separation of powers

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

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

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

There are two important respects in which the Constitution of Malawi is weak. If these provisions were strengthened, there would be specific benefits for the media in Malawi. It is disappointing that the Constitution does not provide for an independent broadcasting regulator to ensure the regulation of public, commercial and community broadcasting in the public interest. Similarly, it is disappointing that the Constitution does not provide for an independent public broadcaster to ensure access by the people of Malawi to quality news, information and entertainment in the public interest.

3 THE MEDIA AND LEGISLATION

In this section you will learn:

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

3.1 Legislation: An introduction

3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed by parliament, which is the legislative authority. As we know, legislative authority in Malawi vests in Parliament, which is made up of the National Assembly and the president.

As a general rule, the National Assembly and the president are ordinarily involved in passing legislation. There are detailed rules in sections 49, 57, 196 and 197 of the Constitution of Malawi which set out the different law-making processes that apply to different types of legislation. It is important for journalists and others in the media to be aware that the Constitution of Malawi requires different types of legislation to be passed in accordance with particular procedures. The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the Constitution of Malawi, there are three kinds of legislation, each of which has particular procedures and/or rules applicable to it. These are:

- Legislation that amends the Constitution – the procedures and/or applicable rules are set out in sections 196 and 197 of the Constitution
- Ordinary legislation – the procedures and/or applicable rules are set out in section 49 of the Constitution
- Legislation that deals with financial measures – the procedures and/or applicable rules are set out in section 57 of the Constitution

3.1.2 The difference between a bill and an act

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

In terms of section 73 of the Constitution of Malawi, if a bill is passed by Parliament in accordance with the various applicable procedures required for different types of bills as set out above, it becomes an act, once it is assented to by the president. An act must be published in the Gazette and, in terms of section 74 of the Malawi Constitution, becomes law only when it has been so published.

3.2 Statutes governing the operations of the print media

The Printed Publications Act, Act 18 of 1947, is a colonial-era statute that has not been repealed. There are a number of key requirements laid down by the Printed

Publications Act in respect of books – the definition of which specifically includes newspapers and pamphlets:

- Section 5(1) prohibits any person from printing or publishing a newspaper (defined as any periodical published at least monthly and intended for public sale or dissemination) until there has been full registration thereof at the office of the Government Archivist. The registration includes: full names and addresses of the proprietor, editor, printer or publisher; and a description of the premises where the newspaper is to be printed. Note that every amendment to these registration details is also required to be registered. In terms of section 5(2), any failure to comply with the registration requirements is an offence that carries a fine as a penalty.
- Section 3(1) requires every book (the definition of book specifically includes a newspaper) printed and published in Malawi to reflect the names and addresses of the printer and publisher thereof, as well as the year of publication. In terms of section 3(2), any failure to comply with the publication requirements is an offence that carries a fine as a penalty.
- Section 4(1) requires every book publisher to deliver, as his own expense, a copy of any book he has published in Malawi, within two months of publication, to the Government Archivist. In terms of section 4(3), any failure to comply with the delivery requirements is an offence that carries a fine as a penalty, and the court may also enforce compliance by requiring such delivery.

Note that the minister is empowered under the Printed Publications Act to make rules to exempt compliance from the requirements of sections 3 and 4 in particular circumstances.

3.3 Statutes governing the making and exhibition of films

3.3.1 Making of films

There are a number of constraints on the making of films in Malawi – something that obviously affects the visual media, such as television. The key aspects of the main piece of legislation governing film, namely the Censorship and Control of Entertainments Act, Act 11 of 1968, are as follows:

- In terms of section 19 of the Censorship Act, no person shall direct or even take part in the making of any cinematograph picture (defined as including any film) in Malawi (whether intended for exhibition or sale within or outside Malawi)

unless a film permit has been issued by the Board of Censors authorising the making of the cinematograph picture. Any person contravening section 19 is guilty of an offence and is liable to a fine and a period of imprisonment, in terms of section 32 of the Censorship Act.

- Section 20 of the Censorship Act requires an application for a film permit to be made in writing to the Board of Censors. It is to be accompanied by a full description of the scenes in, and the full text of the spoken parts (if any) of, the entire film that is to be made.
- Section 21 of the Censorship Act empowers the Board of Censors to issue a film permit subject to conditions, including that a bond be paid, the repayment of which is conditional upon the film being made in accordance with the conditions of the film permit. Indeed, the Board of Censors may even order a person appointed by it to be present at the making of the film. Section 21(3) of the Censorship Act provides that any person appointed by the Board of Censors to be present at the making of a film has the authority to intervene and order the cessation of any scene which, in his opinion, is objectionable, endangers any person or property (other than the film producer's property) or is cruel to animals.

3.3.2 Exhibition of films

The Censorship Act also regulates the exhibition of films (termed 'cinematograph exhibition' in the Censorship Act).

- Section 10 makes it an offence to exhibit a film unless the film has been issued with a certificate. The certificate is to be issued by a person authorised to do so by the Board of Censors, in terms of section 12 of the Censorship Act.
- Sections 11 and 12 set out requirements for an application for a film exhibition certificate, including that the application be in writing, set out full details of the film, the theatres it is to be exhibited at and be accompanied by the prescribed fee.
- Section 13 provides that the Board of Censors may authorise the issuing of a film exhibition certificate in accordance with various classifications and conditions including:
 - U – suitable for exhibition to persons of any age
 - A – suitable for exhibition to persons of any age provided that persons under 14 are accompanied by a person aged 18 or older
 - AA – suitable for exhibition to persons aged 14 or older
 - X – suitable for exhibition to persons aged 18 or older

- Section 27 also makes it an offence to display any poster of a film to be exhibited, unless that poster has been approved by the Board of Censors.
- Section 33 of the Censorship Act empowers the minister to grant exemptions from having to comply with the above provisions.
- Offences in terms of sections 10 and 27 carry a penalty of a fine and a period of imprisonment, in terms of section 32 of the Censorship Act.

3.4 Statutes governing the broadcast media generally

3.4.1 Statutes that regulate broadcasting generally

Broadcasting in Malawi is regulated in terms of the Communications Act, Act 41 of 1998, and in particular Part V of that act. The Communications Act also regulates telecommunications and postal services in Malawi.

3.4.2 Establishment of the Malawi Communications Regulatory Authority

Section 3 of the Communications Act establishes the Malawi Communications Regulatory Authority (MACRA) to perform the functions assigned to it under the Communications Act. Section 6 provides that MACRA consists of a chairperson, six other appointed members and two ex officio members, bringing the total number of members to nine, all of whom service in a part-time capacity. In terms of section 1(1) of the First Schedule to the Communications Act, the appointed members hold office for a period of four years and are eligible for reappointment.

3.4.3 Main functions of MACRA

In terms of section 4(1) of the Communications Act, MACRA's general duty is to ensure that 'as far as is practicable, there are provided throughout Malawi reliable and affordable communication services sufficient to meet the demand for them'. Furthermore, section 5(1) gives MACRA the power 'to regulate telecommunications, broadcasting, the use of radio frequencies, and the provision of postal services throughout Malawi'. For the purposes of this chapter, we shall focus on MACRA's broadcasting-related powers and functions. In terms of section 5(2)(k), MACRA's main broadcasting-related functions are to regulate broadcasting services through:

- Licensing broadcasters
- Advising the minister on regulations or policies
- Monitoring compliance with regulations and licence conditions

3.4.4 Appointment of MACRA members

The chairperson and the six appointed members of MACRA are appointed by the president. The two ex officio members are the secretary to the president and the Cabinet, and the secretary for information. Furthermore, the minister (although the specific minister responsible is not stated in the Communications Act, it is presumably the minister responsible for the administration of the Communications Act), appoints the director-general of MACRA, on the recommendation of MACRA.

There is no public nominations process and Parliament is not involved in the appointment process at all. Section 6(2) of the Communications Act sets out the criteria for appointment, namely, Malawian citizens who possess qualifications and expertise in a variety of relevant fields, including broadcasting, frequency planning, law and public affairs. Importantly, section 6(4) sets out people who are disqualified from being appointed as members of MACRA. These include MPs, ministers or deputy ministers, and any person who is a member of a political party committee at district, regional or national level.

3.4.5 Funding for MACRA

Section 12(1) of the Malawi Constitution sets out the allowable sources of funding for MACRA's operating and financial costs. These are:

- Licence fees
- Fines payable for breaches of licence conditions
- Grants or donations
- Monies appropriated by Parliament – that is, monies specifically allocated to MACRA in the national budget
- Proceeds from the sale of MACRA's assets or equipment

3.4.6 Making broadcasting regulations

In terms of section 57 of the Communications Act, the minister, acting on the advice of MACRA, makes regulations governing the provision of broadcasting services. Effectively, this means that MACRA has a veto power in respect of the making of broadcasting-related regulations. In other words, the minister is unable to make regulations without MACRA's consent.

3.4.7 Licensing regime for broadcasters in Malawi

BROADCASTING LICENCE REQUIREMENT

Section 46 of the Communications Act prohibits any person from providing a broadcasting service in Malawi, except in accordance with a licence issued by MACRA. Section 100(1) of the Communications Act makes this an offence.

CATEGORIES OF BROADCASTING LICENCES

Section 47(1) of the Communications Act makes provision for MACRA to issue licences for three kinds of broadcasting services:

- *Public*: Defined in section 1 as ‘any broadcasting service provided by the MBC [Malawi Broadcasting Corporation] or any broadcasting service provided under a licence which stipulates: national or local transmission, provision of regular news bulletins and access to the service for public information announcements or programmes’.
- *Private*: Defined in section 1 as ‘a broadcasting service operated for profit and controlled by a person who is not the holder of a public broadcasting licence’.
- *Community*: Defined in section 1 as ‘a broadcasting service which: (a) serves a particular community; (b) is carried on for non-profitable purposes; and (c) is fully controlled by a non-profit entity’.

BROADCASTING LICENSING PROCESS

Section 48(2) of the Communications Act requires MACRA to publish a notice in the Government Gazette and in two issues of a newspaper that it intends to issue a broadcasting licence. The notice must state the:

- Kind of broadcasting service that may be offered
- Coverage area of the service
- Relevant radio frequencies, including technical parameters
- Procedure by which an application can be made, including:
 - Information that applicants must provide
 - Assessment criteria
 - Closing date for applications

Note that in terms of section 49 of the Communications Act, MACRA cannot issue an invitation to apply for a public broadcasting service until:

- It has carried out a study of various aspects of the proposed service, including the demand for such a service and the effect of the proposed service, and
- The minister has approved.

Importantly, section 48(3) requires a public notice and comment procedure for all licensing processes – meaning that the public is invited to make representations on applications for licences.

Political parties or party-political associations, alliances or organisations may not be issued with a broadcasting licence, in terms of section 48(7) of the Communications Act.

FREQUENCY SPECTRUM LICENSING

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

Part IV of the Communications Act deals with radio spectrum management. In terms of section 33, MACRA is required to regulate access to and the use of radio frequencies in Malawi to ensure efficient use of the radio frequency spectrum and to protect against interference.

In terms of section 34 of the Communications Act, MACRA prepares and adopts the radio spectrum plan, setting out the uses for various radio frequencies.

In terms of section 35 of the Communications Act, no person may operate a radio station (defined in section 1 as equipment used for radio communication) without a licence, unless exempted by regulation.

In terms of section 36, MACRA is required to publish a schedule setting out the different kinds of radio licences available and the fees payable for each. Note that there can be different procedures for different kinds of licences.

Section 38 of the Communications Act also clearly envisages a competitive tendering process, where a radio licence would grant exclusive rights for the use of particular frequencies. Such a process requires the prior written approval of the minister.

3.4.8 Responsibilities of broadcasters under the Communications Act

ADHERENCE TO LICENCE CONDITIONS

Section 42 empowers MACRA to revoke a radio licence if a licensee has failed to comply with the conditions of that licence.

Section 54 empowers MACRA to monitor compliance with the terms and conditions of broadcasting licences. Section 51(1) sets out some of the provisions that must be contained in a broadcasting licence. These include the:

- Radio frequencies to be used and the technical parameters thereof
- Broadcasting services that may be provided and the broadcast coverage area
- Period of validity, namely seven years

Section 51(3) sets out the kinds of licence conditions that may be imposed in any broadcasting licence for public or private broadcasting services. These include:

- Requiring balanced and equitable reporting during elections
- The provision of party political broadcasts during elections
- Broadcasting news and factual programmes
- Broadcasting programmes in support of the democratic process
- The preservation of broadcast material
- Provision of financial information
- Advertising limitations
- Limitation of foreign financial or voting interests to 40%

Importantly, the last three licence conditions may be imposed in a private broadcasting licence only if similar conditions are included in all private broadcasting licences.

In terms of section 54 of the Communications Act, MACRA may hold public hearings relating to the enforcement of broadcasting licences. It is entitled to make a number of orders, including:

- Requiring that particular information be broadcast
- Directing the licensee to comply
- Imposing a fine
- Directing the licensee to take remedial steps

If a broadcasting licensee does not comply with such an order, MACRA may prohibit the licensee from providing the broadcasting service for any period not exceeding 30 days for a first failure to comply.

ADHERENCE TO THE OWNERSHIP AND CONTROL LIMITATIONS FOR PRIVATE BROADCASTING SERVICES

Section 50(1) imposes strict ownership and control limits on national private broadcasting services. A person may control, or be a director of the board of, only one national private broadcasting licensee. Section 50(2) imposes only slightly less strict ownership and control limits on local private broadcasting services. A person may control, or be a director of the board of, not more than two local private broadcasting licensees.

ADHERENCE TO THE CODE OF CONDUCT FOR BROADCASTERS

Section 52 requires all broadcasters to comply with the Code of Conduct for Broadcasters set out in Schedule Three of the Communications Act. In summary, the code of conduct requires adherence to the following requirements:

■ General obligations

- Broadcasting licensees shall not broadcast any material which is indecent, obscene or offensive to public morals, or offensive to the religious convictions of any section of the population, or likely to prejudice the safety of the republic or public order and tranquillity.
- Broadcasting licensees shall exercise due care and sensitivity in presenting materials which relate to acts of brutality, violence, atrocities, drug abuse or obscenity.
- Broadcasting licensees shall exercise due care and responsibility to the presentation of programming, where a large proportion of the audience is likely to be children.

■ News

- Licensees shall report news truthfully, accurately and objectively.
- News shall be presented in an appropriate context and in a balanced manner, without intentional or negligent departure from the facts.
- Where a report is founded upon opinion, supposition, rumour or allegation, this must be clearly indicated.
- Where it subsequently appears that a broadcast report was incorrect in a material respect, this must be rectified immediately.

■ Comment

- Licensees are entitled to comment on and criticise any actions or events of public importance.
- Comment must be clearly presented as such.
- Comment must be an honest expression of opinion.

■ Controversial issues

- In presenting a programme in which controversial issues of public importance are discussed, reasonable effort must be made to present differing points of view either in the same programme or in a subsequent programme.
- A person whose views, deeds or character have been criticised in a programme on a controversial issue is entitled to a reasonable opportunity to reply.

■ Elections

- During an election, broadcasting licensees must ensure equitable treatment of all political parties, election candidates and electoral issues.

■ Privacy

- Licensees shall exercise exceptional care and consideration in matters involving the private lives and private concerns of individuals; however, the right to privacy may be overridden by a legitimate public interest.

■ Payment for information

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

3.4.9 Is MACRA an independent regulator?

MACRA cannot be said to be truly independent, despite the fact that section 4(3) of the Communications Act states that it ‘shall be independent in the performance of its functions’.

MACRA’s independence is compromised in the following ways:

- All MACRA’s members (apart from the *ex officio* members who are in any event members of the executive) are appointed by the president with no public nominations process and no involvement by Parliament.
- The minister is responsible for making broadcasting regulations, albeit on the advice of MACRA.

This means that MACRA does not meet international best practice standards in regard to appointment requirements for independent bodies and institutional independence.

3.4.10 Amending the legislation to strengthen the broadcast media generally

There are a number of problems with the legislative framework for the regulation of broadcasting generally in Malawi:

- The overriding problem is the fact that MACRA is not an independent body.
- The Communications Act ought to be amended to deal with the following issues:
 - MACRA members ought to be appointed by the president acting on the advice of the National Assembly, after the National Assembly has drawn up a list of recommended appointees. As part of this process, the National Assembly should call for public nominations and should conduct public interviews.
 - The members of MACRA and not the minister should appoint MACRA's director-general.
 - MACRA should be empowered to make its own regulations.

3.5 Statutes that regulate the state broadcast media

Part IX of the Communications Act, 'Reconstitution of MBC', deals with the Malawi Broadcasting Corporation (MBC). One of the definitions of a public broadcasting service in section 1 of the Communications Act is 'any broadcasting service provided by the MBC'. It is therefore clear that, in terms of the Communications Act, the MBC is seen as a public broadcasting service.

3.5.1 Establishment of the MBC

The MBC was established under the now-repealed Malawi Broadcasting Corporation Act, and its existence is continued by section 86 of the Communications Act.

3.5.2 The MBC's mandate

The MBC's national public broadcasting mandate is broadly set out in section 87 of the Communications Act. There are a number of aspects to its mandate, including to:

- Provide programmes which educate, entertain and inform
- Encourage free and informed opinion on all matters of public interest
- Function without any political bias and independently of any person or body of persons

- Reflect the wide diversity of Malawi's cultural life
- Respect human rights, the rule of law and the Constitution
- Support the democratic process
- Refrain from expressing its opinion (or that of its board or management) on current affairs or on matters of public policy, other than broadcasting matters
- Provide balanced election coverage
- Have regard for the public interest

3.5.3 Appointment of the MBC Board

The MBC is controlled by a board of directors. In terms of section 89 of the Communications Act, the MBC Board is made up of a chairman, six appointed members and an ex officio member who is the secretary for information.

Section 90 of the Communications Act empowers the president, alone, to appoint the chairman of the MBC Board. The president is also empowered to appoint the six other members, but this must be done in consultation with the Public Appointments Committee. Section 1 of the Communications Act defines the Public Appointments Committee as a committee of the National Assembly, which is established in terms of section 56(7) of the Malawi Constitution. Note that this committee is required to be appointed by the National Assembly, with proportional representation of all political parties in the National Assembly.

Section 90(2) of the Communications Act sets out the criteria for appointment to the MBC Board – namely, Malawian citizens who possess qualifications and expertise in a variety of relevant fields, including broadcasting, education, engineering, law, business, finance and public affairs. Importantly, section 90(2) sets out people who are disqualified from being appointed as members of the MBC Board. These include: anyone who has recently been sentenced to a term of imprisonment for more than six months for an offence involving fraud or dishonestly; an undischarged bankrupt; MPs; ministers or deputy ministers; and any person who is a member of a committee of a political party at district, regional or national level.

3.5.4 Funding for the MBC

Section 94 sets out the allowable sources of funding for the MBC. These are:

- Monies appropriated by Parliament – that is, specifically allocated to the MBC in the national budget
- Grants, donations, subsidies, bequests, gifts, subscriptions and royalties
- Proceeds from the sale of MBC property
- Proceeds from television licence fees payable by every person owning a television set
- Commercial advertising or sponsorships
- Investments
- Loans

3.5.5 The MBC: Public or state broadcaster?

There are many aspects of the regulatory framework for the MBC which suggests that it is a public as opposed to a state broadcaster. Importantly, a multiparty body (in this case the National Assembly's Public Appointments Committee) has to agree with the president before a person can be appointed to the MBC.

However, the fact that the secretary for information sits as an *ex officio* member of the board does indicate a level of governmental involvement in the board which is not appropriate and not in accordance with international best practice standards.

Furthermore, while the MBC Board compiles an annual report, this is not made to the National Assembly but rather to the minister. Thus, its accountability appears to be to the executive rather than to the public's elected representatives in the National Assembly.

3.5.6 Weaknesses in the MBC provisions of the Communications Act which should be amended

Three important weaknesses ought to be addressed.

- There ought to be no *ex officio* members of the MBC Board.
- All MBC board members ought to be appointed by the president, in consultation with the Public Appointments Committee, but following a public nominations process.

- The MBC's annual report ought to be made to the National Assembly rather than to the minister.

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

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

3.6.1 Courts Act, Act 1 of 1958

The Courts Act was enacted prior to Malawi's independence but has been amended numerous times since then. Provisions of the Courts Act might be used to compel a journalist to reveal confidential sources.

- Section 49 of the Courts Act empowers a subordinate court to secure the attendance of any person in court for any purposes and to meet any demand, in such manner as may be prescribed. The effect of this is that a subordinate court is empowered, for example, to require a journalist to attend at court and answer questions or produce his or her notebooks in any proceedings taking place before the court.
- Section 50 of the Courts Act empowers a subordinate to imprison any person who fails to comply with an order to attend at court.

3.6.2 Penal Code, Act 22 of 1929

The Penal Code was enacted prior to Malawi's independence, but has been amended numerous times since then. Part II of the Penal Code sets out a list of crimes. Chapter XI of the Penal Code (which is found in Part II, Division II) is headed 'Offences relating to the administration of justice'. Section 113 of the Penal Code falls under that heading and deals with offences relating to judicial proceedings. In terms of section 113(1)(b), it is an offence to refuse to answer a question or produce a document, having been called upon to give evidence in a judicial proceeding. The

penalty is imprisonment for up to three years and, if this takes place before the court, an additional fine.

3.6.3 Official Secrets Act, Act 3 of 1913

Section 11 of the Official Secrets Act makes it a misdemeanour for any person to refuse to give information on demand about any offence or suspected offence under the Official Secrets Act to the police commissioner, a police superintendent or any member of the Malawian armed forces. The penalty is a fine and a period of imprisonment.

Clearly, these provisions might well conflict with a journalist's ethical obligation to protect his or her sources. It is, however, important to note that whether or not requiring a journalist to reveal a source is in fact an unconstitutional violation of the right to freedom of expression will depend on the particular circumstances in each case, particularly on whether the information is available from any other source. Consequently, it is extremely difficult to state that these provisions are, by themselves, a violation of the right to freedom of expression under the Constitution.

3.7 Statutes that prohibit the publication of certain kinds of information

A number of statutes contain provisions which, looked at closely, undermine the public's right to receive information and the media's right to publish information. These statutes are targeted and prohibit the publication of certain kinds of information, including:

- Information regarding legal proceedings
- Information relating to public safety, order and security, or that otherwise undermines government's authority (such as sedition, alarm), protected or prohibited places, and prisons
- Expression which constitutes intimidation
- Expression which is obtained from public officers and relates to corrupt practices
- Expression which insults the president, the flag and protected emblems
- Expression which is obscene or contrary to public morals
- Expression which constitutes defamation or otherwise causes contempt or defamation of foreign princes

- Expression which is likely to offend religious convictions
- Expression which harms relations between sections of the public
- Expression which constitutes commercial advertising involving traditional music

3.7.1 Prohibition on the publication of information relating to legal proceedings

CENSORSHIP AND CONTROL OF ENTERTAINMENTS ACT, ACT 11 OF 1968

Part VII of the Censorship Act deals with publications, pictures, statues and records. Section 23(1) of the Censorship Act makes it an offence to import, publish, distribute, sell or offer any publication (which is defined in section 2 as including any newspaper, book or periodical or other printed matter) which is ‘undesirable’.

Section 23(2) of the Censorship Act contains a number of provisions that deem publications undesirable. In brief, section 23(2)(c) provides that a publication will be deemed to be undesirable if it discloses the following kinds of information in relation to any judicial proceedings:

- Any matter which is indecent or obscene, or is offensive or harmful to public morals, including any indecent or obscene medical, surgical or physiological details.
- Any particulars relating to divorce proceedings or proceedings for the restitution of conjugal rights other than:
 - Names and addresses and occupations of parties and witnesses
 - A concise statement of evidence given (except where this would disclose indecent or obscene matters)
 - Submissions on points of law arising in the course of proceedings and the decision of the court thereon
 - The judgment and any observations made by the court in giving judgment

The penalty for such an offence is a fine and a period of imprisonment, in terms of section 32 of the Censorship Act.

CHILDREN AND YOUNG PERSONS ACT, ACT 7 OF 1969

Section 8 of the Children Act makes it an offence to reveal the name, address, school or other particulars which may lead to the identification of any juvenile concerned in

the juvenile court proceedings, when reporting on such proceedings. The offence carries a penalty of a fine.

PENAL CODE, ACT 22 OF 1929

Part II, Division II of the Penal Code contains ‘Offences against the administration of lawful authority’, and Chapter XI, which forms part thereof, is headed ‘Offences relating to the administration of justice’. Chapter XI, section 113 of the Penal Code deals with offences relating to judicial proceedings. In terms of section 113(1)(e), it is an offence to publish a report of the evidence taken in any judicial proceeding which has been directed to be held in private. The penalty is imprisonment for up to three years.

3.7.2 Prohibition on the publication of state security–related information

CENSORSHIP AND CONTROL OF ENTERTAINMENTS ACT, ACT 11 OF 1968

Part VII, section 23(1) of the Censorship Act makes it an offence to import, publish, distribute, sell or offer any publication (which is defined in section 2 as including any newspaper, book or periodical or other printed matter) which is ‘undesirable’.

Section 23(2) of the Censorship Act contains a number of provisions that deem publications undesirable. In brief, section 23(2)(b)(iv) provides that a publication will be deemed to be undesirable if it is likely to be contrary to the interests of public safety or public order.

The penalty for such an offence is a fine and a period of imprisonment, in terms of section 32 of the Censorship Act.

PRESERVATION OF PUBLIC SECURITY ACT, ACT 11 OF 1960

Section 3 of the Public Security Act empowers the minister to make regulations which, among other things, prohibit the publication and dissemination of any matter that appears to him to be prejudicial to public security. See the section on regulations below.

PENAL CODE, ACT 22 OF 1929

Part II, Division I of the Penal Code contains ‘Offences against public order’, which are divided into a number of parts, including ‘Treason and other offences against the government’s authority’:

Prohibition on the importation of publications

Section 46 of the Penal Code deals with prohibiting the importation of publications. In terms of section 46(1), if the minister believes that a publication is contrary to the public interest, he may, in his absolute discretion, prohibit the importation of the publication.

In terms of section 47, any person who prints, imports, publishes or sells a publication that is prohibited from importation is guilty of an offence and is liable, upon conviction for a first offence, to a fine and imprisonment for up to three years (or four years for a subsequent offence) and the publication is to be forfeited.

A clear problem with the provisions of section 46 of the Penal Code is that they are not objective. In other words, the publication does not have to pose a genuine, realistic or objective threat to the public interest – the minister just has to believe this is the case before he makes an order prohibiting the importation of a publication. This does not comply with internationally accepted standards for prohibiting the publication of information.

Prohibition of seditious publications

Section 51 of the Penal Code also falls under the heading ‘Treason and other offences against the government’s authority’. It provides, among other things, that any person who prints, publishes, sells, distributes or even possesses a seditious publication is guilty of an offence, and is liable to a fine and imprisonment for up to three years (four years for a subsequent offence). Furthermore, any seditious publication is to be forfeited to the state. Note that in terms of section 50(1), a seditious intention is an intention, among other things, to:

- Excite disaffection against the president or government of Malawi
- Excite the inhabitants of Malawi to procure the alteration, by illegal means, of any matter established by law
- Excite disaffection against the administration of justice in Malawi
- Raise discontent or disaffection among the inhabitants of Malawi
- Promote feelings of ill-will or hostility between different classes of the population of Malawi

However, section 50(1) also explicitly provides that a publication is not seditious by reason only that it intends to:

- Show the president has been misled or is mistaken in any of his measures
- Point out errors or defects in the government or Constitution of Malawi, or in the legislation or administration of justice in Malawi, with a view to remedying these
- Persuade the inhabitants of Malawi to attempt to procure changes by lawful means
- Point out, with a view to their removal, any matters which are producing feelings of ill-will between different classes in the population

Alarming publications

Section 60(1) of the Penal Code falls under ‘Treason and other offences against the government’s authority’ and provides, among other things, that any person who publishes any false statement, rumour or report that is likely to cause fear and alarm to the public or to disturb the public peace is guilty of an offence. Note, however, that section 60(2) specifically provides a defence to this offence – namely, that prior to publication, the person took ‘such measures to verify the accuracy of such statement, rumour or report as to lead him reasonably to believe that it was true’.

OFFICIAL SECRETS ACT, ACT 3 OF 1913

Section 4 of the Official Secrets Act makes it a misdemeanour to communicate (other than to an authorised person) any information which relates to a prohibited place (defined in section 5 as including government-owned establishments), or which has been entrusted to him or her in confidence by any person holding government office. The penalty is a fine and a period of imprisonment.

PROTECTED PLACES AND AREAS ACT, ACT 6 OF 1960

The Protected Places Act was enacted prior to Malawi’s independence and has not been repealed. Although it does not directly prohibit the publication of information, section 4 of the Protected Places Act makes it an offence for any unauthorised person (for example, a journalist) to be in a protected place (defined as a place which has been declared a protected place by the minister) without a permit. The penalty is a fine and a period of imprisonment. This provision has implications for the media, making it more difficult for journalists to perform their reporting functions.

PRISONS ACT, ACT 9 OF 1955

Section 83 of the Prisons Act makes it an offence to publish, whether whole or in

part, a letter or document written by a prisoner, which has not been endorsed by a prison officer. The penalty is a fine and a period of imprisonment.

3.7.3 Prohibition on the publication of expression that constitutes intimidation

The Penal Code, Act 22 of 1929, sets out a list of crimes. Part II, ‘Offences against public order’ is divided into three parts, one of which is ‘Unlawful societies, unlawful assemblies, riots and other offences against public tranquillity’. Section 88 makes intimidation an offence – that is, it is an offence to publish any writing threatening a person. The penalty is a fine and a period of imprisonment.

3.7.4 Prohibition on the publication of expression that is obtained from public officers and relates to corrupt practices

Although the Corrupt Practices Act, Act 18 of 1995, does not prohibit the publication of information, it is important to note certain prohibitions contained in the Corruption Practices (Prohibition of Abuse of Information Obtained in Official Capacity) Regulations, 1999, which are dealt with in the section on regulations below.

3.7.5 Prohibition on the publication of expression that insults the president, the flag and protected emblems

Section 4 of the Protected Flag, Emblems and Names Act, Act 10 of 1967, makes it an offence to publish anything liable to insult, ridicule or show disrespect to, among other things, the president, the Malawian national flag and the national coat of arms. The penalty is a fine and a period of imprisonment.

3.7.6 Prohibition on the publication of expression that is obscene or contrary to public morals

Part VII of the Censorship and Control of Entertainments Act, Act 11 of 1968, deals with publications, pictures, statues and records. Section 23(1) of the Censorship Act makes it an offence to import, publish, distribute, sell or offer any publication (which is defined in section 2 as including any newspaper, book, periodical or other printed matter) that is ‘undesirable’.

In brief, section 23(2)(a) provides that a publication will be deemed to be undesirable if it is indecent or obscene, or is offensive or harmful to public morals. Note that none of these terms is defined. The penalty for such an offence is a fine and a period of imprisonment, in terms of section 32 of the Censorship Act.

3.7.7 Prohibition on the publication of expression that constitutes defamation or otherwise causes contempt and defamation of foreign princes

DEFAMATION — PENAL CODE, ACT 22 OF 1929

Part II, Division III of the Penal Code contains ‘Offences injurious to the public in general’ and Chapter XVIII thereof is headed ‘Defamation’. Section 200, which falls under that chapter, makes defamation a misdemeanour termed ‘libel’.

What is defamatory matter?

Section 201 of the Penal Code provides that defamatory matter ‘is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation’.

When is the publication of defamatory matter unlawful?

Section 203 provides that any publication of defamatory matter will be unlawful unless:

- The matter is true and publication was for the public benefit
- Publication is privileged

Two types of privilege are recognised under the Penal Code: absolute privilege and conditional privilege.

Absolute privilege

In terms of section 204 of the Penal Code, the publication of defamatory matter is absolutely privileged in the following cases:

- Publications published under the authority of the president, Cabinet or National Assembly.
- Publications to and by a person having authority over an individual who is subject to military or naval discipline, about that person’s conduct.
- Publications arising out of judicial proceedings.
- Fair reports of anything said, done or published in Cabinet or the National Assembly.
- If the publisher was legally bound to publish the matter.

Once the publication of defamatory matter is absolutely privileged, it is immaterial if the matter is false or published in bad faith.

Conditional privilege

In terms of section 205 of the Penal Code, the publication of defamatory matter is conditionally privileged provided:

- It is published in good faith
- The relationship between the parties by and to whom the publication is made is such that the persons publishing and receiving the matter are under a legal, moral or social duty to publish/receive same, or has a legitimate personal interest in publishing/receiving same
- Publication does not exceed either in extent or subject matter what is reasonably sufficient for the occasion, and in any of the following cases – namely, if the matter published:
 - Is a fair and substantially accurate report of court proceedings, provided the court has not prohibited publication
 - Is a copy or a fair abstract of any matter which has previously been published and which was absolutely privileged
 - Is an expression of opinion in good faith as to the conduct of a person in a judicial, official or other public capacity or as to his personal character so far as it appears in such content
 - Is an expression of opinion in good faith as to the conduct of a person as disclosed by evidence given in a public legal proceeding, or as to the conduct or character of any person as a party or witness in any such proceeding
 - Is an expression of opinion in good faith as to the merits of any book, writing, painting, speech or other work, performance or act published or publicly made or otherwise submitted by the person to the judgment of the public, or as to the character of the person in so far as it appears in such work
 - Is a censure passed by a person in good faith on the conduct or character of another person in any matter, where he or she has authority over that person
 - Is a complaint or accusation about an individual's conduct or character made by a person of good faith to a person having authority over the individual and having authority to hear such complaints
 - In good faith for the protection of the rights or interests of:

- The person publishing it
- The person to whom it was published

Definition of good faith

In terms of section 206 of the Penal Code, a publication of defamatory matter will not be deemed to have been made in good faith if it appears that the:

- Matter was untrue and the publisher did not believe it to be true
- Matter was untrue and the publisher did not take care to ascertain whether it was true or false
- Publisher acted with intent to injure the person defamed in a substantially greater degree than was reasonably necessary for the public interest or for the protection of a privileged interest

There is a presumption of good faith if defamatory matter was published on a privileged occasion, unless the contrary is proved, in terms of section 207 of the Penal Code.

CENSORSHIP AND CONTROL OF ENTERTAINMENTS ACT, ACT 11 OF 1968

Part VII, section 23(1) of the Censorship Act makes it an offence to import, publish, distribute, sell or offer any publication (which is defined in section 2 as including any newspaper, book, periodical or other printed matter) which is ‘undesirable’.

In brief, section 23(2)(b)(ii) provides that a publication will be deemed to be undesirable if it is likely to bring any member or section of the public into contempt. Note that the term ‘contempt’ is not defined, but it appears to connote a lowering of someone’s standing in the community, and would be similar to defamation. The penalty for such an offence is a fine and a period of imprisonment, in terms of section 32 of the Censorship Act.

DEFAMATION OF FOREIGN PRINCES — PENAL CODE, ACT 22 OF 1929

Section 61 of the Penal Code, although still forming part of Part II of the Penal Code, which sets out a list of crimes, and of Division I of Part II which contains ‘Offences against public order’, falls under the heading ‘Offences affecting relations with foreign states and external tranquillity’. It essentially makes it an offence to publish anything tending to degrade, revile, expose to hatred or contempt any foreign prince, potentate, ambassador or other foreign dignitary with intent to disturb the peace and friendship between Malawi and that person’s country.

3.7.8 Prohibition on the publication of expression that is likely to offend religious convictions

CENSORSHIP AND CONTROL OF ENTERTAINMENTS ACT, ACT 11 OF 1968

Part VII, section 23(1) of the Censorship Act makes it an offence to import, publish, distribute, sell or offer any publication (which is defined in section 2 as including any newspaper, book or periodical or other printed matter) which is ‘undesirable’.

Section 23(2) of the Censorship Act contains a number of provisions that deem publications undesirable. In brief, section 23(2)(b)(i) provides that a publication will be deemed to be undesirable if it is likely to give offence to the religious convictions or feelings of any section of the public. The penalty for such an offence is a fine and a period of imprisonment, in terms of section 32 of the Censorship Act.

PENAL CODE, ACT 22 OF 1929

Part III of the Penal Code sets out a list of ‘Offences injurious to the public in general’ and Chapter XIV thereof sets out ‘Offences relating to religion’. Section 130 of the Penal Code falls under that heading and makes it a misdemeanour to ‘write any word’ with the deliberate intention of wounding the religious feelings of any other person. The penalty is a period of imprisonment.

3.7.9 Prohibition on the publication of expression that harms relations between sections of the public

Part VII, section 23(2)(b)(iii) of the Censorship and Control of Entertainments Act, Act 11 of 1968, provides that a publication will be deemed to be undesirable if it is likely to harm relations between sections of the public.

The penalty for such an offence is a fine and a period of imprisonment, in terms of section 32 of the Censorship Act.

3.7.10 Prohibition on the publication of expression that constitutes commercial advertising involving traditional music

Section 4 of the Commercial Advertising (Traditional Music) Control Act, 1978 makes it an offence, for the purposes of use in commercial advertising, to publish any sound, cinematographic or photographic record of any Malawi traditional music or dancing (defined in section 2 of the act as music, dancing, singing or drumming performed in connection with any official celebration or act of public acclaim of the president or of any other notable person or visitor to Malawi). The offence is punishable by a fine or a period of imprisonment.

3.8 Legislation that specifically assists the media in performing its functions

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

Unfortunately, Malawi has yet to enact access to information or whistleblower protection legislation. In 2003, an Access to Information Bill was developed by civil society organisations, including the Media Institute of Southern Africa. However, the Malawian government has shown little inclination to enact it or even to introduce it in Parliament, despite access to information being a constitutional right.

4 REGULATIONS AFFECTING THE MEDIA

In this section you will learn:

- What regulations or rules are
- Key regulations governing the media generally

4.1 Definition of regulations

Regulations are subordinate legislation. They are legal rules that are made in terms of an empowering statute (for example, an act of Parliament), and are made by a public functionary, usually a minister or a regulatory body.

4.2 Key regulations governing the media

4.2.1 Public Security Regulations, 1965

The Public Security Regulations were passed in terms of the Public Security Act (see section on legislation above). The regulations have significant implications for the media because they contain prohibitions on publication, as well as provisions that undermine a journalist's duty to protect his or her sources (for more on this topic see the section on legislation).

PROHIBITING PUBLICATION

Section 4 of the Public Security Regulations makes it an offence to, and prohibits any person from, publishing anything likely to:

- Be prejudicial to public security
- Undermine the authority of the government
- Promote feelings of ill-will or hostility between sections, classes or races of the inhabitants of Malawi

The penalty is a fine and a period of imprisonment.

UNDERMINING A JOURNALIST'S DUTY TO PROTECT HIS OR HER SOURCES

Section 9 of the Public Security Regulations empowers a police officer (or other authorised officer, such a person with a commission in the armed forces) to order the production of any information, article, book or document from any person if he or she considers it necessary for the preservation of public security. The penalty for failing to comply with such an order is a period of imprisonment.

4.2.2 Corruption Practices (Prohibition of Abuse of Information Obtained in Official Capacity) Regulations, 1999

Although the Corrupt Practices Act does not prohibit the publication of information, it is important to note certain prohibitions in the Corruption Practices Regulations:

- Section 3 of the Corrupt Practices Information Regulations prohibits any person who has obtained unpublished tender information from a government employee from communicating that information to any other person if he or she knows or believes that the information would be used for the purposes of dealing in any contract to which the information relates.
- Section 4 makes the contravention of section 3 an offence, the penalty for which is a fine and a period of imprisonment.

5 MEDIA SELF-REGULATION

The Media Council of Malawi (MCM) has published a Code of Ethics and Professional Conduct, which governs the conduct and practice of journalists in Malawi. The MCM has established an Ethics, Complaints and Disciplinary Committee to adjudicate complaints of breaches of the code. The key elements in the code are as follows:

- **The individual journalist**
 - Is responsible for providing the public with accurate information

- Shall conduct him/herself with propriety
 - Shall dress decently
 - Shall observe etiquette as the situation demands
 - When conducting interviews:
 - Sources must be informed they are being interviewed for a story
 - Interviewees must not be insulted, abused or otherwise embarrassed
 - Interviewees are free to restrict what is to be published as well as what is to be attributed to them
 - Interviews are to be conducted in a language in which an interviewee is competent, or the journalist may arrange for an interpreter
 - Must avoid situations giving rise to conflicts of interest
 - Shall observe his or her employers' editorial policy
 - Shall not demand or accept payment for including or excluding material from a story
- **The journalist's work**
- All material produced by a journalist must be credible, balanced, fair and verifiable.
 - Headlines must reflect the gist of the story and must not be misleading.
 - Avoid unwarranted distortion and speculation, as well as discriminatory and inflammatory language involving, for example, racism, tribalism or religion.
 - Pictures:
 - Should not be traumatising, shocking or obscene
 - Must be appropriate and must not be used for the sake of sales promotion
 - Must not infringe on an individual's right to privacy
 - Quotations must be accurate.
- **General principles and issues**
- Strive for accuracy, transparency and thoroughness in the reporting of news.
 - Avoid plagiarism.
 - Whenever a significant inaccuracy, misleading statement or distorted report has been published, it should be corrected promptly and with due prominence, including an apology where appropriate.
 - Strive for objectivity.
 - Distinguish between news reports, speculation and opinion.

- Balance:
 - Present all sides of a story.
 - Provide a fair opportunity to reply.
- Advertising and public announcements must be accurate and clearly distinguishable from news.
- Legal reporting:
 - Avoid practices which might interfere with the right to a fair trial.
 - Do not prejudice the outcome of a case when reporting on it.
- While facilitating the public's right to know, a journalist shall observe the following limits:
 - No identification of a victim of sexual assault unless the journalist is free to do so by law.
 - No identification of any person under 13 years who is involved in sexual offences cases – as a victim, witness or defendant.
 - Avoid references to a person's race, colour, ethnic origin, religion, sex or sexual orientation, physical or mental illness or disability, unless this is relevant to the story.
 - No obtaining information or pictures through misrepresentation or subterfuge unless the material cannot be obtained by other means.
 - Respect an individual's private life without intrusion or harassment.
- Professional misconduct:
 - An infringement of any of the provisions of the code constitutes professional misconduct.
 - The Ethics, Complaints and Disciplinary Committee shall be responsible for enforcing observance of this code in accordance with the principles of natural justice (that is, with an unbiased adjudicator and observing the journalist's right to a hearing).

6 COMMON LAW AND THE MEDIA

In this section you will learn:

- The definition of common law
- What is meant by judicial review, and in particular:
 - The difference between a review and an appeal
 - The various grounds for judicial review
 - What the High Court of Malawi held in a case involving the judicial review of a decision to revoke a licence of a sound broadcaster in Malawi

6.1 Definition of common law

The common law is judge-made law. It is made up of judgments handed down in cases adjudicating upon disputes brought by people, whether natural (individuals) or juristic (for example, companies). In common law legal systems such as Malawi's, judges are bound by the decisions of higher courts and also by the rules of precedent. This requires that rules laid down by the court in previous cases be followed, unless they were clearly wrongly decided. Legal rules and principles are therefore decided on an incremental, case-by-case basis.

This section focuses on a single judgement that involved the judicial review of a decision by MACRA to revoke a broadcaster's licence.

6.2 Judicial review

6.2.1 The difference between a review and an appeal

When a court hears an application for judicial review of an administrative decision, this is not the same as hearing an appeal from a lower court. In an appeal, the court considers the facts and the law, and essentially asks if the lower court came to the *correct* decision. In an application for judicial review, the court considers the facts and the law, but it asks a different question – namely, whether the *process* by which the decision-maker arrived at the decision being reviewed was flawed or not.

In a leading High Court of Malawi decision, *The State and the Malawi Communications Regulatory Authority ('MACRA') Ex Parte Joy Radio Limited (Miscellaneous Civil Cause No. 143 of 2008)* (*'MACRA v Joy Radio'*), the court reiterated that 'judicial review is not concerned with the merits of the decision ... Rather it is concerned with the decision-making process followed by the maker of the impugned decision'.

Traditionally, judicial review was concerned with purely common law principles. This has, however, changed where constitutions provide a right to administrative justice – as is the case in Malawi. Nevertheless, common law principles play a significant role in determining the scope of the constitutional right.

6.2.2 Grounds for judicial review

There is no absolute, closed list of grounds for reviewing and setting aside an administrative decision. However, in *MACRA v Joy Radio*, the High Court of Malawi specified a number of grounds, namely:

- Where a decision is *ultra vires* – that is, where the decision-maker goes beyond his/her or its legal authority or mandate to act when taking a decision
- Where a decision was taken in a manner that did not observe the principles of natural justice (that is, a duty to act fairly). Although not specifically enumerated by the High Court, in most common law jurisdictions this is distilled into at least two duties, namely, to:
 - Ensure that the decision-maker is not biased
 - Give persons affected by a decision a hearing
- Errors which undermine the process
- Unreasonable decisions

Besides these grounds, which are specifically listed in the judgment, it is widely recognised that there are other grounds for judicial review, including the following:

- Ulterior purpose – this is where a decision is taken ostensibly for one reason but is in fact taken for another, illegitimate reason.
- Failure to apply mind – this is a broad ground of review that is usually evidenced by one or more of the following instances of failure to apply mind:
 - Taking direction – this is where a decision-maker who is empowered to act does so, but at the instruction of a person or authority who or which is not empowered to take the decision.
 - Taking irrelevant considerations into account – this is where a decision-maker takes account of considerations which he or she is not empowered or required to take account of.
 - Failing to take relevant considerations into account – this is where a decision-maker does not take account of considerations which he or she is empowered and required to take account of.

6.2.3 High Court ruling in *MACRA v Joy Radio*

FACTS OF THE CASE AS DETERMINED BY THE COURT

The facts at issue involved a radio station, Joy Radio, licensed by MACRA to provide a broadcasting service. MACRA had issued Joy Radio with two licences: a radio (frequency) licence and a broadcasting licence.

Over a period of time in 2008, MACRA had repeatedly asked Joy Radio for copies

of broadcasts, usually after coverage of opposition political party events. At some point Joy Radio asked MACRA for justifications for the numerous requests for copies of broadcasting material. MACRA did not respond.

In August 2008, MACRA wrote to Joy Radio and threatened to revoke its licence. It accused Joy Radio of violating the provisions of the Communications Act in that:

- At least one of its shareholders was a significant opposition party politician, thereby violating the prohibition against political parties being granted licences
- It had failed to submit copies of broadcasts as requested

In October 2008, MACRA revoked Joy Radio's radio licence. Joy Radio approached the High Court for judicial review of the revocation.

COURT FINDING

The High Court of Malawi made a number of findings about the process which MACRA undertook in revoking Joy Radio's radio (as opposed to broadcasting) licence.

- The High Court found that the Communications Act makes it clear that revocation is a penalty which MACRA may impose only if a broadcaster has failed to comply with an order prohibiting it from broadcasting for a 30-day period.
- Such 30-day prohibition order can be made only after a process which involves granting the party concerned a hearing.
- It found that MACRA had revoked a radio licence on grounds that related only to broadcasting licences and had nothing to do with radio spectrum management. This was unsound and *ultra vires* its powers under the legislation.
- It found that MACRA had a duty to respond to Joy Radio's written request for an explanation as to the frequency of the requests for copies of broadcasts.
- It found that MACRA's refusal to respond to Joy Radio's request for an explanation, coupled with its threat to revoke Joy Radio's licence, demonstrated a desire to intimidate.
- It found that by not holding a hearing into its allegations that Joy Radio's shareholding was not in order, MACRA had failed to comply with the

Communications Act's procedures in dealing with purported non-compliance in this respect.

The High Court concluded that MACRA's decision-making process 'was flawed through and through with irregularities'. The court used strong language in commenting on this: 'I find that MACRA behaved most disgracefully, and that it not only acted *ultra vires* the powers the law has vested it with, but also without fairness in the sense depicted by the principles of natural justice.' The court set aside the revocation of Joy Radio's radio licence and ordered MACRA to pay all costs of the law suit.

6

South Africa



1 INTRODUCTION

The Republic of South Africa officially institutionalised a system of racial segregation known as apartheid in 1948, although racial segregation had always been a feature of colonial rule. The country's first democratic election was held in 1994 following the passage of the Interim Constitution, 1993, which was a negotiated constitution. In 1996 the first democratically elected Parliament, acting as the Constitutional Assembly, enacted the final Constitution. Both the Interim and final constitutions protected basic civil rights, such as freedom of expression, but the final Constitution is particularly noteworthy because it provides for independent regulation of the broadcasting sector.

A feature of the apartheid era was extensive state regulation and censorship of the media. The only broadcast media that was freely available in the country was the South African Broadcasting Corporation (SABC), which provided both radio and television services. The SABC was a state broadcaster, which was subject to government control and manipulation. The only other broadcast service that was allowed in South Africa was a subscription television service – M-Net – which was specifically prohibited from broadcasting news. Some radio and television services did, however, broadcast from the so-called independent states, particularly from Bophuthatswana and the Ciskei, but their reach was limited.

The apartheid era also saw the imposition of severe restrictions on the reporting of news and current affairs by the print media. This was particularly relevant during states of emergency, such as those which were in place during much of the 1980s.

The advent of democracy after 1994 brought about significant improvements in the media environment in South Africa. The broadcast media sector burgeoned as commercial and community sound and television broadcast media were licensed by the independent regulator. The SABC was transformed into a public, as opposed to a state, broadcaster. In the print media sector, black economic empowerment imperatives have broadened print media ownership, and there are a number of independent daily and weekly newspapers.

South Africa has recently seen a number of potential threats to the media. The public broadcaster has been in crisis for some years and signs indicate a possible shift back to the era of state – as opposed to public – broadcaster. The ruling party has also been discussing the need for a statutory media appeals tribunal ostensibly to protect the public against poor journalism.

There has also been huge protest against the Protection of State Information Bill. In this book, bills are generally not discussed and the chapters deal with the law as it stands. However, given the importance of South Africa as a leader in democratic media law on the continent, the Protection of State Information Bill will be a critical test of South Africa's commitment to democratic media law.

It is important to note that certain of the bill's provisions are excellent and it does repeal an important apartheid-era security law. However, there are a number of extremely problematic aspects to the bill, which, if enacted into law, will send very worrying signals about South Africa's commitment to media freedom. In particular, the bill provides, in effect, that South Africa's Promotion of Access to Information Act will not apply to information classified under the bill. In addition, there are tough prison sentences for the publication of classified information and there is no public interest override allowing for such publication in the public interest.

These provisions are being hotly contested by opposition parties and civil society in South Africa, including by the trade union federation, which is one of the ruling party's key allies. At the time of writing, the second house of Parliament, the National Council of Provinces (NCOP), had received over 300 written submissions, almost all of which are critical of the bill. The NCOP is due to hold oral hearings on the bill shortly.

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

- Media and the constitution

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

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

2 THE MEDIA AND THE CONSTITUTION

In this section you will learn:

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

2.1 Definition of a constitution

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

The South African Constitution sets out the foundational rules of the South African state. These are the rules upon which the entire country operates. The Constitution contains the underlying principles, values and laws of the Republic of South Africa. A key constitutional provision in this regard is section 1, which states:

The Republic of South Africa is one sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms;
- (b) Non-racialism and non-sexism;
- (c) Supremacy of the constitution and the rule of law;
- (d) Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

2.2 Definition of constitutional supremacy

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

The South African Constitution makes provision for constitutional supremacy. Section 2 specifically states: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

2.3 Definition of a limitations clause

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

The Constitution of South Africa makes provision for three types of legal limitations on the exercise and protection of rights contained in Chapter 2, 'Bill of Rights'.

2.3.1 Internal limitations

There are limitations that are right specific and contain limitations or qualifications

to the particular right that is dealt with in a particular section of the Bill of Rights. As discussed later, the right to freedom of expression contains such an internal limitations clause.

2.3.2 Constitutional limitations

Section 36(2) of the Constitution makes it clear that a law may limit any right entrenched in the Bill of Rights if this is allowed in terms of any provision of the Constitution. See, for example, section 37 of the Constitution, which deals with states of emergency. Section 37(4) specifically allows for emergency legislation to provide for derogations from the Bill of Rights in certain circumstances. These circumstances include where the derogation is strictly required by the emergency, and that certain rights cannot be derogated from, namely, the rights to dignity and life.

2.3.3 General limitations

The last type of limitation is a general limitations provision. General limitations provisions apply to the provisions of a bill of rights or other statement setting out the fundamental rights. These types of clauses allow a government to pass laws limiting rights, generally provided this is done in accordance with the constitution. One can find the general limitations clause applicable to the South African Bill of Rights in section 36 of the South African Constitution, headed 'Limitations of rights'. Section 36(1) provides that the rights in the Bill of Rights may be limited only:

- In terms of a law of general application. This means that the law may not single out particular individuals and deny them their rights
- To the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
 - The nature of the right
 - The importance of the purpose of the limitation
 - The nature and extent of the limitation
 - The relation between the limitation and its purpose
 - Less restrictive means to achieve the purpose

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

It is not always clear why it is necessary to have internal limitations clauses if there is

a general limitations clause as well. Often, internal limitations clauses offer insight into rights, which appear to be substantive but which are actually not very effective.

2.4 Constitutional provisions that protect the media

The South African Constitution contains a number of important provisions in Chapter 2, ‘Bill of Rights’, that directly protect the media, including publishers, broadcasters, journalists, editors and producers. There are, however, provisions elsewhere in the Constitution that assist the media as it goes about its work of reporting on issues in the public interest, and we include these in this section too.

2.4.1 Rights that protect the media

FREEDOM OF EXPRESSION

The most important provision that protects the media is section 16(1), part of the section headed ‘Freedom of expression’, which states:

Everyone has the right to freedom of expression, which includes –

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

This provision needs some detailed explanation.

- This freedom applies to ‘everyone’ and not just to certain people, such as citizens.
- The freedom is not limited to speech (whether oral or written) but extends to non-verbal or non-written ‘expression’. There are many different examples of this, including physical expression (such as mime or dance), photography or art.
- Section 16(1)(a) specifies that the right to freedom of expression includes ‘freedom of the press and other media’. This is very important for two reasons:
 - It makes it clear that this right can apply to corporate entities such as media houses, newspapers or broadcasters, as well as to individuals.
 - It makes it clear that the right extends to both the ‘press’ and ‘other media’. Thus, the section distinguishes between the ‘press’ – with its connotations of the news media – and ‘other media’, which could include fashion, sports, gardening or business publications or television channels, thereby protecting all media.

- Section 16(2)(b) specifically enshrines the freedom ‘to receive or impart information and ideas’. This right of everyone’s to receive information is a fundamental aspect of freedom of expression and this subsection enshrines the right to the free flow of information. Thus, the information rights of audiences, for example, as well as the expression rights of the media are protected. This right is important because it also protects organisations that foster media development. These organisations facilitate public access to different sources and types of information, particularly in rural areas that traditionally have limited access to the media.

RIGHT OF ACCESS TO INFORMATION

Another critically important provision that protects the media is section 32, which enshrines the right of access to information. Section 32(1) provides that everyone has the right of access to:

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

This right requires some explanation.

Section 32 essentially provides for two types of rights of access to information:

- The first is a general right of access to any information held by the state. There are no prerequisites for this right; everyone has the right to any information held by the state.
- The second right is, paradoxically, both broader and narrower. It is broader because it grants everyone the right to information ‘held by any other person’ – other than the state, that is. Essentially, this grants everyone the right to information held by all private persons, whether individuals or institutions. However, this right is more narrowly tailored as one has the right to information held by non-state persons only where access to the information is ‘required for the exercise or protection of any rights’. Thus one needs to demonstrate that the information is required in order to protect or exercise a right.

The right of access to information is vital in the information age in which we live. When states wield enormous power, particularly with regard to the distribution of resources, the right of access to information is one of the most important rights in ensuring transparency and holding government accountable. If one considers that the

media plays an enormous role in ensuring transparency and government accountability through providing the public with information, having this right of *access* to information is critical to enable the media to perform its functions properly.

Importantly, section 32(2) provides that national legislation must be enacted to give effect to the right of access to information. This has been done through the Promotion of Access to Information Act, 2000, which is dealt with in more detail in the legislation section below.

RIGHT TO JUST ADMINISTRATIVE ACTION

Another important provision that protects the media is section 33, ‘Just administrative action’. Section 33(1) provides that everyone ‘has the right to administrative action that is lawful, reasonable and procedurally fair’, and section 33(2) provides that everyone ‘whose rights have been adversely affected by administrative action has the right to be given written reasons’.

This right requires explanation. The reason why this provision is important for journalists and the media is that it protects them (as it does all people) from administrative officials who act unfairly and unreasonably and who do not comply with legal requirements. It also entitles journalists and the media to written reasons when administrative action results in their rights being adversely affected.

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

Many decisions taken by bodies are ‘administrative’ in nature, and this requirement of administrative justice is a powerful one that prevents or corrects unfair and unreasonable conduct on the part of administrative officials. Furthermore, having a constitutional right to written reasons is a powerful tool in ensuring rational and reasonable behaviour on the part of administrative bodies, and aids in ensuring transparency and, ultimately, accountability.

Importantly, section 33(3) provides that national legislation must be enacted to give effect to the right to just administrative action. This has been done in the Promotion of Administrative Justice Act, 2000.

PRIVACY

A fourth protection is contained in section 14, ‘Privacy’. Section 14 specifies that

everyone has the right to privacy, which includes the right not to have their person, home or property searched, their possessions seized or the privacy of their communications infringed upon. This protection of communications (including letters, emails, telefaxes and telephone conversations) is an important right for working journalists.

FREEDOM OF RELIGION, BELIEF AND OPINION

A fifth protection is contained in section 15(1), which guarantees everyone the right to freedom of, among other things, ‘thought, belief and opinion’. Freedom of opinion is important for the media as it protects commentary on public issues of importance.

FREEDOM OF ASSOCIATION

A sixth protection is provided for in section 18, which grants everyone the right to freedom of association, thereby guaranteeing the rights of the press to form press associations, but also to form media houses and operations.

FREEDOM OF TRADE, OCCUPATION AND PROFESSION

Section 22 guarantees everyone the right to choose their profession freely; however, this right is subject to the internal limitation that the practise of a profession, such as journalism, may be regulated by law.

This is not a dangerous internal limitation – it merely allows for appropriate regulation to protect the public, such as ensuring against malpractice by members of the medical profession, or unethical behaviour by lawyers.

2.4.2 Other constitutional provisions that assist the media

It is important to note that there are provisions in the South African Constitution, apart from the Bill of Rights provisions, that are important and assist the media in performing its functions.

PROVISIONS REGARDING THE FUNCTIONING OF PARLIAMENT

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

- Sections 58 and 71, which specifically protect freedom of speech in the National Assembly or the NCOP of the president, Cabinet members, deputy minister and

members of the National Assembly and delegates to the NCOP. They cannot be arrested, charged or sued either civilly or criminally in respect of speeches made or documents produced in the National Assembly or NCOP.

- Sections 59(1) and 72(1), which provide that the National Assembly and NCOP are required to conduct their business in an open manner and must hold their sittings as well as committee sittings in public, although reasonable measures may be taken to refuse entry to any person.
- Importantly, sections 59(2) and 72(1) specifically provide that the National Assembly and NCOP may not exclude the media from a sitting of a committee, unless it is reasonable and justifiable to do so in an open and democratic society.

These provisions assist the media in two key ways. First, they ensure that the media has a great deal of access to the workings of Parliament by being physically able to be in Parliament. Second, they protect parliamentarians by allowing members of Parliament (MPs) to speak freely in front of the media without facing arrest or charges for what they say.

PROVISIONS REGARDING PUBLIC ADMINISTRATION

Section 195 is headed ‘Basic values and principles governing public administration’. Section 195(1) provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, and includes a number of principles. Some of these have particular importance for the media, namely:

- (e) People’s needs must be responded to, and the public must be encouraged to participate in policy-making;
- (f) Public administration must be accountable; and
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

There can be little doubt that the media plays a crucial role in educating the population, enabling citizens to participate meaningfully in a democracy. These provisions could therefore be interpreted as requiring media-friendly policies on the part of the state.

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

Just as there are certain rights or freedoms that protect the media, other rights or

freedoms can protect individuals and institutions *from* the media. It is important for journalists to understand which provisions in the Constitution can be used against the media. There are a number of these.

2.5.1 Right to human dignity

The right to human dignity is provided for in section 10, which states that ‘everyone has inherent dignity and the right to have their dignity respected and protected’. Dignity is a right that is often raised in defamation cases because defamation, by definition, undermines the dignity of the person being defamed. This right is often set up against the right to freedom of the press, requiring a balancing of constitutional rights.

2.5.2 Right to privacy

Similarly, the right to privacy (discussed in some detail above) is often raised in litigation involving the media, with the subjects of press attention asserting their rights not to be photographed, written about or followed in public, etc. The media has to be careful in this regard. The media should be aware that there are always ‘boundaries’ in respect of privacy that need to be respected and which are dependent on the particular circumstances, including whether or not the person is a public figure or holds public office, and the nature of the issue being dealt with by the media.

2.5.3 Internal limitation to the right to freedom of expression

It is important to note that the right to freedom of expression is one of the few rights in the Bill of Rights that is subject to an internal limitation. Section 16(1) sets out the content of the right to freedom of expression, and section 16(2) provides that the right to freedom of expression does not extend to three types of expression, namely: propaganda for war; incitement to imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

It is important to understand the nature of the provisions of section 16(2). There is a misconception that the Constitution outlaws or makes illegal this kind of expression. This is not correct: what the Constitution does say is that these three types of expression do not fall within the right to freedom of expression. In other words, they are simply not constitutionally protected.

The effect of this is that government may prohibit this kind of expression without needing to meet any of the requirements contained in the general limitations clause: because there is no right to make these three types of expression, there is no need to

justify limitations on them. The danger in this, of course, is that the government is free to be heavy handed and to legislate in a disproportionate manner when regulating such expression.

2.5.4 States of emergency provisions

It is also critically important to note the provisions of section 37 in the Bill of Rights, which deal with states of emergency. A state of emergency may be declared in legislation for a period of 21 days (although this can be extended for up to three months at a time) by the National Assembly ‘only when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency and the declaration is necessary to restore peace and order’. Importantly, section 37 specifically allows for emergency legislation to provide for the derogation of rights laid down in the Bill of Rights (including all of the rights that are important to the media, such as the right to freedom of expression, privacy, access to information, administrative justice, etc.), where this is strictly required by the emergency.

2.6 Key institutions relevant to the media established under the South African Constitution

A number of important institutions in relation to the media are established under the South African Constitution. These include the judiciary, the Judicial Service Commission (JSC), the Public Protector, the Human Rights Commission and the independent authority to regulate broadcasting.

2.6.1 The judiciary

In terms of section 165(1) of the South African Constitution, judicial authority of the republic vests in the courts. These are: the Constitutional Court, the apex court in respect of constitutional matters; the Supreme Court of Appeal, the apex court in respect of non-constitutional matters; the high courts; the magistrates’ courts; and any other court established in terms of an act of Parliament.

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

Section 165(2) specifically provides that the courts ‘are independent and subject only to the Constitution and to the law, which they must apply impartially and without fear, favour or prejudice’. Judges are appointed by the state president, acting on the recommendation of the JSC and after consultation with the chief justice and leaders of all political parties represented in Parliament. Judges are removed by the president, who must act on a finding by the JSC that the particular judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct. In addition, a resolution must be passed by two-thirds in the National Assembly calling for the judge to be removed.

2.6.2 The Judicial Service Commission

The JSC is a constitutional body established to participate in the appointment and removal of judges. Many would query why the JSC is relevant to the media. The answer is because of the JSC’s critical role in the judiciary, the proper functioning and independence of which are essential for democracy. In terms of section 178, the JSC comprises: the chief justice; the president of the Supreme Court of Appeal; one judge president designated by all the judges president; two practising advocates nominated by the profession and two practising attorneys nominated by the profession, all of whom are appointed by the president; one law teacher designated by the universities; six members of the National Assembly, three of whom represent opposition parties; four permanent delegates to the NCOP; and four persons designated by the state president after consultation with the leaders of all political parties represented in the National Assembly. Also, when considering matters relating to a specific high court, both the judge president and the premier of that province is part of the JSC.

Unfortunately, it appears that the JSC is becoming increasingly politicised and its credibility among a number of legal practitioners, including some members of the judiciary, has been dented. An example is the furore surrounding the JSC’s effective dismissal of a complaint of judicial misconduct laid by the Constitutional Court against Cape Judge President Hlophe.

2.6.3 The Public Protector

The Public Protector’s Office is an important office for the media because it, too, is aimed at holding public power accountable. The Public Protector is established in terms of section 182 of the Constitution. It is part of Chapter 9 of the Constitution, ‘State institutions supporting constitutional democracy’. The main power of the Public Protector is to investigate (and, if necessary, act upon) any conduct in state affairs or in the public administration in any sphere of government that is alleged or suspected to be improper, or to result in any impropriety or prejudice.

The Public Protector is governed by the Public Protector Act, Act 23 of 1994. In terms of section 1A(2) of this act, read with section 193 of the Constitution, the Public Protector is appointed by the president on the recommendation of the National Assembly. Note that the Public Protector can be removed only on the grounds of misconduct, incapacity or incompetence, in terms of section 194 of the Constitution.

2.6.4 The Human Rights Commission

The Human Rights Commission is an important organisation in respect of the media. It is also a ‘Chapter 9’ body – that is, a state institution supporting constitutional democracy. In terms of section 184 of the Constitution, the Human Rights Commission’s brief is to promote respect for human rights, as well as to promote the protection, development and attainment of human rights, including monitoring and assessing the observance of human rights in South Africa.

The Human Rights Commission is governed by the Human Rights Commission Act, 1994. Members of the Human Rights Commission are appointed by the president upon recommendation of the National Assembly. As with the Public Protector, the commissioners can be removed only on the grounds of misconduct, incapacity or incompetence, in terms of section 194 of the Constitution.

2.6.5 The independent authority to regulate broadcasting

Section 192 of the Constitution is critically important for the broadcast media. It requires that national legislation be passed to establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society. It is also a Chapter 9 body.

The independent broadcasting authority required by section 192 of the Constitution has been established in terms of the Independent Communications Authority of South Africa Act, 2000. It is called the Independent Communications Authority of South Africa (Icasa), and is dealt with in more detail elsewhere in this chapter.

Section 192 clearly articulates constitutional values for the broadcasting sector, namely, that broadcasting is to be regulated in the public interest and that a diversity of views within the broadcasting sector is important.

2.7 Enforcing rights under the Constitution

A right is only as effective as its enforcement. All too often rights are enshrined in

documents such as a constitution or a bill of rights, and yet remain empty of substance because they cannot be enforced.

Section 7(2) of the Constitution requires the state to ‘respect, protect, promote and fulfil the rights in the Bill of Rights’. Section 8(1) of the Constitution makes it clear that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. Furthermore, section 8(2) makes it clear that the Bill of Rights also binds a natural (an individual) or juristic person (such as a company) if a particular right is applicable in the circumstances.

While rights are generally enforceable through the courts, the Constitution itself also envisages the right of people, including the media, to approach a body such as the Public Protector or the Human Rights Commission to assist in the enforcement of rights.

Perhaps one of the most effective ways in which rights are protected under the Constitution is through the provisions of the Constitution that entrench Chapter 2, the Bill of Rights. Section 74(2) of the Constitution requires that a constitutional amendment to Chapter 2 be passed by two-thirds of the members of the National Assembly and by six of the nine provinces in the NCOP, thereby providing significant protection for the Bill of Rights provisions.

2.8 The three branches of government and separation of powers

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

2.8.1 Branches of government

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

THE EXECUTIVE

In terms of section 85(1) of the Constitution, executive power in South Africa vests in the president. Executive power is exercised by the president, together with Cabinet, in terms of section 85(2) of the Constitution. In terms of section 91(1) of the Constitution, the Cabinet comprises the president, a deputy president and ministers appointed by the president – all but two of which must be selected from the members of the National Assembly.

Section 85 sets out a number of functions of the president acting together with members of the Cabinet. These include:

- Implementing national legislation
- Developing and implementing national policy
- Coordinating functions of state departments and administrations
- Preparing and initiating legislation
- Performing any other executive function in terms of the Constitution or legislation

Essentially, it can be said that the role of the executive is to administer or enforce laws, make governmental policy and propose new laws.

THE LEGISLATURE

In terms of section 43(a) of the Constitution, legislative power in South Africa vests in Parliament. In terms of section 42(1) of the Constitution, Parliament consists of the National Assembly and the NCOP. In terms of section 44, this legislative authority has the power to amend the Constitution and to pass and amend legislation. The National Assembly also fulfils other important functions, including, in terms of section 55(2), holding the executive accountable for its operations. It does this through playing an oversight role in terms of the workings of the executive branch of government.

In terms of section 46, the National Assembly is made up of between 350 and 400 people, elected in terms of a common voters' role and in accordance with national legislation. In terms of section 60, the NCOP comprises nine delegations of 10 people – one delegation from each of country's nine provinces.

THE JUDICIARY

As described above, judicial power vests in the courts. The role of the judiciary is to interpret the law and to adjudicate legal disputes in accordance with the law.

2.8.2 Separation of powers

It is important in a functioning democracy to divide governmental power between different organs of the state in order to guard against the centralisation of power, which may lead to abuses of power. This is known as the 'separation of powers' doctrine. The aim is to separate the functions of the three branches of government – the executive, the legislature and the judiciary – so that no single branch is able to operate alone, assume complete state control and amass centralised power. While

each branch performs a number of different functions, each also plays a ‘watchdog’ role in respect of the other. This helps to ensure that public power is exercised in a manner that is accountable to the general public and in accordance with the constitution.

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

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

2.9.1 Remove internal constitutional limitation

The internal limitation contained in section 16(2) of the Constitution and applicable to the right to freedom of expression ought to be repealed. These provisions are unnecessary because the provisions of the general limitations clause give government the powers it needs to limit fundamental rights reasonably. Consequently, the legislature already has the power to pass legislation limiting hate speech and other kinds of expression, which is the subject of the internal qualifier found in section 16(2).

2.9.2 Bolster independence of the broadcasting regulator

It is disappointing that the Constitution does not provide the independent broadcasting regulator, established in terms of section 192, the same degree of institutional protection against political and other interference that is provided to all other Chapter 9 (state institutions supporting constitutional democracy) bodies. The broad provisions that protect the independence of Chapter 9 bodies generally should be amended such that they specifically apply to the broadcasting regulator, as well as to all the other Chapter 9 bodies. These provisions are:

- Section 181 – Establishment and governing principles
- Section 193 – Appointments
- Section 194 – Removal from office

2.9.3 Constitutional protection for the public broadcaster

It has become clear that the public broadcaster, the SABC, is increasingly threatened by political interference. Most South Africans access news and current affairs information from the SABC. The Constitution should therefore specifically protect its independence and ensure that it operates in the public interest.

This is important in order to guarantee impartiality and to be sure that the South African public is exposed to a variety of views. Chapter 9 of the Constitution ought to be amended specifically to include the SABC as a state institution supporting constitutional democracy.

3 THE MEDIA AND LEGISLATION

In this section you will learn:

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

3.1 Legislation: An introduction

3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed by parliament, which is the legislative authority. As discussed, legislative authority in South Africa vests in Parliament, which, in terms of the Constitution, is made up of the National Assembly and the NCOP. Consequently, both houses of Parliament are involved in passing legislation.

Detailed rules in sections 73–82 of the Constitution set out the law-making processes that apply to different types of legislation. It is important for journalists and others in the media to be aware that the Constitution requires different types of legislation to be passed in accordance with particular procedures. The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the Constitution, there are four kinds of legislation, each of which has particular procedures and/or rules applicable to it. These are:

- Legislation that amends the Constitution – the procedures and/or applicable rules are set out in section 74 of the Constitution

- Legislation that does not deal with provincial-related issues – the procedures and/or applicable rules are set out in section 75 of the Constitution
- Legislation that deals with provincial issues – the procedures and/or applicable rules are set out in sections 76 and 78 of the Constitution
- Legislation that deals with taxation issues – the procedures and/or applicable rules are set out in section 77 of the Constitution

3.1.2 The difference between a bill and an act

A bill is a draft law that is debated and usually amended by Parliament during the law-making process. If a bill is passed by Parliament in accordance with the various applicable procedures required for different types of bills as set out above, it is sent to the president. Once it is signed by the president (signifying his assent to the bill) it becomes an act (in terms of section 81 of the Constitution). An act must be published promptly, and takes effect or comes into force when it is published or on a date specified in the act itself (in terms of section 81 of the Constitution).

Besides the checks upon legislation that are built in to the system of having both houses of Parliament consider and vote upon a bill, the Constitution provides for other mechanisms of reviewing a bill passed by Parliament before it becomes an act:

- *Presidential review:* If the president has reservations about the constitutionality of any bill passed by Parliament, he or she may refer it back to the National Assembly for reconsideration, in terms of section 79 of the Constitution. Note that the NCOP must also participate in such reconsideration if the president is concerned about a procedural matter involving the NCOP, or if the bill is one which amends the Constitution or deals with provincial matters. After the reconsideration, the president must either accept the bill – that is, sign it such that it becomes an act – or the president must refer the bill to the Constitutional Court for a ruling on its constitutionality. If the Constitutional Court rules that the bill is constitutional, section 79(5) requires the president to assent to and sign the bill.
- *Review by the National Assembly:* It is interesting that the Constitution, in section 80, provides for a procedure to test the constitutionality of a recently enacted act of Parliament by members of the National Assembly. In terms of section 80, members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an act of Parliament is unconstitutional, provided that:
 - At least one-third of the members of the National Assembly support

the application. The reason for this requirement is to prevent small minority parties (less than a third of the MPs) from being able to disrupt the democratic process by unnecessarily challenging laws through allegations of unconstitutionality

- The act of Parliament was assented to and signed by the president within the previous 30 days. The reason for this requirement is to try to discourage Parliament from causing legal chaos by challenging its own legislation after the legislation has long been settled

3.2 Statutes governing the print media

Since the advent of democracy, South Africa's print media has enjoyed a level of media freedom that is unprecedented in its history. Indeed, South Africa's print media environment is undoubtedly the most free, robust and critical on the continent. There are very few limitations on the ability to operate as a print media publication. Most of the laws setting down specific obligations upon the print media are clearly reasonable and justifiable and do not impinge in any way on the public's right to know.

3.2.1 Imprint Act, Act 43 of 1993

There are certain key requirements laid down by the Imprint Act in respect of printed matter, the definition of which would clearly include a newspaper, newspaper poster, magazine or periodical:

- Section 2 requires printers of publications intended for public sale or distribution to put their full name and full address in one of the official languages on any such publication. Note that it is possible for a registered abbreviation to be used, in terms of section 3.
- Section 4 provides that no person may distribute any publication that is printed outside of the country unless the name of the country of origin is affixed to the publication.
- In terms of section 7, failure to comply with sections 2, 3 or 4 is an offence and, upon conviction, a person would be liable to a fine or imprisonment not exceeding one year.

3.2.2 Legal Deposit Act, Act 54 of 1997

The aim of the Legal Deposit Act is to preserve South Africa's documentary heritage.

Section 2, read with sections 3 and 4, requires a publisher, at its cost, to supply up to five copies of each published document (which clearly includes newspapers, magazines and periodicals) to a prescribed place of legal deposit (these are large libraries based in the major cities), and to provide the State Library with prescribed information regarding that document within 14 days of publication.

3.3 Statutes governing the broadcast media generally

3.3.1 Statutes regulating broadcasting generally

Broadcasting in South Africa is regulated in terms of a number of different pieces of legislation:

- *Broadcasting Act, Act 4 of 1999*. The Broadcasting Act has been amended a number of times and, apart from a few sections which are still generally applicable to all broadcasters, it is essentially an act that regulates the public broadcaster, the SABC, as is dealt with in more detail below.
- *Independent Communications Authority of South Africa Act, Act 13 of 2000*. This act establishes and empowers Icasa, which is the authority that regulates electronic communications, broadcasting and postal services in South Africa.
- *Electronic Communications Act (ECA), Act 36 of 2005*. The ECA provides for a number of specific powers and functions of Icasa in relation to the entire electronic communications and broadcasting sectors in South Africa. Chapter 9 of the ECA, ‘Broadcasting services’, regulates the broadcasting industry in South Africa.
- *Media Development and Diversity Agency (MDDA) Act, Act 14 of 2002*. The MDDA Act creates the Media Development and Diversity Agency as a juristic person, whose main object is to promote development and diversity in the media throughout the country, in terms of section 3 of the MDDA Act. The MDDA’s main source of funding is through financial contributions made by broadcasters. This funding is used for a range of projects, including providing financial support to community media and small commercial media. Note that this is not limited to broadcast media.

3.3.2 Establishment of Icasa and the MDDA

The Icasa Act provides in section 3 that Icasa is established and that it operates through a council. The MDDA Act provides in section 2 that the MDDA is established and that it operates through a board.

3.3.3 Main functions of Icasa and the MDDA

ICASA

In terms of section 2 of the Icasa Act, Icasa is established to regulate electronic communications, postal matters and, importantly, in terms of section 2(a), ‘to regulate broadcasting in the public interest to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the Constitution’.

Section 4(1)(a) of the Icasa Act requires Icasa to exercise the powers and perform the duties conferred or imposed upon it by the Icasa Act, but also by other relevant statutes, including the Broadcasting Act, the Postal Services Act and the Electronic Communications Act. Consequently, Icasa’s mandate derives from a number of different statutes.

If one looks at all the broadcasting-related statutes (the Icasa Act, the Broadcasting Act and the ECA), it is clear that Icasa’s main functions with regard to broadcasting include: licensing of various broadcasting services; spectrum management and licensing; regulation of ownership and control of broadcasting services; and content regulation. These are dealt with in more detail below.

THE MDDA

The MDDA Act, at section 3, provides that the MDDA’s main objective is to promote development and diversity in the South African media and for that purpose, among other things, to:

- Encourage media ownership by historically disadvantaged communities
- Encourage the channelling of resources to the community media and small commercial media sectors.

3.3.4 Appointment of Icasa councillors and MDDA board members

ICASA

In terms of section 5 of the Icasa Act, the Icasa Council is made up of nine people: the chairperson and eight other councillors. They are all appointed by the minister of communications on the advice of the National Assembly.

Section 5(1) requires that the appointment process include a public nominations process, be transparent and open, and include the publication of a shortlist of candidates.

The process set out in section 5 requires the National Assembly to come up with a shortlist of suitable candidates of one-and-a-half times the number of councillors to be appointed, and the minister must make his or her choice of councillors from that list.

Section 5(3) of the Icasa Act sets out criteria for appointment. Importantly, these include a commitment to ‘fairness, freedom of expression, openness and accountability’ as well as technical competencies. Section 6(1) of the Icasa Act sets out grounds for disqualification of Icasa councillors, and these include being foreign, public servants, holding political office, conflicts of interest and prior convictions.

THE MDDA

In terms of section 4 of the MDDA Act, the MDDA board is made up of nine members, all of whom are appointed by the president. However, of the nine members:

- Six are appointed on the recommendation of the National Assembly. Section 4(1)(b) of the MDDA Act requires that the appointment process must include a public nominations process, be transparent and open, and include the publication of a shortlist of candidates
- Three are appointed by the president without the intervention of the National Assembly ‘taking into account section 15’, in terms of section 4(1)(c) of the MDDA Act. Section 15 deals with the funding of the MDDA and is a pointed reference to the fact that the majority of funding for the MDDA currently derives from voluntary contributions made by the media. Indeed, section 4(1)(c) specifies that one of the three purely presidential appointees must be from the commercial print media and another from the commercial broadcast media

Section 4(4) read with section 4(5) of the MDDA Act sets out criteria for appointment. These include a commitment to ‘fairness, freedom of expression, openness and accountability’ as well as technical competencies. Section 5 of the MDDA Act sets out grounds for disqualification of MDDA board members, and these include being foreign, holding elective office, holding political party office and prior convictions.

3.3.5 Funding for Icasa and the MDDA

ICASA

In terms of section 15 of the Icasa Act, Icasa is funded from money appropriated by Parliament. In other words, funding for Icasa must be provided for in the national

budget. Section 15(1A) also allows Icasa to be funded from other sources, as may be agreed between the minister of communications and the minister of finance, and as approved by Cabinet.

It is important to note that Icasa is not permitted to keep any licence/regulatory fees paid to it by the broadcasting, electronic communications or postal industries, and section 15(3) requires Icasa to pay such fees and other revenue into the National Revenue Fund within 30 days of receipt.

THE MDDA

In terms of section 15 of the MDDA Act, the funds of the MDDA consist of: money appropriated by Parliament that is specifically set aside in the national budget for that purpose; money received in terms of voluntary agreements with any organisation (note that this includes a number of print and broadcast media entities); domestic and foreign grants, investment interest and moneys lawfully obtained from any other source.

3.3.6 Making broadcasting regulations

The ECA, at section 4, sets out a regulation-making process and procedure for Icasa. Icasa is given wide powers to make regulations. When Icasa intends making a regulation it must give the public at least 30 days' notice of its intention, and a draft regulation must be published for public notice and comment. Importantly, section 4(5) of the ECA requires Icasa to notify the minister of communications in writing of its intention to make a regulation and the subject matter of the regulation. Section 4(6) allows for Icasa to conduct public hearings in regard to proposed regulations.

3.3.7 The licensing regime for broadcasters in South Africa

CATEGORIES OF BROADCASTING SERVICES

Section 5(1) of the Broadcasting Act provides that there are three categories of broadcasting services:

- *Public*: These are the radio and television services provided by the public broadcaster, the SABC.
- *Community*: These are both radio and television services provided by non-profit entities in the interests of a community – either a geographic community or a community of interest, such as a religious broadcaster or a student radio station.

- *Commercial:* These are both radio and television services provided on a commercial basis. Note that commercial broadcasters operate on a free-to-air basis (in which case their revenue is derived from advertising alone) or on a subscription basis (in which case their revenue is derived from subscription income and advertising).

TYPES OF BROADCASTING LICENCES

In terms of section 5 of the ECA, Icasa is empowered to grant licences for the different categories of broadcasting services. There are two types of broadcasting licences available:

- *Individual licences:* For commercial and public broadcasting services of national or regional scope. In terms of section 5(9) of the ECA, an individual licence may be granted for a period not exceeding 20 years and may be renewed.
- *Class licences:* For community broadcasting services or for low-power services, such as radio stations used by drive-in cinema operators. In terms of section 19(1) of the ECA, a class licence must have a term of validity not exceeding 10 years. Class licences may be renewed.

FREQUENCY SPECTRUM LICENSING

Section 31(1) of the ECA provides that, as a general rule, any person who transmits a signal by radio must have a radio frequency spectrum licence granted by Icasa. As broadcasters in South Africa make use of radio frequencies to transmit their broadcasting signals, all broadcasters are required to have a frequency spectrum licence.

In terms of section 31(2) of the ECA, a radio frequency spectrum licence is required in addition to the broadcasting licences set out above.

3.3.8 Responsibilities of broadcasters in South Africa

ADHERENCE TO LICENCE CONDITIONS

Section 4(3)(d) of the Icasa Act specifically empowers Icasa to develop and enforce licence conditions. In terms of section 8(1) of the ECA, Icasa must pass regulations setting out standard terms and conditions for individual and class licences and, in terms of section 8(3) of the ECA, may prescribe additional terms applicable to any individual or class licence.

ADHERENCE TO CONTENT REQUIREMENTS OR RESTRICTIONS

Although all broadcasters enjoy the constitutional right to freedom of expression, this right is not absolute and broadcasters are, in fact, subject to a range of content regulation in relation to what they may or may not broadcast. These regulations include the following.

Adherence to a broadcasting code of conduct

In terms of section 54 of the ECA, Icasa must prescribe a code of conduct for broadcasting services. Broadcasters must comply either with the Icasa code or with the code of a self-regulatory body of which the broadcaster is a member, provided that Icasa has approved the code of that self-regulatory body. Almost all broadcasters (public, commercial or community) are members of the National Association of Broadcasters (NAB).

The NAB has established a self-regulatory mechanism in respect of broadcasting content, namely the Broadcasting Complaints Commission of South Africa (BCCSA), which has its own Icasa-approved codes of conduct for both free-to-air and subscription broadcasters. Most broadcasters are therefore governed by and adhere to the BCCSA's codes, which are very similar to Icasa's code.

The codes are dealt with in more detail in the regulations and self-regulation sections below.

Adherence to an advertising code

In terms of section 55 of the ECA, all broadcasting service licensees must adhere to the Code of Advertising Practice of the Advertising Standards Authority of South Africa. However, breaches of the Code of Advertising Practice by broadcasters are dealt with by Icasa, acting through its Complaints and Compliance Committee. The code is dealt with in more detail in the self-regulation section below.

Adherence to local content quotas

Section 61 of the ECA deals with the preservation of South African programming, and empowers Icasa to make regulations and licence conditions on:

- Local television content quotas for television broadcasting services
- Independent television production quotas for television broadcasting services
- South African music quotas for sound broadcasting services

The requirements of the local content regulations are set out in more detail in the regulations section below.

National sporting events

Section 60(1) of the ECA prohibits subscription broadcasting services from acquiring exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events, as identified in the public interest by Icasa, after consultation with the ministers of communications and sports. The requirements of the sports broadcasting regulations are set out in more detail in the regulations section below.

Political broadcasting restrictions

Section 56 of the ECA prohibits the broadcasting of all party election broadcasts and political advertising except during an election period. During each specific election period, Icasa develops a new set of regulations for party election broadcasts, in accordance with the following requirements of section 57 of the ECA:

- Party election broadcasts cannot be broadcast within the 48-hour period prior to an election.
- No commercial or community broadcaster is obliged to carry party election broadcasts, although the public broadcaster is so obliged.
- Icasa is to determine the duration and scheduling of party election broadcasts, having regard to the principle that all parties are to be treated equitably. Note that equitable treatment does not mean that all parties are required to be given equal time for party election broadcasts.

Political advertising is governed by section 58 of the ECA, which provides that:

- Political advertisements cannot be broadcast within the 48-hour period prior to an election
- No broadcaster (public, commercial or community) is obliged to carry political advertising, but if it chooses to do so it must afford all political parties an equal opportunity
- Broadcasters may not discriminate against or give preference to any political party in respect of political advertising

Section 59 of the ECA requires generally equitable treatment of political parties by broadcasters during an election period:

- All parties must be treated equitably and there must be reasonable opportunities for the discussion of conflicting views.

- There must be adherence to the principle of the right of reply.

KEEPING RECORDS OF PROGRAMMES BROADCAST

Section 53 of the ECA requires all broadcasters to keep a recording of every programme broadcast for a period of 60 days from the date of broadcast, and to produce a script or transcript of a programme after the broadcast thereof. Importantly, section 53(2) specifically provides that Icasa is not authorised to view programmes prior to their being broadcast.

ADHERENCE TO OWNERSHIP AND CONTROL REQUIREMENTS

Regulating ownership and control of broadcasting licences is an important part of Icasa's regulatory work. Ensuring diversity of ownership is an important part of guaranteeing that there is genuine diversity of views expressed over the airwaves. Icasa has five important areas of supervision in this regard:

No party political broadcasters

Section 52 of the ECA prohibits any broadcasting licence to be given to any party, movement, organisation or like body which is of a party political nature.

Limitations on foreign ownership and control of commercial broadcasting services

Section 64 of the ECA prohibits:

- A foreign person from controlling a commercial broadcasting licensee
- A foreign person from having a financial interest or voting interest exceeding 20% in a commercial broadcasting licensee
- Foreigners from constituting more than 20% of directors of a commercial broadcasting licensee

Limitations on the number of commercial broadcasting services a single entity can control

Section 65 of the ECA sets limits on the number and type of commercial broadcasting services a single entity can control. In summary, the limitations are as follows:

- No person can control more than one commercial television service. Note that acting in terms of section 92(3) of the ECA, Icasa has recommended that this provision not apply to subscription broadcasters, thus allowing a single entity to control more than one subscription television broadcasting service.

- No person may control more than two FM sound broadcasting services or more than one in the same coverage area.
- No person may control more than two AM sound broadcasting services or more than one in the same coverage area.

However, Icasa may grant exemptions from all of these requirements on good cause shown.

Limitation on cross-media control of commercial broadcasting services

Section 66 of the ECA sets limits on cross-media control. Cross-media ownership and control is an issue where a single entity owns or controls both print and broadcast media. In summary, section 66 prohibits:

- An entity from controlling a newspaper, a sound broadcasting service and a television broadcasting service
- An entity which controls a newspaper from also controlling a sound or television broadcasting service if the:
 - Newspaper has an ABC (Audit Bureau of Circulations – a print media industry body responsible for accurately calculating circulation and readership figures) circulation that is equal to 20% of the entire newspaper readership in the area
 - Circulation area of the newspaper substantially overlaps (by 50% or more) with the broadcast coverage area of the sound or television broadcasting service

Ownership and control of individual licences by persons from historically disadvantaged groups

There are no set requirements for ownership and control of licences by persons from historically disadvantaged groups. Section 9(2)(b) of the ECA does, however, specify that Icasa must set out the percentage of equity ownership required to be held by persons from historically disadvantaged groups whenever it issues an invitation to apply for an individual licence. Importantly, section 9(2)(b) stipulates that such percentage cannot be less than 30%.

3.3.9 Is Icasa an independent regulator?

Icasa has a huge advantage over many other broadcasting regulators in the South African region, namely, that its independence is constitutionally mandated in terms of section 192 of the South African Constitution (see constitutional section above).

Furthermore, the Icasa Act contains specific statements about Icasa's independence. Section 3(3) of the Icasa Act states that Icasa 'is independent, and subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice'. Section 3(4) of the Icasa Act states specifically that Icasa 'must function without any political or commercial interference'.

Besides these important statements, Icasa does have substantive independence in relation to its main regulatory functions, particularly with respect to broadcasting:

- *Licensing*: Icasa is entitled to issue invitations to apply for individual broadcasting licences and to license such broadcasters on its own without any role being played by the executive. It is likewise entitled to issue class broadcasting licences on its own. In both cases Icasa makes licence conditions without any role being played by the executive (see sections 5 and 9 of the ECA).
- *Regulation making*: While Icasa is required to inform the minister of proposed regulations, the minister's consent to such regulations is not required (see section 4 of the ECA).
- *Ministerial policy directions*: While the minister is entitled to make policy directions on any matter of national policy applicable to the information and communication technology sector, he or she may not do so if this will affect licensing – see section (3)(3) of the ECA. Furthermore, Icasa is only required to 'consider' such ministerial policy directions and is not required to act in accordance with them – see section 3(4) of the ECA.

However, there are certain regulatory functions that Icasa is not entirely free to regulate.

- *Frequency spectrum management*: Importantly, the ECA at section 34(2) provides for ministerial approval of the National Radio Frequency Spectrum Band Plan, which is to be developed by Icasa. The ECA is silent on what would occur if the minister did not approve the band plan, but it is clear that Icasa may proceed to publish the final band plan in the Government Gazette only once such approval has been obtained – see section 34(12) of the ECA.

In relation to appointments, already mentioned above, Icasa's councillors are appointed by the minister upon the recommendation of the National Assembly. It is important that the National Assembly is involved because this is a representative body comprising members of various political parties. However, concerns have been raised about the fact that the minister makes the final appointments.

In the 2007 report of the Ad Hoc Committee on the Review of Chapter 9 and associated institutions, the committee recommended to Parliament that changes be made in this regard. The committee recommended that Icasa councillors be appointed by the president, rather than the minister, on the recommendation of the National Assembly. To date, however, the recommendations of the committee have not been implemented by Parliament.

In relation to performance management, section 6A of the Icasa Act was introduced in 2006 to provide for a performance management system to monitor and evaluate the performance of Icasa council members. The performance management system is established by the minister in consultation with the National Assembly, in terms of section 6A(1) of the Icasa Act. In the 2007 report of the Ad Hoc Committee on the review of Chapter 9 and associated institutions, the committee recommended to Parliament that changes be made in this regard. The committee bluntly recommended that the performance management system be revised to remove the role of the minister. To date, however, the recommendations of the committee have not been implemented by Parliament.

3.3.10 Amending the legislation to strengthen the broadcast media generally

There are two broad problems with the current and proposed legislative framework for the regulation of broadcasting generally:

- *Provisions regulating ownership diversity:* The ECA should be amended to ensure that a workable definition of ‘control’ of a broadcasting service is clearly provided for. This will ensure that ownership limitations which are critical for maintaining viewpoint diversity (e.g. foreign ownership restrictions and limitations on the number of broadcasting services a single entity can own) can be enforced effectively.
- *Provisions that undermine the constitutionally required independence of Icasa:*
 - The Icasa Act ought to be amended to provide that the:
 - President is the member of the executive who is the formal authority responsible for Icasa council appointments and not the minister. This is because ministerial appointments lack credibility from an independence point of view
 - National Assembly is responsible for developing and ensuring compliance with a performance management system in respect of Icasa councillors and not the minister.
 - The ECA ought to be amended to make it clear that Icasa is able to develop the national radio frequency band plan on its own, and this should not require the prior consent of the minister.

3.4 Statutes that regulate the public broadcasting sector

3.4.1 Introduction

The SABC is South Africa's public broadcaster. It has three free-to-air television services as well as Channel Africa, which is broadcast on a satellite platform. The SABC has 18 radio stations, some of which are regional and some national. In recent times, the SABC has been in severe crisis. In 2009:

- Its board of directors was dismissed by Parliament and an interim board was appointed to run the affairs of the SABC
- Most of its senior managers were suspended pending investigation into financial and other irregularities
- The SABC's debts ballooned to nearly R2 billion, requiring a government bail-out involving the Department of Finance

The main statute governing the affairs of the SABC is the Broadcasting Act, Act 4 of 1999, although there are also relevant provisions in the ECA.

3.4.2 Establishment of the SABC

The SABC was converted from a statutory body into a public company incorporated in terms of the Companies Act, 1973, and having a share capital in terms of section 8A(1) and (2) of the Broadcasting Act. In terms of section 8A(3), the state is the sole shareholder of the SABC. The Broadcasting Act provides, at section 9, that the SABC consists of two separate operating divisions: a public service division and a commercial service division.

3.4.3 The SABC's mandate

The SABC's exact mandate is very unclear. Chapter IV of the Broadcasting Act is headed 'Public broadcasting service and charter of the corporation', but it contains a number of provisions that have nothing to do with the public broadcasting mandate. Indeed, the Broadcasting Act has been criticised for some time because the actual public mandate appears to consist of provisions found in a number of different sections of the Broadcasting Act, and it is difficult to say with any legal certainty precisely what the public mandate is.

It appears that the public mandate of the SABC is currently contained in a number of disparate provisions of the Broadcasting Act and the ECA, and includes:

- Taking into account the needs of language, cultural and religious groups as well as constituent regions and local communities, and the need for educational programming – section 2(u) of the ECA
- Developing South African expression by providing in official languages a range of programming that: reflects South African attitudes, opinions and values; displays South African talent in education and entertainment programmes; offers a plurality of views and a variety of news, information and analysis from a South African point of view and advances the national and public interest – section 6(4) of the Broadcasting Act
- Providing radio and television programming that informs, educates and entertains – section 8(d) of the Broadcasting Act
- Being responsive to audience needs, including the needs of the deaf and the blind – section 8(e) of the Broadcasting Act
- Providing a public service that: makes services available in all official languages; reflects both the unity and diverse cultural and multilingual nature of South Africa; strives to be of high quality; provides significant news and public affairs programming; includes significant amounts of educational programming; enriches South Africa’s cultural heritage; commissions programming from within the corporation and from the independent production sector; and includes national sports programming as well as developmental and minority sports – section 10(1) of the Broadcasting Act
- Providing a commercial service that: is subject to the same policy and regulatory structures as outlined for commercial services; complies with the values of the public programming service; commissions from the independent production sector; subsidises the public service; and is operated efficiently – section 11(1) of the Broadcasting Act

3.4.4 Appointment of the SABC Board

The SABC is controlled by a board of 12 non-executive members and three executive members (the group chief executive officer, the chief operations officer and the chief financial officer), in terms of section 12 of the Broadcasting Act.

The non-executive members are appointed by the president on the advice of the National Assembly, in terms of section 13(1) of the Broadcasting Act. Furthermore, section 13(2) of the Broadcasting Act requires that the appointment process must

include a public nominations process, be transparent and open, and include the publication of a short-list of candidates.

Unfortunately, the Broadcasting Act is silent on who appoints the executive members of the board, the minister or the non-executive members of the board. This gap in the law has led to a great deal of conflict and litigation, and it appears from court papers (although this was contested) that the minister has played a decisive role in appointing the executive members of the board.

Section 13(4) of the Broadcasting Act sets out the criteria for board appointments. These include a commitment to ‘fairness, freedom of expression, openness and accountability’ as well as technical competencies. Section 16(1) of the Broadcasting Act sets out grounds for disqualification of board members, and these include being foreign and having conflicts of interest or prior convictions.

The appointment process of the SABC Board has come under intense public scrutiny over the past few years. It was widely publicised that the ruling party had intervened in the parliamentary process to ensure that certain individuals were recommended for board appointment when they had not made the short-list. Furthermore, the presidential appointments were made days after the then-president had lost the party leadership. The board was seen to be out of step with the new political alignment within the ruling party. This, coupled with the financial crisis that developed at the SABC, and open conflicts between the board and management, led to widespread calls for changes to the board and mass resignations of board members. Parliament quickly pushed through an amendment act, which resulted in a number of key changes to the Broadcasting Act. These changes include the introduction of section 15A of the Broadcasting Act, which allows for Parliament to:

- Recommend the dissolution of the entire board if it has failed to discharge its fiduciary duties or adhere to the charter
- Recommend the appointment of an interim board to replace a dissolved board. This interim board consists of the three executive board members and five non-executive board members appointed by the president on the advice of the National Assembly. Note that there are no requirements in respect of public nominations or transparency, or the development of a short-list vis-à-vis recommendations for interim board members.

3.4.5 Funding for the SABC

The Broadcasting Act does not contain a single clear statement on how the SABC is

funded. The SABC is required to keep separate accounts for its public services and public commercial services divisions, in terms of section 9 of the Broadcasting Act. Its public services division is entitled to draw revenue from a range of sources, including advertising and sponsorships, grants and donations, licence fees and state grants, in terms of section 10(2) of the Broadcasting Act.

Unfortunately, the Broadcasting Act is silent on the sources of revenue for the public commercial services division, although section 11(1)(d) does make it clear that it is to subsidise the public services division.

Section 27 of the Broadcasting Act provides for a television licence fee, to be determined by the minister. Television licence fees account for approximately 16% of the SABC's total revenues and direct government funding accounts for approximately 2%. The rest of the SABC's income is largely dependent on advertising and sponsorship.

3.4.6 SABC: Public or state broadcaster?

There is doubt as to whether the SABC is currently a genuinely public, as opposed to a state, broadcaster. From a legal point of view, the role of the minister is particularly problematic in relation to his or her development of company articles and memoranda of association, as well as the appointment of executive management, leading to fears of ruling party 'deployment'.

In recent years, scandals such as the black-listing saga and the cancellation of a political satire series already commissioned by the SABC have raised questions about the SABC's commitment to its own editorial independence. There has been disquiet about instances of alleged ruling party interference in the parliamentary process concerning board appointments.

3.4.7 Amending the legislation to strengthen the public broadcaster

The government has recognised that the current crises involving the SABC are at least partly a result of legislative weaknesses, and it is clear that the Broadcasting Act is going to be substantially amended, if not entirely repealed, at some point in the future.

There are currently three main weaknesses in the existing Broadcasting Act, namely:

- The SABC's public mandate is not set out in a single, clear, coherent statement. Consequently, the board and senior management struggle to define their roles properly and the public have little idea about what they should expect from the

public broadcaster. This makes it extremely difficult to hold the SABC accountable for meeting its public mandate.

- There is a significant legal gap in the Broadcasting Act in that it does not set out clearly who is responsible for the appointment of the SABC's executive management. This has led to alleged ministerial interference and open conflict between the board and executive management.
- The SABC has a range of programming obligations, including in all 11 official languages, yet its funding model appears to be unsustainable. The SABC is overwhelmingly dependent on commercial sources of funding, and there is insufficient public funding of the broadcaster.

3.5 Statutes governing broadcasting signal distribution

Broadcasting signal distribution is the technical process of ensuring that the content-carrying signal of a broadcaster is distributed such that it can be heard and/or viewed by its intended audience. Two statutes are of particular relevance here, namely the ECA and the Sentech Act, Act 63 of 1996.

3.5.1 Licences required by broadcasting signal distribution providers

The ECA makes it clear that broadcasting signal distribution is a form of electronic communications network service (ECNS), which is defined in section 1 as:

- a service whereby a person makes available an electronic communications network, whether by sale, lease or otherwise:
 - (a) for that person's own use for the provision of ... [a] broadcasting service;
 - (b) to another person for that other's use in the provision of a ... broadcasting service; or
 - (c) for resale to a ... broadcasting service

Consequently, all broadcasting signal distributors must have an ECNS licence to provide ECNS.

As is the case with broadcasting licences, there are two types of ECNS licences: individual and class licences. In terms of section 5(3) of the ECA, an ECNS of provincial and national scope operated for commercial purposes and an ECNS having a public entity hold more than 25% of its share capital must hold individual licences. In terms of section 5(5) of the ECA, an ECNS of district municipality or local municipal scope operated for commercial purposes is required to hold only a class licence.

3.5.2 The regulatory framework for an ECNS

The ECA, at sections 62 and 63, sets out the regulatory framework for ECNSs that provide broadcasting signal distribution.

The main obligations upon an ECNS licensee that provides signal distribution are to prioritise South African broadcasting channels (section 62(1)(a)) and to ensure that it provides signal distribution only to licensed broadcasters (section 62(2)(b)).

3.5.3 Types of broadcasting signal distribution ECNSs

It is important to note that the ECA distinguishes between types of signal distribution ECNSs, although it is not clear on this point. The lack of clarity is because the provisions of the ECA on this issue were not fully carried over from the previously applicable, and now repealed, Independent Broadcasting Authority (IBA) Act, 1993.

The ECA clearly specifies two types of signal distribution ECNSs, but there is also a third:

- Section 62(3) of the ECA refers to a ‘common carrier’ ECNS, which is defined as an ECNS provider ‘who is obliged to provide signal distribution for broadcasting services on a non-discriminatory and non-exclusive basis’. Sentech is the only common carrier ECNS.
- In section 63(1) of the ECA, reference is made to self-provisioning of broadcasting signal distribution. This means that a broadcaster is entitled to distribute its own signal provided it has an ECNS licence to do so. There are a number of community broadcasting services that have a class ECNS licence to provide their own signal distribution services.
- There is, in practice, a third kind of ECNS signal distribution service that is neither a self-provider nor a common carrier, and that is a commercial signal distributor, which can choose whether or not to provide signal distribution services to a broadcasting licensee. An example of this kind of ECNS licensee is Orbicom, the company that distributes the M-Net and MultiChoice subscription broadcasting services signals.

3.5.4 Legal provisions governing Sentech

Sentech Limited is the only ‘common carrier’ signal distributor in South Africa. It is a public company established in terms of the Sentech Act, with the state as the sole

shareholder (section 6(1)). The minister of communications exercises the rights of the state in respect of the state's shares in Sentech (section 6(3)). Clearly, this includes appointing the board. Consequently, the executive effectively controls the activities of Sentech.

The Sentech Act provides, at section 5, that the main object and business of Sentech is to provide electronic communications services and ECNSs in accordance with the ECA.

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

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

3.6.1 Criminal Procedure Act, Act 51 of 1977

Section 205 of the Criminal Procedure Act (CPA) empowers a presiding officer to call any person who is likely to give material or relevant information as to any alleged offence to come before him or her and to be examined by the public prosecutor, at the request of the director of public prosecutions or any public prosecutor so authorised by the director. Thus, if a public prosecutor suspects that a journalist knows something about a crime, such journalist might be ordered, in terms of section 205 of the CPA, to reveal his/her sources of information relating to that crime.

3.6.2 National Prosecuting Authority Act, Act 32 of 1998

Section 28, read with sections 1 and 7(1), empowers an investigating director within the National Prosecuting Authority to conduct investigations into specific offences, as set out in a proclamation by the president. These are known as 'specified offences'. Section 28(6) specifically empowers any investigating director who is looking into such specified offences to summon any person who is believed to be able to furnish any information on the subject of the investigation for questioning, or to require such person to produce any book, document or object. Refusing to appear before the

investigating director or refusing to provide the book, document or object is an offence.

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

3.7 Statutes that prohibit the publication of certain kinds of information

A number of statutes contain provisions which, when closely examined, undermine the public's right to receive information and the media's right to publish information. These statutes are targeted and prohibit the publication of certain kinds of information, including:

- Identities of minors in court proceedings
- Certain kinds of information regarding legal proceedings
- Information regarding defence, security, prisons and the administration of justice
- Obscene materials
- Racism
- Election-related information
- State procurement
- Financial intelligence information
- Certain advertising restrictions

It is often very difficult for journalists to find out how laws that would seem to have no direct relevance to the media can affect their work. Key provisions of these kinds of laws are therefore set out below.

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

CRIMINAL PROCEDURE ACT, ACT 51 OF 1977

Section 154(3) of the CPA prohibits the publication of the identity of an accused person or of a witness in criminal proceedings if that accused person or witness is under 18 years of age, unless the court rules that such publication would be just and equitable.

In terms of section 154(5), such publication is an offence with a penalty of a fine or imprisonment of not more than five years, or both.

CHILD JUSTICE ACT, ACT 75 OF 2008

Section 45 specifically makes the provisions of section 154 of the Criminal Procedure Act (set out immediately above) applicable to minors in preliminary inquiries (in other words, before criminal proceedings even start).

CHILDREN'S ACT, ACT 38 OF 2005

Section 74 of the Children's Act prohibits the publication 'in any manner' of any information relating to the proceedings of a children's court (a court specifically established under the act), which may reveal the name or identify of a child who is a party or witness to a proceeding, without the permission of the court.

Anyone contravening section 74 commits an offence in terms of section 305(1)(b) of the Children's Act and is liable to a fine, a period of imprisonment, or both, in terms of section 306(6) of the Children's Act.

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

CRIMINAL PROCEDURE ACT, ACT 51 1977

The CPA, at section 154, read with section 153, sets out circumstances in which a court may direct that no information relating to certain criminal proceedings may be published. These circumstances include:

- In the interests of the security of the state or of good order, public morals or the administration of justice
- To protect the identity of witnesses in criminal proceedings
- To protect the identity of minors in criminal proceedings
- To protect the identity of a complainant in relation to a charge involving extortion or sexual offences

In terms of section 154(5) of the CPA, any such publication is an offence with a penalty of a fine or imprisonment of not more than one year, or both.

Importantly, section 154(6) of the CPA specifically allows the court to award civil compensation for such publication. In other words, to require damages to be paid to the person whose identity is revealed.

DIVORCE ACT, ACT 70 OF 1979 AND MEDIATION IN CERTAIN DIVORCE MATTERS ACT, ACT 24 OF 1987

Section 12(1) of the Divorce Act makes it an offence to ‘publish for the information of the public’ any particulars of a divorce action or any information which comes to light in the course of a divorce action other than: the names of the parties to a divorce action; or the judgment or order of the court. A person found guilty of such an offence is liable to a fine not exceeding R1,000 or to imprisonment not exceeding one year, or both, in terms of section 12(4).

The provisions of section 12(1) of the Divorce Act (set out immediately above) also apply to any enquiry instituted by the Family Advocate in terms of the Mediation in Certain Divorce Matters Act and in terms of section 12(3) of the Divorce Act.

3.7.3 Prohibition on the publication of state security–related information and the administration of justice

DEFENCE ACT, ACT 42 OF 2002

Section 104(7) of the Defence Act makes it an offence to, without authority, disclose or publish any information (whether in the print or electronic media, verbally or by gesture) that has been classified in terms of the Defence Act. Any person found guilty of such an offence is liable to a fine or imprisonment not exceeding five years. Importantly, this provision is subject to the Promotion of Access to Information Act, Act 2 of 2000. However, as there are exceptions to the requirement of granting access to information based on national defence and security grounds in that act, this may not be particularly helpful.

It is also important for journalists to be aware of the provisions of section 104(19)(1), which makes it an offence to even gain access to classified information from specific classified facilities, installations or instruments of the Department of Defence. Any person found guilty of such an offence is liable to a fine or imprisonment not exceeding 25 years.

PROTECTION OF INFORMATION ACT, ACT 84 OF 1982

The Protection of Information Act, at section 4, sets out a number of provisions relating to the disclosure of security-related information and essentially makes it an offence to publish a range of security-related information, such as official codes or passwords, or confidential information that has been entrusted to a person by the government. The penalty for such disclosure is a fine not exceeding R10,000 or imprisonment for a period not exceeding 10 years, or both.

NATIONAL KEY POINTS ACT, ACT 102 OF 1980

Section 2 of the National Key Points Act allows the minister of defence, whenever he or she thinks it necessary for the safety of South Africa or in the public interest, to declare any place a national key point. In terms of section 10(2) of the National Key Points Act, any person who provides any information relating to security measures in relation to a national key point or to any incident that took place at such national key point without being legally obliged or entitled to do so, or without the authority of the minister of defence, is guilty of an offence. Upon conviction for such an offence, the person would be liable to a fine not exceeding R10,000, or to imprisonment for a period not exceeding three years, or both.

CORRECTIONAL SERVICES ACT, ACT 111 OF 1998

The Correctional Services Act contains restrictions upon the publication of issues relating to prisons. Section 123(1) prohibits the publication of any account of prison life or of conditions that may identify a specific prisoner, unless the prisoner concerned has granted permission for such publication.

Section 123(2) requires permission from the commissioner of correctional services to publish any account of an offence for which a prisoner or person who is subject to community corrections is serving a sentence, unless the information is part of the official court record.

A person who contravenes these provisions is guilty of an offence and may be liable to a fine or imprisonment for up to two years, or both.

SOUTH AFRICAN POLICE SERVICE ACT, ACT 68 OF 1995

In terms of section 69(2) of the Police Service Act, any person who, without the permission of the national or provincial police commissioner, publishes a photograph or sketch of a person who is in police custody and:

- Who is suspected of having committed an offence and a decision on prosecution is pending
- The commencement of criminal proceedings at which he or she is an accused is pending
- Who is a witness in criminal proceedings, pending the commencement of his or her testimony in those proceedings,

commits an offence, and upon conviction is liable to a fine or imprisonment for a period not exceeding 12 months.

NATIONAL PROSECUTING AUTHORITY ACT, ACT 32 OF 1998

Section 41(6) read with section 28(1) makes it an offence to disclose the record of any investigation into any specified offence as gazetted by the president without the permission of the national director of public prosecutions.

Upon conviction, a person would be liable to a fine, imprisonment for a period not exceeding 15 years, or both.

3.7.4 Prohibition on the publication of obscene materials

The Films and Publications Act, Act 65 of 1996 is a post-constitutional piece of legislation that is the main mechanism for regulating obscene materials in South Africa. It has undergone significant amendment as a result of the Films and Publications Amendment Act, Act 3 of 2009, which came into effect on 14 March 2010.

MATERIALS NOT REGULATED UNDER THE FILMS AND PUBLICATIONS ACT

The Films and Publications Act appears to regulate a wide range of materials, including films, most publications, games, and certain services provided over the internet or on mobile telephones.

While it seems that the Films and Publications Act has an enormous impact on, and relevance to, the media, this is not necessarily the case because it has two important exceptions to its application:

- *Newspapers:* Section 16(1) of the Films and Publications Act specifically exempts all newspapers published by a member recognised by the Press Ombudsman, which subscribes and adheres to a code of conduct enforced by that body.
- *Broadcasters:* Section 18(6) of the Films and Publications Act exempts broadcasters regulated by Icasa from the obligation of applying for classifications for films broadcast or from being subject to film classifications made in terms of the act, except in respect of a film that is subject to an XX or X18 classification, or which has been refused classification by the Film and Publication Board.

In dealing with the Films and Publications Act, we generally focus only on those provisions affecting publications and films.

BODIES ESTABLISHED UNDER THE ACT, APPOINTMENT OF MEMBERS AND FUNCTIONS

The Films and Publications Act establishes three key bodies:

- *The Film and Publication Board:* In terms of section 9A:
 - The board consists of the chief executive officer and such number of officers as determined by the council
 - The functions of the board are to:
 - Appoint classification committees to classify films or publications submitted by the board
 - Determine applications for exemptions in respect of any film or publication
 - Determine applications for registration as a distributor or exhibitor of films or publications

- *The Film and Publication Council:*
 - In terms of section 4, the council consists of a chairperson and deputy chairperson appointed by the minister responsible for the administration of the Films and Publications Act (which is currently the minister of home affairs) and such other members, not exceeding seven, as the minister may appoint, having regard to the need to ensure representivity of the South African community of relevant stakeholders, as well as the chief executive officer appointed by the council in consultation with the minister.
 - In terms of section 6, the minister is to consult with Cabinet before making such appointments.
 - In terms of section 4A, the council issues directives of general application, including classification guidelines, and reviews the functioning of the board.

- *The Film and Publication Review Board:*
 - In terms of sections 5 and 6, the review board consists of a chairperson and eight other members appointed by the minister after consultation with Cabinet.
 - In terms of section 20, the role of the review board is to hear appeals in respect of classification-related decisions taken by the board.

CLASSIFICATION OF PUBLICATIONS

There are two mechanisms for classifying publications:

- *Request mechanism:* Any person may request that a publication (other than an exempted newspaper) be classified.
- *Prior classification:* Publications (other than an exempted newspaper) that are required to undergo pre-distribution classification are, in terms of section 16(2):
 - Publications that contain certain kinds of sexual conduct, namely, sexual conduct which is disrespectful, degrading or constitutes incitement to cause harm
 - Publications that constitute propaganda for war, incitement of violence and advocacy of hatred based on group characteristics, which constitute incitement to cause harm. Note that these particular provisions appear to have been tailored to meet the requirements of unprotected expression, as laid down in section 16(2) (the internal limitation to the right to freedom of expression) of the Bill of Rights.

Section 16(4) contains the following types of publication classifications/rulings by the Film and Publication Board's Classification Committee:

- *Refused classification:* Those publications involving child pornography or constituting propaganda for war, incitement of violence or the advocacy of hatred based on group characteristics, which constitute incitement to cause harm. While there are no exemptions in respect of child pornography, there are exceptions for the other types of publications set out above, provided the publication is a bona fide documentary or is a publication of scientific, literary or artistic merit, or is on a matter of public interest. In a legal gap, the act is silent as to what classifications such exempted materials will be subject to, if any.
- *XX classification:* This generally relates to publications containing explicit and degrading adult sexual conduct or extreme violence. Note that bona fide documentaries or publications of scientific, literary or artistic merit, or which are on a matter of public interest will be entitled to an X18 classification or other condition, ensuring that children do not have access to the publication. Certain of the provisions relating to the XX classification might well be found to be unconstitutional as they are overbroad and vague, and would impinge too heavily on the right to freedom of expression. For example, the act provides at section 16(4)(b)(iii) that publications which reflect conduct or an act which encourages 'harmful behaviour' are also to be subject to an XX classification.
- *X18 classification:* This relates to explicit adult sexual conduct that is not degrading and does not contain extreme violence. Note that bona fide documentaries or

publications of scientific, literary or artistic merit, or which are on a matter of public interest will not be classified as X18, but instead will be subject to other conditions, ensuring that children do not have access to the publication.

- Publications that do not fall within the above categories may still be subject to conditions, ensuring that children do not have access to them.

With regard to any publication that contains child pornography, the matter will be handed over to the police for investigation and prosecution. Notice must be given in the Government Gazette of all publications that have been classified as refused classification, XX or X18.

HOW ARE FILMS CLASSIFIED?

Section 18(1) of the act provides that any person who intends to exhibit or distribute any film (other than broadcasters, as discussed above) must submit the film for classification.

Section 18(3) contains the following types of film classifications by the Film and Publication Board's Classification Committee:

- *Refused classification:* Those films involving child pornography or constituting propaganda for war, incitement of violence, or the advocacy of hatred based on group characteristics, which constitute incitement to cause harm. While there are no exceptions to this classification in respect of child pornography, there are exceptions for the other types of films set out above, provided the film is a bona fide documentary or is a publication of scientific, dramatic or artistic merit, or is on a matter of public interest. In a legal gap, the act is silent as to what classifications these kinds of excepted films or games will be subject to, if any.
- *XX classification:* This generally relates to films containing explicit and degrading adult sexual conduct or extreme violence. Note that bona fide documentaries or films of scientific, dramatic or artistic merit will be entitled to an X18 classification or other condition, ensuring that children do not have access to the publication. Certain of the provisions relating to the XX classification might well be found to be unconstitutional as they are overbroad and vague, and would impinge too heavily on the right to freedom of expression. For example, the act provides at section 18(3)(b)(iii) that films which reflect conduct or an act which encourages 'harmful behaviour' are also to be subject to an XX classification.
- *X18 classification:* This relates to explicit adult sexual conduct. Note that bona

vide documentaries or films or games of scientific, dramatic or artistic merit will not be classified X18 but instead will be subject to other conditions, such as age restrictions, ensuring that children do not have access to them.

- Films that do not fall within the above categories may still be subject to conditions, ensuring that children do not have access to them.

With regard to any film that contains child pornography, the matter will be handed over to the police for investigation and prosecution. Notice must be given in the Government Gazette of all films that have been classified as refused classification, XX or X18.

PROVISIONS APPLICABLE TO INTERNET SERVICE PROVIDERS OR MOBILE TELEPHONE PROVIDERS

Section 24C contains a number of obligations applicable to persons providing child-oriented contact service or content service, including internet chat-rooms, via mobile cellular telephones or the internet. These are not set out in detail, but they relate to:

- Displaying safety messages
- Moderating services to ensure that offences are not being committed against children through the use thereof
- Mechanisms for children to report suspicious behaviour
- Reporting obligations to the police

PENALTIES FOR CONTRAVENING THE PROVISIONS OF THE LEGISLATION

The offences and enforcement provisions in the Films and Publications Act are found in sections 24A–30B of the act. The following offences carry various penalties ranging from the imposition of a fine, to imprisonment or both:

- Distributing: XX classified publications, films and games; X18 publications, films or games (unless the distributor is a licensed adult premises); publications, games or films not in accordance with conditions of distribution; unclassified films or games; films or games without being a registered distributor.
- Possessing child pornography.
- Advertising, including in newspapers, films and games without indicating the

classification, age restriction or other consumer advice, or showing a trailer of a film with a more restrictive classification.

- Knowingly distributing a film, game or publication classified as X18 or which contains explicit sexual conduct, unless it is a bona fide documentary or is of scientific, literary or artistic merit, or is on a matter of public interest, to a person who is under the age of 18.
- Failing to report suspected child pornography offences to the South African Police Service.
- Facilitating financial transactions relating to child pornography.
- Failing to register with the board as an internet service provider.
- Failing as an internet service provider to take all reasonable steps to: prevent access to child pornography; report the presence of child pornography to the South African Police Service and to provide particulars thereof; preserve evidence of child pornography; secure child-oriented services (such as contact and child-targeted content services), including providing safety messages, reporting mechanisms and filter information.

3.7.5 Prohibition on the publication of racist expression

The Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000 (the Equality Act) is a piece of legislation that is required to have been passed in terms of the right to equality provisions in the Bill of Rights. Most of the Equality Act's provisions relate to unfair discrimination provisions. However, a number of provisions also relate to 'hate speech' and directly prohibit the publication of certain types of expression:

- Section 10 of the Equality Act prohibits the publication, propagation, advocacy or communication of words based on one or more of the prohibited grounds (these are defined in section 1 as being race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, or indeed any other ground that undermines human dignity and causes or perpetuates systemic disadvantage), which could reasonably be construed to demonstrate a clear intention to be hurtful, harmful or incite harm, or promote or propagate hatred.
- Section 12(1) of the Equality Act prohibits the dissemination or broadcast of any

information, or the publication or display of any advertisement or notice that could reasonably be understood as demonstrating a clear intention to unfairly discriminate (on the prohibited grounds set out immediately above) against any person.

Both sections 10 and 12(1) are subject to the exceptions contained in section 12(2), namely:

- Bona fide engagement in artistic creativity, academic or scientific enquiry
- Publication of any information, advertisement or notice in accordance with section 16 of the Constitution.
- Fair and accurate reporting in the public interest

The provisions of the Equality Act are enforced by specialised equality courts established in terms of the act. Such courts can impose damages awards, including in respect of impairment of dignity, pain and suffering, or emotional and psychological suffering (section 21(2)(d)). Also, in respect of hate speech, the matter may in addition be sent to the director of public prosecutions for the institution of criminal proceedings under the common law or other legislation (section 10).

Note that a particular weakness of the Equality Act is that its hate speech provisions are not tailored to match the type of hate speech referred to in 16(2)(c) of the Constitution. This means that the prohibitions contained in sections 10 and 12(1) of the Equality Act extend far beyond the unprotected hate speech provided for in section 16(2)(c) of the Constitution.

This is a problem because certain of the speech or expression prohibited under the Equality Act is actually protected expression under the Constitution. It would have been far better if the hate speech prohibitions in the Equality Act matched the wording of the constitutionally unprotected hate speech provisions found in section 16(2)(c) of the Constitution.

3.7.6 Prohibition on the publication of election-related information

Section 109 of the Electoral Act, Act 73 of 1998, specifically prohibits exit polls from being printed or published or otherwise distributed during the prescribed hours for an election – that is, while voting is actually taking place. Note that this prohibition applies in addition to the broadcasting-related election coverage provisions set out above in the sections relating to broadcasting legislation specifically.

3.7.7 Prohibition on the publication of state procurement–related information

The National Supplies Procurement Act, Act 89 of 1970, is an old apartheid-era statute. Sections 2 and 3(1) of the act are extremely broad, all-encompassing provisions, which give the minister of trade and industry vast powers to bypass tender and procurement board procedures, and to insist on delivery of goods or services if the minister ‘deems it necessary or expedient for the security of the Republic’.

Furthermore, section 8A prohibits the disclosure of any information relating to any such goods or service without the permission of the minister of trade and industry or a controller acting in accordance with the minister’s directions.

Much more generally, section 8B also empowers the minister of trade and industry to issue a notice in the Government Gazette prohibiting the disclosure of any information in relation to any goods or service. Any contravention of the above provisions is an offence and, upon conviction, the penalty is a fine, imprisonment or both. A number of the provisions of the National Supplies Procurement Act are unlikely to withstand constitutional scrutiny.

3.7.8 Prohibition on the disclosure of Financial Intelligence Centre information

Section 41 of the Financial Intelligence Centre Act, Act 38 of 2001, makes it an offence to disclose confidential information held by or obtained from the Financial Intelligence Centre (established in terms of the act to counter money laundering activities) without the permission of the centre.

Section 60 of the Financial Intelligence Centre Act makes it an offence to disclose any information that is likely to prejudice an investigation being conducted by the Financial Intelligence Centre.

3.7.9 Prohibition on roadside advertising

The provisions of the Advertising on Roads and Ribbon Development Act, Act 21 of 1940, are probably of more interest to media owners than media practitioners, but it is important to note that this act allows for local government to regulate certain forms of advertising on roadsides, such as billboards.

3.8 Legislation prohibiting the interception of communication

The legality of monitoring, recording and intercepting communications by the media has been heard in South Africa’s court cases. This issue is governed by the Regulation

of Interception of Communications and Provision of Communication-related Information Act, Act 70 of 2002.

Section 2 of the Interception Act prohibits the intentional interception of a communication in the course of its transmission. For the purposes of the Interception Act, ‘interception’ is defined in section 1 as acquiring the content of any communication so as to make it available to a person other than the sender and recipient of the communication. Interception includes monitoring or recording the content, viewing the content or diverting it away from its intended destination.

There are certain important exceptions to the general prohibition in section 2, which journalists need to be aware of. Section 4 specifically allows a person to intercept (note the definition of this includes recording the content thereof) communication if he or she is a party to the communication (unless the purpose of the interception is to commit an offence). In this regard it is important to note that a party to communication means a person:

- Actually participating in the communication
- In whose immediate presence the communication occurs and is audible to the person concerned, whether or not the communication is specifically directed to him or her
- In relation to indirect communication (making use of a telecommunications system such as a telephone or email), any person who is in the immediate presence of the sender or recipient of the indirect communication

The effect of these exemptions is that if, for example, a journalist is in the office of a news source and the source is party to a conversation that takes place over a speaker phone in his/her office, the journalist may record the conversation and make use of the contents thereof without this being an offence under the Interception Act, even though the other party to the conversation is not aware of the journalist’s presence and has not consented to the recording or to the publication or broadcasting thereof.

3.9 Legislation that specifically assists the media in performing its functions

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

3.9.1 Promotion of Access to Information Act, Act 2 of 2000

The Promotion of Access to Information Act (PAIA) was passed in accordance with the requirements of section 32 of the Constitution, in order to facilitate and give effect to the right of access to information provision in the Bill of Rights.

Section 3 of PAIA stipulates that the act extends to records of both:

- Public bodies – note that this includes:
 - Government departments (national, provincial or local)
 - Functionaries and institutions exercising public powers, such as parastatals or statutory bodies such as Icasa or the SABC
- Private bodies – that is, individuals or juristic persons such as a company

Section 11 of PAIA provides that any person requesting information from a public body must be given access to the records of such body, provided:

- The requester has complied with the relevant procedural requirements
- Access to the record is not refused on a ground of refusal recognised by PAIA

Importantly, section 11(3) specifically provides that the *reason* for requesting information from a public body is irrelevant to a consideration of whether or not there is a right of access to the information requested.

Section 50 of PAIA provides that any person requesting information from a private body must be given access to the records of such body, provided:

- The record is required for the exercise or protection of any rights
- The requester has complied with the relevant procedural requirements
- Access to the record is not refused on a ground of refusal recognised by the act

Section 33 of PAIA makes it clear that there are grounds for refusing access which are mandatory (access *must* be denied), and grounds for refusing access which are discretionary (access *can* be denied).

- *Mandatory grounds for refusing access to information applicable to both public and private bodies:*
 - Protection of privacy of a third party who is a natural person, where the access would result in unreasonable disclosure of personal

- information about an individual – sections 34 (public bodies) and 63 (private bodies)
 - Protection of commercial information of third parties – sections 36 (public bodies) and 64 (private bodies)
 - Protection of confidential information of third parties – sections 37 (public bodies) and 65 (private bodies)
 - Protection of the safety of individuals and property – sections 38 (public bodies) and 66 (private bodies)
 - Protection of legally privileged information – sections 40 (public bodies) and 67 (private bodies)
 - Protection of research information of third parties and of public or private bodies – sections 43 (public bodies) and 69 (private bodies)
- *Mandatory grounds for refusing access to information applicable to public bodies only:*
- Protection of certain records of the South African Revenue Service – section 35
 - Protection of police dockets and law enforcement and legal proceedings – section 39
- *Discretionary grounds for refusing access to information applicable to public bodies only:*
- Protection of defence, security and international relations – section 41
 - Economic interests and financial welfare of South Africa – section 42
 - Operations of public bodies with respect to pre-decision policy formulation and deliberative processes – section 44
 - Manifestly frivolous or vexatious requests – section 45
- *Discretionary grounds for refusing access to information applicable to private bodies only:*
- Commercial activities of private bodies – section 68

Note that there are no discretionary grounds for refusing access that are applicable to both public and private bodies.

Two similar and important provisions in PAIA are sections 46 (in relation to public bodies) and 70 (in relation to private bodies), which require even mandatory grounds of refusal to be overridden when the public demands this, and where the record would reveal evidence of a substantial contravention of the law, or would reveal any imminent and serious public safety or environmental risk.

In terms of section 90, any person who, while trying to deny a right of access, destroys, damages, alters, conceals or falsifies a record, commits an offence. Upon conviction, the person is liable to a fine or imprisonment for a period not exceeding two years.

PAIA is critically important for the media. If used properly, particularly in respect of ongoing investigative journalism, it can provide access to extremely valuable information. Much of what the public knows about South Africa's notorious arms deal has come to light as a result of access to information held by public bodies, particularly documents obtained from the Auditor General's Office under PAIA.

3.9.2 Protected Disclosures Act, Act 26 of 2000

The Protected Disclosures Act (PDA) makes provision for procedures for both private and public sector employees to disclose information regarding unlawful or irregular conduct by their employers, or indeed other employees, and to be protected in relation to such disclosures.

Section 3 is at the heart of the PDA. It provides that no employee (whether of a public body or private person or body) may be subjected to any occupational detriment for having made a protected disclosure.

- Occupational detriment includes, among other things, any disciplinary action – being dismissed, suspended, demoted, intimidated, transferred unwillingly, or refused promotion or appointment – section 1.
- A protected disclosure is a disclosure made to a legal advisor, employer, Cabinet member or member of a provincial executive council, public protector, auditor general or, in exceptionally serious cases, any other person – sections 1, 8 and 9.
- Section 1 defines a disclosure as the disclosure of information regarding the conduct of an employer or another employee, which shows or tends to show that:
 - A criminal offence has been committed or is likely to be committed
 - A legal obligation has not been complied with
 - A miscarriage of justice is happening
 - The health and safety of an individual is endangered
 - The environment is being damaged
 - Unfair discrimination
 - Any of the above is being concealed

The effect of the PDA is that in serious cases it will be competent for an employee to make a protected disclosure to the media itself, if bodies that are supposed to address

such issues (such as the Public Protector) have failed to act in the past. This legislation assists the media in working with whistleblowers within both government and the private sector to make public information regarding corruption and other illegal or damaging conduct.

3.9.3 Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, Act 4 of 2004

The Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act (Powers Act) confirms and, indeed, adds to the privileges and immunities that are given to Parliament and provincial legislatures by the Constitution. As the preamble to the Powers Act provides, furthering privileges and immunities is essential ‘in order to protect the authority, independence and dignity of the legislatures and their members’.

- Section 6 of the Powers Act extends the constitutional privilege of free speech to the president, members of the National Assembly and delegates to the NCOP, as well as to joint sittings of the National Assembly and the NCOP.
- Section 18 of the Powers Act is critical for the press because it provides that no person (including, of course, the media) is liable to civil or criminal proceedings in respect of the publication of any report, paper or minutes that have been submitted to Parliament, including committees thereof. However, section 19 prohibits the wilful publication of documents that have been prohibited in Parliament or which falsely purport to have been published under the authority of Parliament or to be a verbatim account of proceedings.
- Section 21 allows for the broadcasting of parliamentary proceedings only with the permission of the authority of the body (for example, a committee chair) concerned. Once such authority is granted, no person is liable to civil or criminal proceedings in respect of such broadcast.
- All of the above provisions apply equally to provincial legislatures (section 28).

4 REGULATIONS AFFECTING THE BROADCAST MEDIA

In this section you will learn:

- What regulations are
- Key regulations governing broadcasting content
- Other key aspects of broadcast-related regulations

4.1 Definition of regulations

Regulations are subordinate legislation. They are legal rules made in terms of a statute. Regulations are a legal mechanism for allowing ministers or organisations such as Icasa to make legally binding rules governing an industry or sector, without needing Parliament to pass a specific statute thereon.

The statute will empower the minister or a body such as Icasa to make regulations on particular matters within the scope of the functions and powers of that minister or body.

4.2 Key regulations governing broadcasting content

4.2.1 Regulation setting out the Code of Conduct for Broadcasters

The Code of Conduct for Broadcasters – Notice 958 published in Government Gazette 32381 dated 6 July 2009, applies to all broadcasters except those governed by an Icasa-approved code of conduct enforced by a self-regulatory body (see section below on self-regulatory codes).

The Code of Conduct for Broadcasters:

- Prohibits the broadcasting of:
 - Unnecessary or explicit extreme violence or explicit infliction of domestic violence
 - Propaganda for war
 - Incitement of imminent violence
 - Advocacy of hate speech based on race, ethnicity, religion or gender and which constitutes incitement to cause harm
 - Certain kinds of sexual conduct: child pornography, bestiality, sexual conduct which advocates hatred based on gender that constitutes incitement to cause harm; explicit sexual conduct

Note that there are exceptions for bona fide scientific, documentary, dramatic, artistic or religious broadcasts, or which amounts to a discussion, argument or opinion pertaining to religion, belief or conscience, or on a matter of public interest. There are also exceptions for material broadcast during the watershed period (between 9 pm and 5 am for free-to-air broadcasters, and between 8 pm and 5 am for subscription broadcasters), with relevant warnings.

- Requires particular care when children are likely to be part of the audience. There

are specific requirements for children's programming, including in respect of: the portrayal of violence, safety matters and issues which could threaten a sense of security such as death, domestic conflict, the use of drugs or alcohol, etc.; and the use of offensive language

- Provides that programming which contains scenes of explicit violence, sexual conduct or nudity, or offensive language may be broadcast only during the watershed period
- Specifies that television broadcasting licensees must provide advisory assistance, including age guidelines, where broadcasts contain violence, sex, nudity or offensive language
- Requires that news be truthful, accurate and fair without intentional or negligent departure from the facts:
 - Where a report is based on opinion, rumours or allegations, this must be clearly presented
 - Where there is reason to doubt the correctness of a report, verification should take place
 - When a broadcast report is known to have been incorrect, this must be rectified quickly and fairly
 - The identity of rape victims and other victims of sexual violence must not be divulged without their consent
 - There must be warnings for reports involving graphic violence or sexual assault
- Requires that comment be honest, clearly presented and based on facts
- Requires that when presenting programming in which controversial issues of public importance are discussed, reasonable efforts must be made to present opposing views and to ensure a right of reply
- Requires that broadcasters exercise exceptional care in matters involving the privacy, dignity and reputation of individuals (particularly in respect of people who are bereaved and in regard to children, the aged and the disabled), subject to a legitimate public interest
- Requires, when audiences are invited to react to a programme or competition, that broadcasters broadcast:
 - The full cost of the telephone call or SMS, and must specify what percentage thereof is intended for a charitable cause, if any

- The rules of any competition, including the closing date and the manner in which the winner is determined

4.2.2 Subscription broadcasters' obligation to carry SABC channels

The Regulations on the Extent to which Subscription Broadcasting Services Must Carry the Television Programmes Provided by the Public Broadcasting Service Licensee – Notice 1271 published in Government Gazette 31500 dated 10 October 2008, oblige certain subscription television broadcasters to carry SABC television channels.

The obligations are as follows:

- Only subscription broadcasters providing 30 or more television channels are obliged to carry SABC channels.
- Every 20th channel above the minimum threshold of 30 channels must be a public broadcasting service channel. This means that channels 30, 50, 70, 90 etc. will be public channels.
- The channels provided by the public services division (as opposed to the public commercial services division) of the SABC must be prioritised for carriage.

Failure to comply with the must-carry regulations carries a fine not exceeding R1 million.

4.2.3 Local content regulations

The Local Content Regulations – Notice 153 published in Government Gazette 28453 dated 31 January 2006 and Notice 154 published in Government Gazette 28454 dated 31 January 2006, set out South African programming and independent television production requirements for both radio and television licensees in all three categories: public, commercial and community.

Local content requirements are important because they ensure that South African television content (including independently produced content) and music is produced and broadcast, when it is often cheaper and easier to import poor quality foreign content. It is also important to note that the Local Content Regulations represent a floor and not a ceiling in respect of local content; the local content requirements may well be higher for specific broadcasters depending on their licence conditions. The regulations are, in places, extremely technical. Below is a summary of the basic local content requirements.

TELEVISION

Nature of television service	Local television content to be broadcast as a percentage of programming	Percentage of local content to be independently produced
Public services	<p>Overall total and prime time percentage required: 55%, and of this:</p> <ul style="list-style-type: none"> • 35% of drama • 80% of current affairs • 50% of documentary • 50% of informal knowledge building • 60% of educational programming • 55% of children's programming 	40%
Commercial and public commercial services	<p>35% of programming broadcast during the South African performance period (5 am to 11 pm daily) and of this:</p> <ul style="list-style-type: none"> • 20% of drama • 50% of current affairs • 30% of documentary • 30% of informal knowledge building • 25% of children's programming 	40%
Community services	55%	40%
Terrestrial or cable subscription services	<p>10% of programming (including 2% being South African drama) or to spend a specified sum of money as determined by Icasa on programming that has South African television content</p>	40%
Satellite subscription services	<p>At least 10% of the channel acquisition budget is spent on channels with South African television content. Note that channels carried under the 'must-carry' regulations do not count towards meeting local content requirements</p>	40%

RADIO

Applicable to all radio stations which, between the hours of 5 am and 11 pm, devote more than 15% of broadcast time to music.

Nature of the radio/sound service	South African music requirement as a percentage of total music broadcast
Public sound services	40%
Commercial and public commercial sound services	25%
Community sound services	40%
Subscription sound services	10% of the bouquet is to consist of channels made up of South African music content.

4.2.4 Sports broadcasting rights regulations

The Sports Broadcasting Rights Regulations – Notice 1044 published in Government Gazette 27728 dated 28 June 2005, contain a list of specified national sporting events that are required to be broadcast live, delayed live or delayed by a free-to-air television broadcaster. The regulations are, however, silent on the fact that the rights to broadcast such events are to be acquired from the rights holders (often subscription broadcasting licensees) at commercial rates. Although these Sports Broadcasting Regulations were supposed to have been reviewed in 2009, this process has yet to be finalised.

4.3 Other key broadcasting-related regulations

Icasa has passed dozens of regulations governing different non-content aspects of broadcasting, signal distribution and radio frequency spectrum management, including in respect of licence fees, administrative procedures and record keeping. The regulation that has particular significance for the development of broadcasting generally is set out below.

4.3.1 People with disabilities

Icasa has prescribed Regulations on a Code on People with Disabilities – Notice 1613 published in Government Gazette 30441 dated 7 November 2007. The Disability Code requires all broadcasters to report annually on their progress in implementing the following:

- All broadcasting licensees must ensure that their services are available and accessible to people with disabilities, including through:
 - The use of sign language and sub-titles
 - Programme support such as fact sheets
 - Websites that offer a range of formats, such as audiotape
 - The use of spoken languages, where materials such as weather forecasts or economic indicators are shown on screen
- Broadcasting licensees must have surveys and contact with disability organisations regarding their services.
- Broadcasting licensees must ensure that their programming does not stereotype disabled people or disability, and must involve disabled people as part of studio audiences and in-programming story lines.

5 MEDIA SELF-REGULATION

There are three important self-regulatory codes that affect the media in South Africa:

- The Code of Advertising Practice governs advertising and is put out by the Advertising Standards Authority.
- The Broadcasting Complaints Commission of South Africa's (BCCSA) Codes of Conduct for Broadcasters – one for free-to-air broadcasters and one for subscription broadcasters.
- The South African Press Code, which is put out by the Press Council of South Africa and enforced by the Press Ombudsman and the South African Press Appeals Panel.

5.1 The Code of Advertising Practice

The essence of the Code of Advertising Practice is that advertising should be legal, decent, honest and truthful, and have a sense of responsibility to the consumer. Some key topics that the code addresses are the following:

- No advertising that is harmful to children or that exploits children or portrays them in a sexually provocative manner.
- No harming of animals in advertisements.

- No advertising may be discriminatory, unless this is reasonable in an open and democratic society based on dignity, equality and freedom.
- Educational advertising must not mislead as to the qualification to be obtained.
- No fear tactics may be used.
- Advertisers of financial products must take special care to ensure comprehensive communication of commitments.
- Any product that has a cost payable above postage costs cannot be advertised as ‘free’.
- Furniture advertisements must specifically state additional items that are shown but which are not part of the price.
- Guarantees must be available in printed form.
- Advertisements must be honest.
- Advertisements for instructional courses must not make exaggerated claims regarding employment opportunities.
- No encouragement of criminal activity.
- No misleading claims.
- No claims of miracle healing.
- Money-back undertakings may be made only if a full refund of the purchase price is available.
- No advertisements if the goods are not available.
- No offensive advertising.
- Living persons must consent to being part of an advertisement.
- No advertising which jeopardises safety.
- Advertisers must have acceptable proof of factual claims made.

- There are fairly detailed provisions regarding the advertising of self-employment opportunities.
- No encouragement of violence.

5.2 The BCCSA Code of Conduct for Free-to-Air Broadcasters

The BCCSA Code for Free-to-Air Broadcasters is very similar to the Icasa Code of Conduct set out under the regulations section above.

The BCCSA Code of Conduct for Free-to-Air Broadcasters:

- Prohibits the broadcasting of:
 - Unnecessary violence, particularly in respect of violence against women
 - Propaganda for war
 - Incitement of imminent violence
 - Advocacy of hate speech based on race, ethnicity, religion or gender, and which constitutes incitement to cause harm
 - Certain kinds of sexual conduct: child pornography, bestiality, sexual conduct which advocates hatred based on gender, and which constitutes incitement to cause harm; explicit sexual conduct

Note that there are exceptions for bona fide scientific, documentary, dramatic, artistic or religious broadcasts, or which amounts to a discussion, argument or opinion pertaining to religion, belief or conscience, or on a matter of public interest. And there are also exceptions for material broadcast during the watershed period (between 9 pm and 5 am for free-to-air broadcasters, and 8 pm and 5 am for subscription broadcasters) with relevant warnings.

- Requires particular care when children are likely to be part of the audience. There are specific requirements for children's programming, including in respect of: the portrayal of violence; safety matters; issues which could threaten a sense of security, such as death, domestic conflict, the use of drugs or alcohol; and the use of offensive language
- Provides that programming which contains scenes of explicit violence, sexual conduct or offensive language may be broadcast only during the watershed period (between 9 pm and 5 am)
- Specifies that television broadcasting licensees must provide advisory assistance,

including age guidelines, where broadcasts contain violence, sex, nudity or offensive language

- Requires that news be truthful, accurate and fair without intentional or negligent departures from the facts.

In this regard:

- Where a report is based on opinion, rumour or allegation, this must be clearly presented
 - Where there is reason to doubt the correctness of a report, verification should take place
 - When a broadcast report is known to have been incorrect, this must be rectified quickly and fairly
 - The identity of rape victims and other victims of sexual violence must not be divulged without consent
 - There must be warnings for reports involving graphic violence or sexual assault
- Requires that comment be honest and clearly presented as comment, and must be based on facts
 - Requires that when presenting programming in which controversial issues of public importance are discussed, reasonable effort must be made to present opposing views and to ensure a right of reply
 - Requires that broadcasters exercise exceptional care in matters involving the privacy and dignity of individuals, subject to a legitimate public interest
 - Requires that no payment be made to a criminal for information about a crime, unless there are compelling societal interests in doing so

5.3 The BCCSA Code of Conduct for Subscription Broadcasters

The BCCSA Code of Conduct for Subscription Broadcasters is virtually identical to the Code of Conduct for Free-to-Air Broadcasters set out above. There are, however, some small differences:

- There are no special provisions regarding children and children's programming, undoubtedly due to the parental control mechanisms which are to be in place.
- Subscription broadcasters are under an obligation to, where practicable, implement parental control mechanisms to enable a subscriber to block a

programme based on its classification and to provide its subscribers with a parental control guide and a call centre facility.

- The watershed period is an hour longer and is from 8 pm to 5 am.

5.4 The South African Press Code

The South African Press Code states as part of its preamble that the ‘primary purpose of gathering and distributing news and opinion is to serve society by informing citizens and enabling them to make informed judgments on the issues of the time’.

Below are some key topics that the code addresses:

- Reporting of news
 - Truthful, accurate and fair
 - Contextual and balanced with no departure from the facts
 - Only what is reasonably true may be presented as fact
 - Opinions, allegations and rumours to be clearly indicated as such
 - Verification of accuracy if possible
 - Seek the views of the subject of critical reporting where possible
 - Publish retractions and apologies for inaccuracies promptly
 - Reports and visual images involving obscenity to be presented with sensitivity to the prevailing moral climate, and in this regard:
 - No visual presentation of sexual conduct unless this is in the public interest
 - No child pornography
 - Identities of victims of sexual violence not to be published without consent
 - No publication of news obtained by dishonest or unfair means
 - Respect privacy, unless there is an overriding public interest
- Discrimination and hate speech
 - Press to avoid discriminatory or denigratory references
 - Press should not refer to a person’s race, colour, ethnicity, gender, sexual orientation or physical or mental illness in a prejudicial or pejorative context, except where strictly relevant to the story
 - Press must not publish material amounting to hate speech
- Advocacy – a publication may strongly advocate its own views provided it:
 - Distinguishes between fact and opinion
 - Does not misrepresent facts

- Comment
 - Comment must be made fairly and honestly
 - Comment must clearly appear as commentary and must be based on facts
 - Honest expression of opinion

- Headlines, posters, pictures and captions:
 - To be reasonably reflective of the contents of the report or picture in question
 - Posters and pictures not to be misleading

- Protect confidential sources of information

- No payment for feature articles to persons engaged in crime or notorious behaviour, except in the public interest

- Due responsibility to be exercised on the presentation of brutality, violence and atrocities

6 COMMON LAW AND THE MEDIA

In this section you will learn about:

- Common law
- Defamation
- Contempt of court
- Court rulings on the issue of allowing the broadcast of important legal proceedings

6.1 Definition of common law

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

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

This section focuses on three areas of common law of particular relevance to the media, namely: defamation; contempt of court; and the broadcasting of legal proceedings.

6.2 Defamation

6.2.1 Definition of defamation

Defamation is part of the common law of South Africa. It is the unlawful publication of a statement about a person, which lowers his or her standing in the mind of an ordinary, reasonable and sensible person. An action for defamation ‘seeks to protect one of the personal rights to which every person is entitled, that is, the right to a good name, unimpaired reputation and esteem by others’.¹ Once it is proved that a defamatory statement has been published, two legal presumptions arise:

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

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

6.2.2 Defences to an action for defamation

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

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

The most relevant here is the defence of truth in the public interest. Truth in the public interest is where an action for damages is defended by asserting that the defamatory statement was true and, furthermore, that it is in the public interest to publicise the information. It is important to note that ‘public interest’ does not mean what is *interesting* to the public, but rather what contributes to the greater public good. Therefore, it may be in the public interest to publish true, albeit defamatory, material about public representatives. This is due to the importance of the public having accurate information to be able to engage in democratic practices, such as voting, effectively.

Prior to South Africa’s transition to democracy and a new constitutional order, the media (publishers, printers, editors, newspaper owners, broadcasting companies) were strictly liable for the publication of defamatory material. This meant that in the absence of one of the recognised defences set out above (for example, truth in the public interest), the media was not entitled to raise a lack of intention or absence of negligence argument. In other words, the courts were not required to find fault on the part of the media in the publication of a defamatory statement.³ In the groundbreaking case of *National Media Ltd and Others v Bogoshi* [1998] 4 All SA 347 (A), the Appellate Division (as it was then called) overruled its earlier *Pakendorf* decision as being clearly wrong and adopted the approach taken in England, Australia and the Netherlands.

The new legal principle is stated at pages 361–362 of the *Bogoshi* judgment:

[t]he publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time. In considering the reasonableness of the publication, account must obviously be taken of the nature, extent and tone of the allegations. We know that greater latitude is usually allowed in respect of political discussion ... and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper.

The effect of the *Bogoshi* judgment is to make it possible for the media to escape

liability for the publication of false defamatory statements if the media acted reasonably in the publication of the false statements. As is stated in the judgment, key factors in determining whether the media's conduct is reasonable will include:

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

6.2.3 Remedies for defamation

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

- *The publication of a retraction and an apology by the media organisation concerned:* Where it has published a false defamatory statement, a newspaper or broadcaster often will publish a retraction of a story or allegation in a story, together with an apology. Whether or not this satisfies the person who has been defamed will depend on a number of factors, including: the seriousness of the defamation; how quickly the retraction and apology is published; and the prominence given to the retraction and apology (this is a combination of the size of the retraction, but also its positioning in the paper).
- *An action for damages:* This is where a person who has been defamed sues for monetary compensation. This takes place after the publication has occurred. Damages (money) are paid to compensate for the reputational damage caused by the defamation in circumstances where there are no defences to defamation. The amount to be paid in compensation will depend on a number of factors, including whether or not an apology or retraction was published, as well as the standing or position in society of the person being defamed.
- *An action for prior restraint:* This is where the alleged defamatory material is prevented from being published in the first place. Where a person is aware that defamatory material is going to be published, he or she may go to court to, for example, obtain an interdict prohibiting the publication, thereby preventing the defamation from occurring. Prior restraints are dangerous because they deny the

public (such as readers of a publication or audiences of a broadcaster) the right to receive the information that would have been publicised had it not been for the interdict. Prior restraints are seen as being a last resort mechanism. The legal systems of countries that protect the right to freedom of expression usually prefer to allow publication and to deal with the matter through damages claims – in other words, using ‘after publication’ remedies.

6.3 Contempt of Court

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

6.3.1 The *sub judice* rule

The *sub judice* rule guards against people trying to influence the outcome of court proceedings while legal proceedings are under way: ‘It is contempt of court to publish information or comment regarding a case which is pending and which may tend to prejudice the outcome of the case’.⁴

6.3.2 Scandalising the court

The reason why scandalising the court is criminalised is to protect the institution of the judiciary. The point is to prevent the public from undermining the dignity of the courts. In *S v Mamabolo (Etv, Business Day and the Freedom of Expression Institute Intervening)* 2001 (5) BCLR 449 (CC), the Constitutional Court held at paragraph 19 that:

[b]ecause of the importance of preserving public trust in the judiciary and because of the reticence required for it to perform its arbitral role, special safeguards have been in existence for many centuries to protect the judiciary against vilification. One of the protective devices is to deter disparaging remarks calculated to bring the judicial process into disrepute.

The court held that the test is ‘that the offending conduct, viewed contextually, really was likely to damage the administration of justice’ [at paragraph 50].

6.4 Broadcasting court proceedings

South Africa is not the only country in Africa that has allowed the broadcasting of legal proceedings, but it undoubtedly has the most developed case law on the subject.

Given the importance of the broadcast media in ensuring that news and information, particularly with regard to legal and governmental matters, is disseminated to the public, the issue of broadcasting court proceedings is extremely important. In *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* 2007 (2) BCLR 167 (CC), the Constitutional Court held that the overriding concern was not the right of the broadcaster concerned, '[w]hat is at stake is the right of the public to be informed and educated' [at paragraph 27]. '[I]t concerns the right of South Africans to know and understand the manner in which one of the three arms of government functions, namely, the judiciary' [at paragraph 29].

However, in relation to the broadcasting of criminal proceedings, the court agreed with the Supreme Court of Appeal that this clearly has to be weighed against the right of an accused person to justice. In particular, the Constitutional Court supported the test which had been formulated by the Supreme Court of Appeal, namely that 'broadcasting should not be permitted unless the court was satisfied that it would not inhibit justice' [at paragraph 45].

NOTES

- 1 See FDJ Brand, 'Defamation', *LAWSA*, 2nd ed., Volume 7, para 232 citing *Argus Printing & Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 (A) at 23D-I.
- 2 *Ibid*, paras 245ff.
- 3 See *Pakendorf en Andere v De Flamingh* 1982 (3) SA 146 (A).
- 4 See generally, *LAWSA*, 2nd ed., Volume 6, para 199.

7

Swaziland



1 INTRODUCTION

The Kingdom of Swaziland became independent from Britain in 1968. That event coincided with the passage of Swaziland's first Constitution, which established the country as a constitutional monarchy. The first elections after independence took place in 1972, where the opposition received slightly more than 20% of the vote. In response, the then-king of Swaziland, King Sobhuza II, issued a decree in 1973 in which he repealed the 1968 Constitution and assumed supreme power, expressly taking all legislative, executive and judicial powers for himself. The current king, King Mswati III, ascended to the throne in 1986 and continued to rule in terms of the 1973 decree. However, bowing to political pressure he ratified a new constitution, which came into force in 2006.

Despite the coming into force of the 2006 Constitution, Swaziland cannot be said to be a democratic country. Even though the Constitution ostensibly guarantees freedom of expression, Swaziland's media environment is extremely difficult. According to a paper by Richard Rooney, 'no discernable progress has been made in changing the existing restrictive media environment'.¹ The media in Swaziland is mostly government controlled. Swazi TV and radio are effectively 'departments of the Swazi civil service'.² Although there is a non-state television channel, it was created 'specifically to support King Mswati II'.³

There are two newspaper groups in the country: the Observer Group is effectively controlled by the king's family, while the Times of Swaziland Group practises strict self-

ensorship, although it is independent of government.⁴ In 2010, Reporters Without Borders ranked Swaziland 155 out of 178 countries on its press freedom index.

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

- Media and the constitution
- Media-related legislation, which includes a discussion on Swaziland’s stalled Media Reform Bill of 2007
- Media-related common law based on decided cases

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

2 THE MEDIA AND THE CONSTITUTION

In this section you will learn:

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

2.1 Definition of a constitution

A constitution is a set of rules that are foundational to the country, institution or

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

The Constitution of Swaziland came into force in 2006 and sets out the foundational rules for the Kingdom of Swaziland. The coming into force of a new constitution is obviously a significant development in the political life of a country. It will be interesting to see how the people of Swaziland and the king adjust and respond to this document, and if any of its promised political and legal changes in fact come about.

The Constitution contains the underlying principles, values and laws of the Kingdom of Swaziland. A key constitutional chapter in this regard is Chapter V, which sets out directive principles of state policy and duties of the citizen. Section 58 sets out the political objectives for the country. In brief, these provide that:

- Swaziland shall be a democratic country
- The state shall be guided in the conduct of public affairs by the principle of decentralisation and devolution of governmental functions and powers to levels where the people can best manage and direct their own affairs
- The state shall cultivate respect for human rights and freedoms and the dignity of the human person
- All associations aspiring to manage and direct public affairs shall conform to democratic principles in their internal organisation and practice
- All lawful measures shall be taken to expose, combat and eradicate corruption and abuse of power by those holding political or public office
- The state shall promote a culture of political tolerance, and all organs of state and people of Swaziland shall work towards the promotion of national unity, peace and stability
- The state shall provide a peaceful, secure and stable political environment, which is necessary for economic development

Section 58 sets out some important statements of principle and admirable political objectives, which would seem to indicate that the rulers of Swaziland recognised a need to chart a new course away from the undemocratic and draconian practices of the past.

It is important to note, however, that the provisions set out in section 58 are not capable of being enforced in any court, in terms of section 56(3) of the Constitution.

2.2 Definition of constitutional supremacy

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

The Constitution of Swaziland makes provision for constitutional supremacy. Section 2(1) specifically states that ‘[t]his Constitution is the supreme law of Swaziland and if any other law is inconsistent with the provisions of this Constitution that other law shall, to the extent of such inconsistency, be void’. Importantly, given the enormous power wielded by the king of Swaziland, section 2(2) specifically provides that the king, as well as ‘all citizens of Swaziland’, have a duty ‘to uphold and defend this Constitution’. Furthermore, section 2(3) provides that suspending, overthrowing or abrogating the Constitution through violent or otherwise unlawful means constitutes treason.

2.3 Constitutional provisions that protect the media

The Constitution of Swaziland contains a number of important provisions in Chapter III, ‘Protection and promotion of fundamental rights and freedoms’, which directly purport to protect the media, including publishers, broadcasters, journalists, editors and producers. There are other provisions elsewhere in the Constitution that assist the media as it goes about its work of reporting on issues in the public interest. These are included in this section too.

2.3.1 Rights that protect the media

FREEDOM OF EXPRESSION

The most important basic provisions that protect the media are set out in subsections 24(1) and (2), which state:

- (1) A person has a right to freedom of expression and opinion.
- (2) A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say –

- (a) Freedom to hold opinions without interference
- (b) Freedom to receive ideas and information without interference
- (c) Freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons); and
- (d) Freedom from interference with the correspondence of that person.

This provision needs some explanation.

- The freedom applies to ‘every person’ and not just to certain people, such as citizens. Hence, everybody enjoys this fundamental right.
- The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many different examples of this, including physical expression (such as mime or dance), photography or art.
- Section 24(1) specifies that there is a right to freedom of opinion as well. Freedom of opinion is important for the media as it protects commentary on public issues of importance.
- Section 24(2) specifies that the right to freedom of expression includes ‘freedom of the *press* and *other media*’. This is important because it makes it clear that this right:
 - Can apply to corporate entities such as a media house, newspaper or broadcaster, as well as to individuals
 - Extends to both the ‘press’ and ‘other media’. Thus the section itself distinguishes between the ‘press’ – with its connotations of the news media – and ‘other media’, which could include fashion, sports, gardening or business publications or television channels, thereby protecting all media
- Section 24(2)(b) specifically enshrines the freedom to *receive* ideas and information without interference. This right to receive information is a fundamental aspect of freedom of expression, and this subsection enshrines the right to the free flow of information. Thus, the information rights of audiences, for example, as well as the expression rights of the media are protected. This right is important because it also protects organisations that foster media development. These organisations facilitate public access to different sources and types of information, particularly in rural areas that traditionally have little access to the media.
- Section 24(2)(c) specifically enshrines the freedom to communicate ideas and information without interference and, furthermore, specifies that this freedom

relates to the right to communicate with any specific person, any class of persons or to the public generally. This is a critical freedom for the media. In at least one Southern African country, government officials have argued for the narrowest possible interpretation of the right to freedom of expression by saying that the right protects the ability of individuals to have a conversation rather than the media's right to communicate news and information to the public.

- Section 24(2)(d) specifically enshrines the freedom from interference with correspondence. This protection of correspondence (which would include letters, emails and telefaxes) is an important right for working journalists.

RIGHT TO ADMINISTRATIVE JUSTICE

Another important provision that protects the media is section 33, 'Right to administrative justice'. Section 33(1) provides that:

A person appearing before any administrative authority has the right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved.

Section 33(2) provides that '[a] person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority'. This right requires explanation.

- The reason why this provision is important for journalists and the media is that it protects them (as it does all people) from administrative officials who act unfairly and unreasonably and who do not comply with legal requirements. It also entitles them to written reasons for administrative action.
- An administrative body is not necessarily a state body. Indeed, these bodies are often private or quasi-private institutions. These constitutional requirements would therefore apply to non-state bodies too.
- Many decisions taken by such bodies are 'administrative' in nature. The requirement of administrative justice is therefore powerful as it prevents or corrects unfair and unreasonable conduct on the part of administrative officials.
- This constitutional right entrenches the right to 'judicial review' – that is, the right to approach a court in respect of an administrative decision.

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

FREEDOM OF ASSOCIATION

A third broad protection is provided for in section 25, ‘Protection of freedom of assembly and association’. Section 25(1) grants a person ‘the right to freedom of peaceful assembly and association’. Section 25(2) specifies that the right to association includes the right to ‘associate freely with other persons for the promotion or protection of the interests of that person’. The effect of this is to guarantee the rights of the press to form press associations and to form media houses and operations. It also guarantees the rights of, for example, civil society to form non-governmental organisations dedicated to media freedom.

2.3.2 Other constitutional provisions that assist the media

There are other sections in the Constitution, apart from the human rights provisions, that assist the media in performing its functions.

PARLIAMENTARY PRIVILEGE

Section 130(1) of the Constitution entitles Parliament to prescribe laws providing for immunities and privileges for the president, the speaker, members of Parliament (MPs) and anyone else participating in or reporting on the proceedings of Parliament. It is important to note that this section only entitles Parliament to pass such laws and is not itself a guarantee of parliamentary privilege.

Nevertheless, such laws – including Swaziland’s Parliamentary Privileges Act, 1967 – do assist the media to report on the work of Parliament because they allow MPs and other people participating in parliamentary proceedings to speak freely during parliamentary proceedings, without facing arrest or civil proceedings for what they say.

PUBLIC ACCESS TO COURTS

Section 139(4) of the Constitution provides that except as may otherwise be provided in the Constitution or as ordered by a court in the interest of public morality, public safety, public order or public policy, the proceedings of every court shall be held in public. This is an important provision because it allows journalists (and therefore the media) to attend court proceedings.

2.4 Definition of a limitations clause

It is clear that rights are not absolute as society would not be able to function. For example, if the right to freedom of movement were absolute, society would not be able to imprison convicted criminals. Similarly, if the right to freedom of expression were absolute, the state would not be able to protect its citizens from hate speech or false defamatory statements made with reckless disregard for the truth.

Clearly, governments require the ability to limit rights in order to serve important societal interests; however, owing to the supremacy of the constitution this can only be done in accordance with the constitution.

The Constitution of Swaziland makes provision for two types of legal limitations on the exercise and protection of rights, which limitations are contained in Chapter III, ‘Protection and promotion of fundamental rights and freedoms’.

2.4.1 Internal limitations

These are provisions that occur within certain specific sections of the chapter on fundamental rights and freedoms. They deal specifically, and only, with the limitation or qualification of the particular right that is dealt with in that section. Therefore, the section that contains the right also sets out the parameters or limitations allowable in respect of that right. Two of the rights that are of particular relevance to the media – namely, freedom of expression and freedom of association – are subject to internal limitations.

INTERNAL LIMITATION ON THE RIGHT TO FREEDOM OF EXPRESSION

Section 24(3) contains an internal limitation on the general rights to freedom of expression and opinion contained in subsections 24(1) and (2). Section 24(3) provides that nothing contained in any law or done under the authority of that law shall be held to be a contravention of the right to freedom of expression, as set out in section 24, provided that it:

- Is reasonably required in the interests of defence, public safety, public order, public morality and public health
- Is reasonably required for the purpose of:
 - Protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings
 - Preventing the disclosure of confidential information

- Maintaining the independence and authority of the courts
 - Regulating the technical administration or operation of telephony, broadcasting or any other medium of communication
- Imposes reasonable restrictions upon public officers

These limitations are generally not out of step with international norms for limitations on freedom of expression, except in one respect – namely, the restriction imposed upon public officers. Clearly, many public officials do have secrecy obligations, particularly in defence, intelligence and policing posts. Nevertheless, the general ability of whistleblowers in the public service to bring illegal conduct, including corruption, to the attention of the media in the public interest is a critical part of a functioning democracy. Consequently, such limitations provisions could have a chilling effect on public servants, unduly preventing the disclosure of official misconduct.

INTERNAL LIMITATION ON THE RIGHT TO FREEDOM OF ASSOCIATION

Subsections 25(3) and (4) contain internal limitations on the general right to freedom of association contained in section 25(1).

Section 25(3) provides that nothing contained in any law or done under the authority of that law shall be held to be a contravention of the right to freedom of association, as set out in section 25(1), provided that it:

- Is reasonably required in the interests of defence, public safety, public order, public morality and public health
- Imposes reasonable restrictions upon public officers

Furthermore, section 25(4) provides that nothing contained in any law or done under the authority of that law shall be held to be a contravention of the right to freedom of association, as set out in section 25(1), if the law:

- Deals with the registration of certain associations, for example, trade unions, employer organisations, companies, partnerships and other associations, including registration requirements, qualifications and the like
- Prohibits or restricts the performance of a function or the carrying on of any business by an association that is not registered when there is a legal requirement to do so

2.4.2 Limitations arising from states of emergency

Section 37(1) of the Constitution of Swaziland specifically provides that nothing contained in any law or done under the authority of a law shall be held to be inconsistent with the provisions of Chapter III of the Constitution, which sets out fundamental rights and freedoms, to the extent that the law authorises measures during a state of emergency that are reasonably justifiable.

In terms of various subsections of section 36 of the Constitution, a state of emergency for up to three months may be declared by the king, acting on the advice of the prime minister, by publication in the Government Gazette, provided that:

- Swaziland is at war or about to be at war with a foreign state
- There is a natural disaster or threatened natural disaster in Swaziland, or
- Action taken or threatened by a person or body of persons is of such a nature and scale as to be likely to endanger public safety or deprive the community of supplies or services that are essential to the life of the country

Furthermore, the state of emergency is required to be ratified by a two-thirds majority vote taken in a joint sitting of the members of the House and the Senate within 21 days of the declaration, otherwise it ceases. Provision is made for the state of emergency to be extended for additional periods of three months by a three-fifths vote taken in a joint sitting of the members of the House and the Senate. Importantly, section 38 sets out the rights that may not be derogated from during a declared state of emergency. These are:

- The right to life, equality before the law and security of the person
- The right to a fair hearing
- Freedom from slavery or servitude
- The right to approach the High Court for redress in respect of the contravention of constitutional rights
- Freedom from torture, cruel, inhuman or degrading treatment or punishment

Unfortunately, it is clear that the right to freedom of expression is derogable during a declared state of emergency.

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

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

2.5.1 Internal limitations on the right to freedom of expression

Although we have dealt with this issue in the section immediately above, it is important to reiterate that section 24(3)(b)(i) specifically allows for laws that limit the right to freedom of expression, provided that this is reasonably required for ‘protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings’.

Laws that protect reputations, of course, are used against the media in defamation cases. Similarly, the right to privacy in legal proceedings is often given effect by prohibiting the publication of names of complainants in sexual offences cases or divulging private details in divorce cases.

As already mentioned, these internal limitations, while they do limit the freedom of the press, are not out of step with international norms, save in respect of the restriction upon public servants.

2.5.2 States of emergency provisions

It is also important to note the provisions of sections 36–38 of the Constitution of Swaziland, which deal with declarations of emergencies and derogations (see discussion on limitations arising from states of emergency, immediately above).

2.6 Key institutions relevant to the media established under the Constitution

The Constitution of Swaziland establishes a number of important institutions in relation to the media, namely, the judiciary, the Judicial Service Commission (JSC), and the Commission on Human Rights and Public Administration.

2.6.1 The judiciary

In terms of section 138 of the Constitution of Swaziland, ‘[j]ustice shall be administered in the name of the Crown by the Judiciary which shall be independent

and subject only to this Constitution’. This important statement on the role of the judiciary is supported by section 140(1) of the Constitution, which provides that ‘[t]he judicial power of Swaziland vests in the Judiciary. Accordingly, an organ or agency of the Crown shall not have or be conferred with final judicial power’.

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

Section 139(1), read with other sections of the Constitution of Swaziland, sets out the hierarchy of the courts in that country.

In brief, these are the Superior Court of Judicature, comprising the:

■ Supreme Court

- The Supreme Court is the apex court – section 146.
- The Supreme Court has jurisdiction to hear appeals from the High Court – section 146(2).
- The Supreme Court consists of the chief justice and at least four other justices of the Supreme Court – section 145(1).

■ High Court

- The High Court has unlimited original jurisdiction in civil and criminal matters – section 151(1)(a). Note that section 151(2) further specifies that the High Court has the jurisdiction to enforce the fundamental human rights and freedoms guaranteed by the Constitution, and can determine any constitutional matter. It is important to note, however, the provisions of section 151(8), which specifically take decisions regarding certain traditional matters out of the jurisdiction of the High Court and reaffirms that these will continue to be governed by ‘Swazi law and Custom’.
- The High Court consists of the chief justice, at least four justices of the High Court and such justices of the Superior Court of the Judicature as may be assigned to sit as such by the chief justice, in terms of section 150(1) of the Constitution.
- Specialised, subordinate and Swazi courts or tribunals exercising judicial functions, as established by Parliament by law.

Section 141 of the Constitution of Swaziland contains a number of detailed provisions designed to protect the independence of the judiciary, including provisions relating to its judicial and administrative functions as well as to the financing of the judiciary, including provisions regarding salaries, pensions and the like for judges.

In Swaziland, the chief justice and other judges of the superior courts are appointed by the king on the advice of the JSC (section 153(1)).

Section 158 of the Constitution of Swaziland deals with the removal of judges of the superior courts. Essentially, these judges may be removed only for serious misconduct or inability to perform their functions. Judges are removed by the king, acting on the advice of the JSC, after a full enquiry. The JSC also appoints and exercises disciplinary control over lower court officers such as magistrates (section 160).

2.6.2 The Judicial Service Commission

The JSC is a constitutional body established to participate in the appointment and removal of judges. The JSC is relevant to the media because of its critical role in the judiciary, the proper functioning and independence of which are essential for democracy.

In terms of section 159(2) of the Constitution of Swaziland, the JSC is made up of the chief justice (the chairman), two legal practitioners of not less than seven years' practice and in good professional standing to be appointed by the king, the chairman of the Civil Service Commission, and two persons appointed by the king.

It is clear that the king has an enormous amount of say as to who sits on the JSC. The JSC in Swaziland is therefore not independent of executive influence.

2.6.3 The Commission on Human Rights and Public Administration

The Commission on Human Rights and Public Administration (CHRPA) is an important organisation in respect of the media. It is established in terms of Chapter XI, Part 2 of the Constitution of Swaziland.

In brief, in terms of section 164, its primary functions are to:

- Investigate complaints concerning:
 - Alleged violations of fundamental human rights and freedoms
 - Injustice, corruption, abuse of power and unfair treatment by public officers

- The functioning of any public service or administrative organ of the state in relation to:
 - Delivery
 - Equitable access
 - Fair administration

- Take appropriate action for the remedying, correction or reversal of the above

- Promote the rule of law, and fair efficient and good governance in public affairs

Section 166 of the Constitution of Swaziland specifies that the CHRPA is independent in the performance of its functions and shall not be subject to the direction or control of any person or authority.

In terms of section 163, members of the CHRPA are the commissioner for human rights and public administration and at least two deputies, appointed by the king on the advice of the JSC. It is clear that the king has an enormous amount of say as to who sits on the CHRPA. The CHRPA is therefore not independent of executive influence.

2.7 Enforcing rights under the Constitution

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

Section 14(2) of the Constitution of Swaziland provides that '[t]he fundamental rights and freedoms enshrined in this Chapter [being Chapter III] shall be respected and upheld by the Executive, the Legislature and Judiciary and other organs or agencies of Government and, where applicable to them, by all natural and legal persons in Swaziland and shall be enforceable by the courts as provided for in this Constitution'.

Section 35, 'Enforcement of protective provisions', and subsection (1) essentially provide that any person may apply to the High Court for redress if he or she alleges that any rights provision of Chapter III has been, is being, or is likely to be contravened in relation to that person, or in relation to a group of which that person is a member, or in respect of a detained person.

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

Perhaps one of the most effective ways in which rights are protected, at least theoretically, under the Constitution of Swaziland is through the provisions of the Swaziland Constitution that entrench Chapter III – the chapter setting out fundamental rights and freedoms. Section 246 of the Constitution requires that a constitutional amendment to any of the provisions of Chapter III requires a vote of three-quarters of the members of both the Senate and the House, voting in a joint sitting.

2.8 The three branches of government and separation of powers

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

2.8.1 Branches of government

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

THE EXECUTIVE

Executive power in Swaziland vests, in terms of section 64(1) of the Constitution of Swaziland, in the king as head of state. Section 64(3) provides that, as a general rule, the king exercises his executive authority either directly or through the Cabinet or a minister.

Section 65 makes it clear that the king does not wield executive power unilaterally as the section requires the king to act ‘on the advice of Cabinet or a Minister acting under the general authority of Cabinet’, except for certain specified circumstances in which he is free to act unilaterally. The effect of this is to require the king to involve, and act along with, Cabinet or the relevant minister in wielding executive power.

In terms of section 66 of the Constitution of Swaziland, the Cabinet consists of the prime minister (who chairs Cabinet), the deputy prime minister and such number of ministers as the king may deem necessary for administering the functions of government, after consultations with the prime minister. In terms of section 67, the appointments processes for key Cabinet posts are as follows:

- The king appoints the prime minister from among members of the House of Assembly, on the recommendation of the King’s Advisory Council.
- The king appoints ministers from both chambers of Parliament, namely, the

House of Assembly and the Senate, on the recommendation of the prime minister. Note that at least half of the ministers must be from among the elected members of the House of Assembly. Note further that in terms of section 70, the king, after consultation with the prime minister, may assign responsibility for government business, including the administration of any government department, to the prime minister or any other minister.

Section 64(4) sets out the functions of the king as head of state, and these include:

- Assenting to and signing bills
- Summoning and dissolving Parliament
- Receiving foreign envoys and appointing diplomats
- Issuing pardons, reprieves or commuting sentences
- Declaring a state of emergency
- Conferring honours
- Establishing any commission or like body
- Ordering a referendum

Section 69 sets out the functions of Cabinet, and these include:

- Keeping the king fully informed about the general conduct of government and providing the king with any information he may require regarding government
- Being collectively responsible to Parliament for:
 - Any advice given by it to the king
 - All things done by any minister in the execution of the office of minister
- Formulating and implementing government policy in line with national development strategies or plans
- Performing other functions conferred by the Constitution or by any law

THE LEGISLATURE

Legislative (that is, law-making) power in Swaziland vests, in terms of section 106(1) of the Constitution of Swaziland, in ‘the King-in-Parliament’. Thus both the king and the Parliament are involved in making laws. Section 106(2) specifies that they ‘may make laws for the peace, order and good government of Swaziland’. In terms of section 93 of the Swaziland Constitution, Parliament consists of ‘a Senate and a House of Assembly’.

In terms of section 94 of the Swaziland Constitution, the Senate consists of not more than 31 members, comprising:

- 10 senators (at least half of whom must be female) elected by members of the House of Assembly so as to represent a broad cross-section of Swazi society
- 20 senators (at least eight of whom must be female) appointed by the king on the basis of:
 - Representing economic, social, cultural, traditional or marginalised interests not already adequately represented in Parliament
 - Being able to contribute to the good government and progressive development of Swaziland

Note that while there is a consultation requirement regarding these appointees, this is extremely weak as the king has the discretion to determine which bodies to consult.

In terms of section 95 of the Swaziland Constitution, the House of Assembly consists of not more than 76 members, comprising:

- 60 members elected from *tinkhundla* (constituencies based on one or more chiefdoms – section 80)
- 10 members nominated by the king
- Four female members specially elected from the four regions – but this is done only if, after a general election, less than 30% of the members elected ordinarily are female (see section 86)
- the attorney-general as an ex officio member

THE JUDICIARY

Judicial power, as already discussed in this chapter, vests in the courts.

2.8.2 Separation of powers

It is important in a functioning democracy to divide governmental power between different organs of the state in order to guard against the centralisation of power, which may lead to abuses of power. This is known as the separation of powers doctrine. The aim, as the Constitution of Swaziland has done, is to separate the functions of the three branches of government – the executive, the legislature and the

judiciary – so that no single branch is able to operate alone, assume complete state control and amass centralised power. While each branch performs a number of different functions, each also plays a ‘watchdog’ role in respect of the other. This helps to ensure that public power is exercised in a manner that is accountable to the general public and in accordance with the constitution. Sadly, the actual exercise of power by the monarch in Swaziland means that there is no effective separation of powers in the country.

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

There are a number of important respects in which the Constitution of Swaziland is weak. If these weaknesses were addressed, there would be specific benefits for the media in Swaziland.

2.9.1 Access to information

In an information age, where states wield enormous power, particularly in regard to the distribution of resources, the right of access to information is one of the most important rights in ensuring transparency and holding public power – that is, government – accountable. If one considers that the media plays an enormous role in ensuring transparency and government accountability through providing the public with information, having a right of *access* to information is critical to enable the media to perform its functions properly. It is unfortunate that there is no free-standing right of access to information in the Swaziland Constitution.

2.9.2 Access by the public to parliamentary processes

It is disappointing that the Constitution does not specifically provide as a general rule that parliamentary processes are to be open to the public, including members of the media. Media reporting on government in action is one of the most important mechanisms for ensuring an informed citizenry. The general principle of public observance of the workings of the legislature (government) ought to be enshrined in the Constitution of Swaziland.

2.9.3 Independent broadcasting regulator and a public broadcaster

It is disappointing that the Constitution of Swaziland does not provide for an independent broadcasting regulator to ensure the regulation of public, commercial and community broadcasting in the public interest. Similarly, it is disappointing that the Constitution does not provide for an independent public broadcaster to ensure

access by the people of Swaziland to quality news, information and entertainment in the public interest.

3 THE MEDIA AND LEGISLATION

In this section you will learn:

- What legislation is and how it comes into being
- Key legislative provisions governing the operations of the print media
- Key legislative provisions governing the making and exhibition of films
- Key legislative provisions governing the broadcasting media generally
- Key legislative provisions governing the state broadcasting media
- Generally applicable statutes that threaten a journalist's duty to protect sources
- Generally applicable statutes that prohibit the publication of certain kinds of information
- Generally applicable statutes that hinder the press in performing its reporting functions
- Swaziland's stalled media reform initiatives

3.1 Legislation: An introduction

3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed in accordance with the Constitution. As we know, legislative authority in Swaziland vests in 'the King-in-Parliament' and consequently involves both the king and Parliament (made up of the Senate and the House of Assembly).

As a general rule, both Parliament and the king are ordinarily involved in passing legislation. There are detailed rules in sections 49, 107, 108, 110 and 112–117 and in Chapter XVII of the Constitution of Swaziland, which set out the different law-making processes that apply to different types of legislation. It is important for journalists and others in the media to be aware that the Constitution of Swaziland requires different types of legislation to be passed in accordance with particular procedures. The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the Constitution of Swaziland, there are five kinds of legislation, each of which has particular procedures and/or rules applicable to it. These are:

- Legislation that amends the Constitution – the procedures and/or applicable rules are set out in sections 107, 108(2) and Chapter XVII of the Constitution

- Ordinary legislation – the procedures and/or applicable rules are set out in sections 49, 107 and 108 of the Constitution and, where the Senate and House of Assembly disagree thereon, in section 116 of the Constitution
- Legislation that deals with financial matters – the procedures and/or applicable rules are set out in sections 107, 110(a), 111, 112 and 113 of the Constitution
- Legislation deemed urgent by the king – the procedures and/or applicable rules are set out in sections 107 and 114 of the Constitution
- Legislation dealing with matters involving Swazi law and custom – the procedures and/or applicable rules are set out in sections 107, 110(b) and 115 of the Constitution

3.1.2 The difference between a bill and an act

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

As a general rule, if a bill is passed by Parliament in accordance with the various applicable procedures required for different types of bills, as set out above, it becomes an act once it is assented to by the king. It is important to note that sections 108 and 117 of the Constitution of Swaziland contain provisions regarding the process of how the king assents to legislation, including provisions that enable him to refer provisions of a bill to a joint sitting of Parliament. In terms of section 109 of the Swaziland Constitution, the attorney-general has the responsibility for ensuring that once a bill has been duly passed and assented to, it must be published in the Gazette, and it becomes law only when it has been so published.

3.2 Statutes governing the print media

The Books and Newspapers Act, Act 20 of 1963, is a colonial-era statute that has not been repealed. There are a number of key requirements laid down by the Books and Newspapers Act in respect of books (the definition of which specifically includes magazines and pamphlets) and newspapers:

- Section 4(1) prohibits any person from printing or publishing a newspaper (defined as any printed matter published at least monthly and intended for sale or distribution, which contains ‘news, or intelligence, or reports of occurrences of interest to the public or any section thereof, or any views, comments or observations thereon’) unless the editor is resident in Swaziland and a certificate

of registration has been issued. Failure to comply with these requirements is an offence, and the penalty is the payment of a fine or, in the event of non-payment, a period of imprisonment.

- In terms of section 5, the newspaper registration requirements include: the full and correct name of the newspaper and address at which it is to be published; and the full names and addresses of the proprietor, printer, publisher, manager and editor of the newspaper. Section 7 also requires any changes of such information to be provided to the Registrar of Books and Newspapers, who is appointed by the minister responsible for the administration of the Books and Newspapers Act. In terms of section 5(4) of the Books and Newspapers Act, making a false statement when giving particulars in respect of the registration of a newspaper is an offence that carries a fine as a penalty or, failing payment thereof, a period of imprisonment.
- Section 10(1) requires the publisher of every newspaper printed in Swaziland to provide two copies of every edition to the Registrar of Books and Newspapers, at his or her own expense. In terms of section 10(4), failure to do so is an offence punishable by a fine, a period of imprisonment or both.
- Section 9 of the Books and Newspapers Act also requires the publisher of any book (note again that the definition includes a magazine) printed and published in Swaziland to deliver two copies (and such additional ones as may be requested up to a maximum of three) of the book, at his or her own expense, to the Registrar of Books and Newspapers. In terms of section 9(8), failure to do so is an offence punishable by a fine, a period of imprisonment or both.
- Note that the minister is empowered under section 8 of the Books and Newspapers Act to make rules to exempt compliance from the requirements of having to deposit copies of books and newspapers.
- Part IV of the Books and Newspaper Act deals with bonds. In brief, the publishers of every newspaper are to register and deliver to the Registrar of Books and Newspapers a bond as security towards the payment of monetary penalties imposed or libel damages awarded as a result of publication. Publishing a newspaper without a bond is an offence in terms of section 15 of the Books and Newspapers Act, and the penalty is a fine, a period of imprisonment or both.
- Section 16 requires the following to be printed legibly and in English on the first or last page of a book or newspaper printed in Swaziland: the name and address of the printer and publisher; and the name of place where it is printed and

published. Failure to comply is an offence, and the penalty is a fine, imprisonment or both. Note further that an additional penalty of forfeiture or destruction of all copies (held by the court or the defendant) can be imposed by a court.

3.3 Statutes governing the making and exhibition of films

3.3.1 The making of films and the taking of photographs

There are a number of constraints on the making of films and even the taking of photographs in Swaziland – something that obviously affects both the print and broadcast media.

The key provision of the main piece of legislation governing film and photography, namely the Cinematograph Act, Act 31 of 1920, is section 3, which, without the prior written consent of the minister for public service and information, prohibits any person from:

- Making a film (or taking photographs for the purpose of making a film) that portrays gatherings of Africans or scenes of African life, or
- Taking a photograph on the dates and at the places of celebration listed. These include Incwala Day, the king's birthday, the Reed Dance and independence day.

Failure to comply with section 3 is an offence, and the penalty is a fine or, if the fine is unpaid, a period of imprisonment.

3.3.2 Exhibition of objectionable pictures

The Cinematograph Act also regulates the exhibition of films. Section 6(4) makes it an offence to exhibit an 'objectionable picture' (the definition of which includes any film). In terms of section 6, an objectionable picture is one that has been declared to be so by the minister for public service and information.

While the minister's powers are untrammelled in this regard (he or she can declare any picture to be objectionable – section 6(2)), the general grounds upon which he or she can make such a declaration are that the picture represents, in an offensive manner:

- Impersonation of the king
- Scenes holding up to ridicule and contempt any member of the naval, military or air forces

- Scenes tending to disparage public characters
- Scenes calculated to affect the religious convictions of any section of the public
- Scenes of debauchery, drunkenness, brawling or any other habit of life not in accordance with good morals or decency
- Successful crime or violence
- Scenes that are in any way prejudicial to the peace, order or good government of Swaziland.

The penalty for exhibiting a prohibited picture is a fine or a period of imprisonment. (These provisions are dealt with in greater detail elsewhere in this chapter.)

3.4 Statutes governing the broadcast media generally

3.4.1 Statutes that regulate broadcasting generally

Broadcasting in Swaziland is regulated in terms of the Swaziland Television Authority Act, 1983.

3.4.2 Establishment of the Swaziland Television Authority

Section 3 of the Swaziland Television Authority Act establishes the Swaziland Television Authority (STA) as a body corporate, which means that it has its own legal identity. Section 4(2) provides that all that the STA is empowered to do shall be undertaken and carried out by the board of directors of the STA.

Section 5(1) provides that the board of directors of the STA consists of nine people:

- A chairman appointed by the minister responsible for television broadcasting.
- Four people representing the ministries responsible for:
 - Television and broadcasting
 - Education
 - Finance
 - Commerce, industry, mines and tourism
- Three persons, who are not public officers, appointed by the minister on the basis of their relevant qualifications, knowledge or experience.

- The general manager (who is appointed by the board of directors and who is responsible for the day to day activities of the STA, subject to the direction of the board – section 8) as an ex officio member.

Note that the minister appoints one member of the board to act as the deputy chairman. Section 5(2) provides that the term of office of members of the board is three years, and members are eligible for reappointment.

It is important to note that there is a second structure established within the STA, namely the STA Board of Control. It comprises five members appointed by the minister. As is the case with members of the board of directors, the term of office of members of the board of control is three years, and members are eligible for reappointment.

3.4.3 Main functions of the STA and the STA Board of Control

THE STA

In terms of section 4(1) of the STA Act, the STA's objects include:

- To establish, erect and operate television broadcasting stations in Swaziland, including maintaining and all related facilities
- Imposing and implementing controls regarding:
 - Renting, selling and dealing in television receivers and associated equipment
 - Technical quality of transmissions
 - Advertising
- Issuing and withdrawing licences

The following sections elaborate on the STA's key functions:

- Section 17 empowers the STA (but subject to the minister's approval) to grant a licence to any person to conduct a television service in Swaziland, upon such terms and conditions as the board may determine, including the annual fee therefor.
- Section 18 empowers the STA (but, again, subject to the minister's approval) to grant a licence to any person to deal with television receivers, recorders and other television equipment and accessories in Swaziland, upon such terms and conditions as the board may determine, including the annual fee therefor.

- Section 19 envisages that the STA will issue a television viewer's certificate or video cassette recorder's licence to any person who possesses a television receiver or recorder.

It is clearly envisioned in the legislation that the STA is both an operator and a regulator.

THE STA BOARD OF CONTROL

In terms of section 10 of the STA Act, the STA Board of Control's sole function is to monitor the content of programmes and other transmissions to ensure that they conform to acceptable moral standards.

3.4.4 Appointment of board members

As set out above, in respect of the STA Board of Directors:

- The minister appoints the chairperson and the three people appointed on the basis of their expertise or experience
- Four ministries determine who their representatives are, but clearly these are executive appointments
- The general manager is an ex officio member of the board, appointed by the board.

As set out above, every member of the Board of Control is appointed by the minister. There is no public nominations process for appointments to the STA's Board of Directors or Board of Control, and Parliament is not involved in either body's appointments processes. In addition, there are no criteria for appointment.

However, section 7 does set out grounds upon which a director of the STA loses his or her office. These include insolvency, mental or physical incapacity, resignation, being absent without leave, corruption, being convicted of an offence or being suspended from public office.

3.4.5 Funding for the STA

Section 12(1) makes it clear that the assets of the STA are those assets acquired by the government in accordance with an agreement entered into in 1982 between it and Electronic Rentals Group PLC, and any other assets that the STA may acquire. This

is vague wording, but it seems clear that the STA's funding and asset base is derived from government. Note that in terms of section 21 of the STA Act, the STA is exempt from paying tax.

3.4.6 Broadcasting regulations

In terms of section 26 of the STA Act, the minister, acting in consultation with the STA's Board of Directors, makes regulations for the better carrying out of the provisions of the STA Act. Effectively, this means that the STA does have a veto power in respect of the making of regulations. The minister is therefore unable to make regulations without the STA's consent.

Note, however, that the kinds of issues that the STA Act envisages include:

- The appointment of television licence inspectors
- Forms of licences to be used under the STA Act
- Remunerations and allowances for members of the board of directors
- Fees for television receiver and television recorder licences
- The prohibition or restriction of the possession or use of video cassettes

3.4.7 Licensing regime for broadcasters in Swaziland

Section 22(3) of the STA Act prohibits any person from establishing or operating a television service in Swaziland, except in accordance with a licence issued by the STA. Section 23 makes doing so an offence, with a penalty of a fine, a period of imprisonment or both.

3.4.8 Is the STA an independent regulator?

The STA can in no way be said to be independent. Indeed, it is interesting to note that nowhere in the governing legislation is the STA even said to be independent.

The STA's independence is compromised in a number of important ways:

- The STA is conflicted by being both an operator of a television service and a regulator of television broadcasting.
- All members of the STA's boards of directors and control are appointed by the ministry or other members of the executive with no objective and clear criteria, no public nominations process and no involvement by Parliament.

- The minister is responsible for making broadcasting regulations, albeit in consultation with the STA Board of Directors.

The effect of these serious deficiencies is that the STA does not meet international best practice standards regarding the appointment requirements for independent bodies as well as institutional independence.

3.4.9 Amending the legislation to strengthen the broadcast media generally

There are a number of problems with the legislative framework for the regulation of broadcasting generally:

- The overriding problem is that the STA is not an independent body.
- The STA Act ought to be amended to deal with the following issues:
 - The STA ought to function as a regulator only. In other words, the function of operating a television service ought to be assigned to a different body (such as a public broadcaster) so that the STA does not act as operator in and regulator of the television broadcasting sector.
 - Objective criteria for membership to the STA's boards of directors and control ought to be provided for and ought to be based on experience, expertise and qualifications.
 - Public officers, party political office bearers and all members of government ought to be barred from serving on the STA's boards.
 - Members of the STA's boards of directors and control ought to be appointed by the king, acting on the advice of Parliament, after Parliament has drawn up a list of recommended appointees. As part of this process, the National Assembly should call for public nominations and should conduct public interviews.
 - The STA should be empowered to make its own regulations.
 - The STA's regulatory functions should be more clearly set out. The ability to grant licences does not constitute an appropriate regulatory framework. In this regard, at a bare minimum, the STA ought to have provisions dealing with broadcasting-related issues such as:
 - Categories of broadcast licences, for example, public, commercial and community
 - Advertising restrictions
 - Ownership requirements to ensure diversity of views, for example, limits on levels of foreign ownership on the number of broadcasting services a single person may control
 - A code of conduct for broadcasting content

3.5 Statutes that regulate the state broadcast media

The STA Act, which regulates television broadcasting generally, also regulates the functions of the STA as the provider of the state television service. Indeed, with the introduction of the STA Act, the STA took over the functions, employees and assets of the Swaziland Television Broadcasting Corporation and of Visionhire (Swaziland) Ltd.

The provisions of the STA Act are set out above.

3.5.1 STA: Public or state broadcaster?

It is clear that the STA is not a public broadcaster as the regulatory framework does not:

- Provide that the STA is an independent body acting in the public interest
- Contain any objects that deal with public broadcasting aims, such as providing the people of Swaziland with programming that is educational, informative and entertaining

There ought to be a separate act of Parliament dealing with public broadcasting. Such an act should provide that:

- Public broadcasting be carried out in the public interest and, more specifically, that public broadcasting is required to provide programming that is educational, informative and entertaining, and available in local languages
- The public mandate of the public broadcaster be set out in detail in the governing legislation
- Public broadcasting be operated by a legal entity that is independent of the executive of any political party, and that it be governed by a board or similar body whose mandate is to act in the public interest. In this regard, such public broadcasting legislation ought to provide:
 - For objective criteria for membership to the board of directors (or similar body) and membership ought to be based on experience, expertise and qualifications
 - That public officers, party political office bearers and all members of government be barred from serving on the board (or similar body) of the public broadcaster

- That members of the board of the public broadcaster be appointed by the king acting on the advice of Parliament, after Parliament has drawn up a list of recommended appointees. As part of this process, the National Assembly should call for public nominations and should conduct public interviews

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

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

3.6.1 Magistrates Courts Act, Act 66 of 1939

Section 34 of the Magistrates Courts Act contains provisions that might be used to compel a journalist to reveal confidential sources. It provides that any person who has been subpoenaed to give evidence or to produce any documents and who fails to attend, or to give evidence, or to produce such documents may be sentenced by the court to a fine, and, if the fine is not paid, to a period of imprisonment. The court can also issue a warrant for the person's arrest so that he/she may be brought to court to give evidence.

3.6.2 Parliamentary Privileges Act, 1968

Although this act relates to the activities of Parliament under the old 1968 Constitution, it is important to note that the act has not been repealed and so continues to be in force. Section 18 of the Parliamentary Privileges Act empowers Parliament or any of its committees to order any person to attend before Parliament and to produce any book or document under his or her control. Section 11 makes it an offence not to comply, and the penalty is a fine or imprisonment or such lesser penalty as may be provided for in Parliament's Standing Orders.

3.6.3 Public Accounts Committee Order, 1973

Although this order related to the activities of the Public Accounts Committee under

the old 1968 Constitution, it is important to note that it has not been repealed and so continues to be in force. In terms of section 3(2), the duty of the Public Accounts Committee is to report to the legislature on accounts of the Government of Swaziland presented by the auditor-general.

Section 4(1) of the Public Accounts Committee Order empowers the committee to conduct enquiries, and it may summon any person to give evidence at an enquiry or to produce any relevant book or other document. Failure to appear before the committee, to answer any question or to produce the required book or document is an offence in terms of section 5, and the penalty is a fine, a period of imprisonment or both. Note, however, that section 22 allows Parliament to excuse a person from producing any book or document on the grounds that it is private and does not affect the subject of the Parliamentary enquiry.

3.6.4 Official Secrets Act, Act 30 of 1968

Section 10 empowers the commissioner of police, whenever he is satisfied that an offence under the Official Secrets Act has been committed and a person is able to furnish information about it, to require such person to provide the necessary information. If the person fails to do so, he or she shall be guilty of an offence, and the penalty upon conviction is a fine, a period of imprisonment or both.

3.6.5 Control of Supplies Order, 1973

The Control of Supplies Order empowers the minister for commerce to ‘regulate in such manner as he may think necessary in the interests of the public’ the supply of any goods mentioned in a Government Gazette notice. Section 5 empowers the principal secretary for the Ministry of Commerce, or anyone authorised by him, without prior notice, to enter any premises, make an examination and take samples of any goods found there for the purposes of obtaining any information or ascertaining the correctness of any information. Theoretically, this could be used to seize journalists’ computers or notebooks, thereby compromising journalists’ sources.

3.6.6 Aviation Act, 1968

Section 10 of the Aviation Act empowers any accident enquiry board established by the minister responsible for aviation to investigate any air accident, to summon and examine witnesses, and to call for the production of any books and other documents. The section also provides that the laws and rules governing magistrates’ courts of Swaziland apply to procuring the attendance of witnesses and the production of, among other things, books and documents (see above).

Clearly, these provisions might well conflict with a journalist's ethical obligation to protect his or her sources. However, it is important to note that whether or not requiring a journalist to reveal a source is in fact an unconstitutional violation of the right to freedom of expression depends on the particular circumstances in each case, particularly on whether or not the information is available from any other source. Consequently, it is extremely difficult to state that these provisions are, by themselves, a violation of the right to freedom of expression under the Constitution.

3.7 Statutes that prohibit the publication of certain kinds of information

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

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

- Information relating to defence, public safety, order and security, official secrets or that otherwise undermines government's authority (such as sedition or subversion), protected or prohibited places
- Expression which constitutes intimidation
- Expression which is obtained from public officers and relates to corrupt practices
- Expression which is obscene or contrary to public morals
- Expression which is likely to offend religious convictions
- Information relating to voting
- Information provided in response to statistical questionnaires
- Information relating to identity documentation
- Expression which constitutes offensive impersonation of the king
- Expression which is offensive in its portrayal of executions, murders and the like
- Expression which constitutes contempt or ridicule
- Expression which is prejudicial or potentially prejudicial to public health

- Expression which induces a boycott
- Expression which constitutes advertisements relating to medicines and medical treatments
- Pictures which the minister declares to be ‘objectionable’

3.7.1 Prohibition on the publication of state security–related information

PROSCRIBED PUBLICATIONS ACT, ACT 17 OF 1968

Section 3 of the Proscribed Publications Act empowers the minister for public service and information to declare in the Government Gazette any publication or series of publications (the definition of which, in section 2, includes any newspaper, book, periodical, photograph or record) to be ‘proscribed’ if the publication is prejudicial or potentially prejudicial to the interests of, among other things, defence, public safety and public order. (See the case law below for a discussion of an important High Court case involving the Proscribed Publications Act.) Any person who distributes, prints, publishes or possesses a proscribed publication without the necessary licence given under the authority of the minister is guilty of an offence, in terms of section 4 of the Proscribed Publications Act. The penalty for such an offence is a fine, a period of imprisonment or both.

CINEMATOGRAPH ACT, ACT 31 OF 1920

The Cinematograph Act was enacted close on a century ago and many of its provisions are not in keeping with international norms regarding freedom of expression. Section 6, ‘Objectionable pictures’ and section 6(1) entitle the minister for public service and information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable if he is satisfied that, among other grounds, the picture represents in an objectionable manner:

- Successful crime or violence
- Scenes that are in any way prejudicial to the peace, order or good government of Swaziland

Notice of the declaration of such objectionableness must be given in writing, by telegraph or by radio to the proprietor of any theatre which exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or a period of imprisonment.

SEDITION AND SUBVERSIVE ACTIVITIES ACT, ACT 46 OF 1938

In terms of section 4 of the Sedition and Subversion Act, any person who prints, publishes, sells or distributes any seditious publication (or even possesses one without lawful excuse) is guilty of an offence and liable to a fine or a period of imprisonment and forfeiture of the publication. Section 3(1) of the Sedition and Subversion Act sets out a long list of seditious intentions with regard to publications. These include:

- Bringing the king or the government into hatred or contempt or to excite disaffection against them
- Exciting inhabitants of Swaziland to procure changes in Swaziland other than by lawful means
- Bringing the administration of justice into hatred or contempt or to excite disaffection against it
- Raising discontent or disaffection
- Promoting feelings of ill-will and hostility between different classes of the population

It is important to note, however, that section 3(2) specifically excludes those publications that:

- Show that the king has been misled or is mistaken
- Point out errors in the government or Constitution of Swaziland
- Advocate for lawful change
- Point out any matters producing ill-will and enmity between different classes of the population with a view to their removal

OFFICIAL SECRETS ACT, ACT 30 OF 1968

The Official Secrets Act contains numerous provisions which inhibit the publication of types of information.

- Section 3 makes it an offence to:
 - Be in or in the neighbourhood of a prohibited place (defined as

including works of defence, places relating to munitions of war and any place declared by the minister to be a prohibited place)

- Make a sketch (defined as including a photographic representation) that is likely to be even indirectly useful to an enemy
- Publish a secret official code, password, sketch or any other information that is likely to be even indirectly useful to an enemy

The penalty for such an offence is a substantial period of imprisonment.

- Section 4(2) makes it an offence to publish or even communicate any information that relates to munitions of war or any other military or police matter in any manner or for a purpose prejudicial to the safety or interests of Swaziland. The penalty is a fine, a period of imprisonment or both.
- Importantly, section 9 deals with presumptions in relation to charges under the act. For example, although the wording is legalistic, section 9(b) states that if a person is charged with publishing or communicating information for a purpose prejudicial to the safety or interests of Swaziland, and that person was not acting under lawful authority, then there is a presumption that the purpose was prejudicial to the safety or interests of Swaziland. This greatly hinders the media because it sets up a presumption of guilt on the part of unauthorised persons, such as journalists, media houses, etc., when publishing such information.

PUBLIC ORDER ACT, ACT 17 OF 1963

Section 6 of the Public Order Act deems a person to have committed the offence of incitement to public violence if, among other things, he published words, the natural consequence of which would be the commission of public violence by members of the public generally or by persons to whom the publication was addressed.

PROTECTED PLACES AND AREAS ACT, ACT 13 OF 1966

While the Protected Places Act does not directly prohibit the publication of information, section 4 of the Protected Places Act makes it an offence for any unauthorised person (for example, a journalist) to be in a protected place (defined as a place which has been declared a protected place by the relevant Minister) without a permit.

The penalty is a fine, a period of imprisonment or both. Furthermore, the person can be ejected from the place. This provision clearly has implications for media personnel, making it more difficult to perform their reporting functions.

3.7.2 Prohibition on the publication of expression that constitutes intimidation

Section 12 of the Public Order Act, Act 17 of 1963, makes it an offence to intimidate another person, and the penalty is a period of imprisonment. The intimidation can include threatening to cause unlawful injury to a person or to his reputation or property.

3.7.3 Prohibition on the publication of expression obtained from public officers and which relates to corrupt practices

Section 17(3) of the Prevention of Corruption Order No. 19 of 1993, makes it an offence to publish or disclose any document or information that is in one's possession and which one has reason to believe has been disclosed by an officer of the Anti-Corruption Commission, without the written permission of the minister of justice. The penalty is a fine, a period of imprisonment or both.

3.7.4 Prohibition on the publication of expression that is obscene or contrary to public morals

OBSCENE PUBLICATIONS ACT, ACT 20 OF 1927

The Obscene Publications Act regulates the sale and exhibition of obscene publications, books, pictures and the like. Sections 3 and 4 of the act make it an offence to import, produce, sell or distribute any indecent or obscene (note that these terms are not defined) publication (the definition of which includes a newspaper and a magazine). The penalty is a fine or, failing payment thereof, a period of imprisonment.

PROSCRIBED PUBLICATIONS ACT, ACT 17 OF 1968

Section 3 of the Proscribed Publications Act empowers the minister for public service and information to give notice in the Government Gazette declaring any publication or series of publications (the definition of which in section 2 includes any newspaper, book, periodical, photograph or record) to be a 'proscribed publication' if the publication is prejudicial or potentially prejudicial to the interests of, among other things, public morality.

Any person who, among other things, distributes, prints, publishes or even possesses a proscribed publication without the necessary licence given under the authority of the minister is guilty of an offence, in terms of section 4 of the Proscribed Publications Act. The penalty for such an offence is a fine, a period of imprisonment or both.

CINEMATOGRAPH ACT, ACT 31 OF 1920

The Cinematograph Act was enacted close on a century ago and many of its provisions are not in keeping with international norms regarding freedom of expression.

Section 6(1) entitles the minister for public service and information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable if he is satisfied that, among other grounds, the picture represents in an objectionable manner scenes:

- Suggestive of immorality or indecency
- Of debauchery, drunkenness, brawling, or of any other habit of life not in accordance with good morals and decency

Notice of the declaration of such objectionableness must be given in writing, by telegraph or by radio to the proprietor of any theatre that exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or a period of imprisonment.

3.7.5 Prohibition on the publication of expression that is likely to offend religious convictions

Section 6(1)(d) of the Cinematograph Act, Act 31 of 1920, entitles the minister for public service and information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable if he is satisfied that, among other grounds, the picture represents in an objectionable manner ‘scenes calculated to affect the religious convictions or feelings of any section of the public’.

Notice of the declaration of such objectionableness must be given in writing, by telegraph or by radio to the proprietor of any theatre that exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or a period of imprisonment.

3.7.6 Prohibition on the publication of information relating to voting

Section 86(2) of the Electoral Act, Act 4 of 1971, affects the media’s ability to conduct political polls during an election in order to report on voting trends:

- Section 86(2)(a) makes it an offence to obtain information as to which candidate a voter intends to vote for or has voted for.

- Section 86(2)(d) makes it an offence to disclose any information that one may have obtained regarding a candidate for whom a voter intends to or has voted.

The penalty for either of these offences is a fine, a period of imprisonment or both.

3.7.7 Prohibition on the publication of information provided in response to statistical questionnaires

Section 8 of the Statistics Act, Act 14 of 1967, prohibits the publication of any:

- Individual return made in terms of the Statistics Act
- Answer given to a question put in terms of the Statistics Act
- Report or other document containing particulars comprising such returns or answers, which enable the identification of such particulars with any person or business,

unless the person making the return or answering the question has previously consented to the publication in writing. The penalty is a fine or a period of imprisonment, in terms of section 12(4) of the Statistics Act.

3.7.8 Prohibition on the publication of information relating to identity documentation

The Identification Order, Kings Order in Council No. 4 of 1998, deals with Swaziland's population registry and the issuing of identity documents. Section 15(1) of the Identification Order prohibits any person from publishing any information which he knows has been communicated to him in contravention of the provisions of section 15. This means that should a journalist be given information by a civil servant employed to implement the Identification Order regarding information or the contents of documents about another person which the employee is under a secrecy obligation not to have disclosed, the journalist is prohibited from publishing the information. In terms of section 16(1)(h), such publication is an offence, and in terms of section 16(2), the penalty is a fine or a period of imprisonment.

3.7.9 Prohibition on the publication of expression that constitutes offensive impersonation of the king

Section 6(1)(a) of the Cinematograph Act, Act 31 of 1920, entitles the minister for public service and information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable if he

is satisfied that, among other grounds, the picture represents in an objectionable manner ‘impersonation of the King’. Notice of the declaration of such objectionableness must be given in writing, by telegraph or by radio to the proprietor of any theatre that exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or a period of imprisonment.

3.7.10 Prohibition on the publication of expression that is offensive in its portrayal of executions, murders and the like

Section 6(1)(e) of the Cinematograph Act, Act 31 of 1920, entitles the minister for public service and information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable if he is satisfied that, among other grounds, the picture represents in an objectionable manner ‘executions, murders or other revolting scenes’. Notice of the declaration of such objectionableness must be given in writing, by telegraph or by radio to the proprietor of any theatre that exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or a period of imprisonment.

3.7.11 Prohibition on the publication of expression which constitutes contempt or ridicule

Subsections 6(1)(b) and (c) of the Cinematograph Act, Act 31 of 1920, entitle the minister for public service and information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable if he is satisfied that, among other grounds, the picture represents in an objectionable manner scenes:

- Holding up to ridicule or contempt any member of His Majesty’s naval, military or air forces
- Tending to disparage public characters

Notice of the declaration of such objectionableness must be given in writing, by telegraph or by radio to the proprietor of any theatre that exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or a period of imprisonment.

3.7.12 Prohibition on the publication of expression that is prejudicial or potentially prejudicial to public health

Any person who, among other things, distributes, prints, publishes or even possesses a proscribed publication without the necessary licence given under the authority of

the minister for public service and information is guilty of an offence in terms of section 4 of the Proscribed Publications Act, Act 17 of 1968. The penalty for such an offence is a fine, a period of imprisonment or both.

3.7.13 Prohibition on the publication of expression that induces a boycott

Section 13(3) of the Public Order Act, Act 17 of 1963, makes it an offence to, among other things, attempt to persuade any person to take any action which has been specified in relation to a boycott designated as such by the minister. The penalty is a period of imprisonment.

3.7.14 Prohibition on the publication of expression that constitutes advertisements relating to medicines and medical treatments

There are a number of sections in the Regulation of Advertisements Act, Act 62 of 1953, which prohibit certain advertisements.

- Section 3 of the Advertisements Act makes it an offence to publish any ‘prohibited advertisement’ without a lawful defence. The definition of ‘prohibited advertisements’ deals with advertisements that claim to be effective in curing a range of conditions, including venereal diseases, cancer, tuberculosis, epilepsy, paralysis, pneumonia, blindness and sterility. The lawful defences include that the advertisement appeared only in a technical publication intended for circulation among duly registered medical practitioners, chemists and hospital managers, or that publication was required as part of an application for a patent.
- Section 4 of the Advertisements Act makes it an offence to publish advertisements relating to abortions.

Any publication in contravention of sections 3 or 4 of the Advertisements Act carries the penalty of a fine or, failing payment thereof, a period of imprisonment, in terms of section 5 of the act.

3.7.15 Prohibition on the publication of pictures that the minister declares to be ‘objectionable’

Section 6(2) of the Cinematograph Act, Act 31 of 1920, extraordinarily entitles the minister for public service and information to declare any picture (defined as including any cinematograph film or poster used for advertising such film) to be objectionable. There are no grounds listed in this section, which means that the minister has unfettered discretion to determine whether or not a picture is objectionable.

Notice of the declaration of such objectionableness must be given in writing, by telegraph or by radio to the proprietor of any theatre which exhibits cinematograph films. The exhibition of any prohibited picture is an offence punishable by a fine or a period of imprisonment.

3.8 Legislation that hinders the press in performing its reporting functions

Although Standing Orders of the Senate Relating to Public Business, 1968, relate to the Senate under the old 1968 Constitution, it is important to note that these orders have not been repealed and so continue to regulate the procedures for the Senate. There are a number of provisions that are relevant to the media and which can be used to hinder the media in reporting on matters arising before Senate.

- Section 133 of the Senate Standing Orders prohibits ‘strangers’ from being present during deliberations of select committees.
- Furthermore, while section 208 of the Senate Standing Orders envisages that ‘strangers’ may be present in the Senate chamber, section 210 empowers the chairman of any proceedings to order the withdrawal of strangers ‘whenever he thinks fit’.

Public access, including by the media, to legislative proceedings, such as those conducted by the Senate, is critically important to foster transparency and good governance. Consequently, it is disappointing that the Senate Standing Orders do not entrench the rights of the media specifically to cover the operations of the Senate and its committees. While there will always be grounds for holding certain hearings ‘in camera’, the general principle of open government ought to be clearly provided for.

3.9 Swaziland’s stalled media reform initiatives

It is clear that Swaziland’s existing statutes are out of step with the commitment to freedom of expression and, particularly, to freedom of the press, both of which are enshrined in the Constitution of Swaziland. Immediately after the Constitution came into force in 2006, there was a great push to make sweeping changes to Swaziland’s media regulatory landscape with the publication of numerous draft bills that would have heralded a sea change in Swaziland’s media law had they been enacted. However, none of these draft bills has been enacted (or even introduced), and the passage of four years since their publication does not bode well for media freedom in Swaziland.

This section does not cover all of the proposed draft bills nor does it set out in detail

provisions of the draft bills selected for discussion, given that they have not been enacted and will probably not be enacted any time in the near future. Nevertheless, it is important for journalists to be aware of the trends in media law-making that were evidenced by the original publication of the draft bills, many of which would have been largely in line with internationally accepted standards for media regulation had they been passed.

3.9.1 Freedom of Information and Protection of Privacy Draft Bill, 2007

In countries that are committed to democracy, governments pass legislation that specifically promotes accountability and transparency of both public and private institutions. Such statutes, while not specifically designed for use by the media, can and often are used by the media to uncover and publicise information in the public interest. Unfortunately, Swaziland has yet to enact access to information or whistleblower protection legislation. In 2007, an Access to Information and Protection of Privacy Draft Bill was developed. It proposed, among other things, to:

- Provide a right of access to information held by public bodies
- Provide a right of access to information held by private bodies, where such access is required for the exercise or protection of the right to freedom of expression
- Provide for reasonable and justifiable limitations on the right to access to information held by public or private bodies in accordance with the right to freedom of expression in section 24 of the Constitution
- Repeal the 1968 Official Secrets Act, the media-related provisions of which are set out above

However, as has been the case with all media reform initiatives in Swaziland, the process has stalled and the Swaziland government has shown little inclination to enact the draft bill.

3.9.2 Swaziland Broadcasting Draft Bill, 2007

Swaziland's broadcasting regulatory environment is entirely out of step with internationally accepted standards. Indeed, the broadcasting regulatory environment is such that it simply does not accord with the right to freedom of expression as guaranteed by the Swaziland Constitution. It was therefore not surprising that one of the most important of the draft bills published in 2007 was the Swaziland Broadcasting Draft Bill, 2007. This draft bill proposed, among other things, to:

- Recognise the establishment of the Swaziland Communications Commission (which was to have been formally established in terms of a telecommunications act) to:
 - Regulate broadcasting services, including granting, transferring and revoking licences and setting licence conditions
 - Adjudicate complaints
 - Set standards for programming content and advertising
- Provide for various types of broadcasting licensees: community, commercial, public and subscription; and for diffusion services
- Provide for programming content and advertising guidelines
- Establish a broadcasting complaints procedure
- Give the king wide-ranging powers in the event of a public emergency
- Establish a code of conduct for broadcasting services

However, as has been the case with all media reform initiatives in Swaziland, the process has stalled and the Swaziland government has shown little inclination to enact the draft bill.

3.9.3 Swaziland Public Broadcasting Corporation Draft Bill, 2007

One way in which Swaziland's broadcasting regulatory environment is problematic is that the STA operates the state broadcasting service while acting as the regulator of the television sector as a whole. The Swaziland Public Broadcasting Corporation Draft Bill, 2007, was meant to resolve this and proposed, among other things, to:

- Transform the existing STA into the Swaziland Public Broadcasting Corporation
- Set out a list of objects and functions for the Swaziland Public Broadcasting Corporation, including:
 - Providing both sound and television services
 - Aiming to provide programming 'of information, education and entertainment'
 - Providing both a public and a commercial service
- Ensure that the Swaziland Public Broadcasting Corporation had an independent editorial policy 'free from any external interference or influence'

- Provide for a much more independent board of directors, the appointment of which was to have been subject to parliamentary ratification and the involvement of a technical committee
- Repeal the Swaziland Television Authority Act, 1983

However, as has been the case with all media reform initiatives in Swaziland, the process has stalled and the Swaziland government has shown little inclination to enact the draft bill.

3.9.4 National Film Draft Bill, 2007

As is clear from other sections in this chapter, the regulation of films (both the making and exhibition thereof) is shockingly out of date in Swaziland, given that governing legislation dates back to the 1920s. Consequently, it was not surprising that the 2007 National Film Draft Bill proposed, among other things, to:

- Establish the National Film Authority and the National Film Board
- Encourage the development and distribution of Swazi film and video products
- Create a new system of certifying films
- Repeal the Cinematograph Act of 1920

However, as has been the case with all media reform initiatives in Swaziland, the process has stalled and the Swaziland government has shown little inclination to enact the draft bill.

3.9.5 Swaziland Media Commission Draft Bill, 2007

The Swaziland Media Commission Draft Bill is among the most controversial of the 2007 media-related bills. While some of its proposals would be uncontroversial and even laudable, others are problematic and are not in keeping with internationally accepted standards for media regulation. The Swaziland Media Commission Draft Bill proposed, among other things, to:

- Establish the Media Commission of Swaziland to be appointed by the minister responsible for information, subject to parliamentary ratification and the involvement of a technical committee
- Set out various powers and functions of the media commission, including:
 - To promote and preserve freedom of the press
 - To promote and maintain a free and pluralistic media

- Controversially, to protect the interests of the public against exploitation or abuse by media institutions
- Prescribe a code of ethics for journalists
- Establish a complaints procedure to deal with alleged violations of the code of ethics

However, as has been the case with all media reform initiatives in Swaziland, the process has stalled and the Swaziland government has shown little inclination to enact the draft bill.

4 COMMON LAW AND THE MEDIA

In this section you will learn:

- The definition of common law
- The defences to and remedies for an action of defamation
- What is meant by judicial review, and in particular:
 - The difference between a review and an appeal
 - The various grounds for judicial review
 - What the High Court of Swaziland held in a case involving the judicial review of the minister for public service and information's decision to declare certain publications to be proscribed

4.1 Definition of common law

The common law is judge-made law. It is made up of judgments handed down in cases adjudicating upon disputes brought by people, whether natural (individuals) or juristic (for example, companies). In common law legal systems such as Swaziland's, judges are bound by the decisions of higher courts and also by the rules of precedent. This requires that rules laid down by the court in previous cases be followed, unless they were clearly wrongly decided. Legal rules and principles are therefore decided on an incremental, case-by-case basis.

4.2 Defamation

4.2.1 Defamation and the defences to an action for defamation

Defamation is part of the common law of Swaziland. Like many Southern African

countries, Swaziland is influenced by South African law and the law of defamation is no exception. Refer, therefore, to the provisions in the South African chapter for a more detailed discussion of that country's defamation laws.

In brief, defamation is the unlawful publication of a statement about a person, which lowers his or her standing in the mind of an ordinary, reasonable and sensible person. There is sometimes uncertainty about whether defamation has even happened; the mere fact that a person is aggrieved at something published about them does not mean that defamation has in fact taken place. In *Metetwa vs Dlamini and Others* (Civ. Case No. 1717/1998), a defamation case heard by the Swaziland High Court, the court found that there had not been defamation. The case involved a headline 'T.V. Mtetwa is dismissed from Tisuka'; however, the High Court held that regard must be had to the content of the article as a whole, which clearly stated that the reason for the dismissal was that Mr Mtetwa had reached retirement age.

Consequently, the court held that '[n]o one who reads the article in its entirety could reasonably be induced to think ill of the Plaintiff. The article ascribes no misconduct to him. There is not the slightest hint of impropriety on his part' and that 'reading the article as a whole I cannot find that the Plaintiff has been defamed'. The action for damages was therefore dismissed with costs.

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

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

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

4.2.2 Defences to an action for defamation

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

- Truth in the public interest
- Absolute privilege – for example, a member of the National Assembly speaking in Parliament

- Statements made in the discharge of a duty – for example, the duty to provide information in connection with the investigation of a crime, enquiries as to the creditworthiness of a person, etc.
- Statements made in judicial or quasi-judicial proceedings
- Reporting on proceedings of a court, parliament or certain public bodies
- Fair comment on true facts and which are matters of public interest
- Self-defence (to defend one’s character, reputation or conduct)
- Consent

An important case concerning these defences for working journalists is *Dlamini v The Swazi Observer* (Civ. Case 631/99), which was heard in the Swaziland High Court. In the course of his judgment, the judge pointed out that while the media does enjoy a defence of privilege with regard to the publication of matters heard in court, this is limited to statements made in ‘open court’. The reporter in this case had based his report (which was, in any event, erroneous) on documents filed in the registrar’s office in a case that had yet to be heard. The court held: ‘While litigants ... may, subject to limitations, make defamatory allegations relating to the cause of action in their pleadings, the media may not repeat the defamatory matter until those proceedings enter the public domain when the matter is heard in open court.’

4.2.3 Remedies for defamation

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

- Publication of a retraction and an apology by the media organisation concerned
- An action for damages
- An action for prior restraint

An important case on damages for defamation is the Swaziland High Court case of *Mamba and Another v Ginindza and Others* (Civ. Case No. 1354/2000). This case involved the publication of highly defamatory and untrue allegations concerning an attorney (the plaintiff). It was alleged that the attorney and government lawyers had reached a settlement agreement in a case which had the effect of defrauding the government. In fact, the plaintiff had no knowledge that government lawyers had acted illegally in entering into the settlement agreement. In deciding upon the amount of damages to be awarded to the plaintiff, the court took account of the following factors:

- *Character, status and regard of the plaintiff:* The court found that the plaintiff was an attorney and a partner at a law firm, and that he had an untarnished reputation with no fraudulent, unethical or unprofessional behaviour having been ascribed to him. He had high standing in the legal profession and was well-regarded by the High Court itself.
- *Nature and extent of the publication:* The court found that prominently headlined articles repeating the defamatory allegations were published on three occasions in newspapers that are widely distributed and read.
- *Nature of the imputation (serious or not):* The court found that the articles implied that the plaintiff was dishonest, unethical, unprofessional, incompetent and inclined to mislead the court, and that these imputations could ruin his career.
- *Probable consequences of the imputation:* The court found that the consequences could be disastrous for the plaintiff's career. His professional reputation could be destroyed and this could have a serious impact on his personal life. He could lose credibility and the respect of his colleagues and the bench (of judges), and could ultimately face financial ruin.
- *Partial justification:* The court found that while the public did have an interest in knowing that government officials had acted irregularly, this had nothing to do with the plaintiff as nothing indicated that he was even aware of any irregularity with regard to the signing of the settlement agreement.
- *Retraction or apology:* The court noted that the defendants offered to publish an apology only a year after the initial publications.
- *Comparable awards and the declining value of money:* The court took into account other damages awards as well as the effect of inflation.

4.3 Judicial review

4.3.1 The difference between a review and an appeal

When a court hears an application for judicial review of an administrative decision, this is not the same as hearing an appeal from a lower court. In an appeal, the court considers the facts and the law, and essentially asks if the lower court came to the *correct* decision. In an application for judicial review, the court considers the facts and the law, but it asks a different question – namely, whether the *process* by which the decision-maker arrived at the decision being reviewed was flawed or not.

4.3.2 Grounds for judicial review

There is no absolute, closed list of grounds for reviewing and setting aside an administrative decision (see, for example, the Malawi chapter). Some grounds for judicial review include:

- Where a decision is *ultra vires* – that is, where the decision-maker goes beyond his/her or its legal authority or mandate to act when taking a decision
- Where a decision was taken in a manner that did not observe the principles of natural justice (that is, a duty to act fairly). In most common law jurisdictions this is distilled into at least two duties, namely, to:
 - Ensure that the decision-maker is not biased
 - Give persons affected by a decision a hearing
- Errors that undermine the process
- Unreasonable decisions
- Ulterior purpose – where a decision is taken ostensibly for one reason but is in fact taken for another, illegitimate, reason
- Failure to apply mind – this is a broad ground of review that is usually evidenced by one or more of the following instances of failure to apply mind:
 - Taking direction – this is where a decision-maker who is empowered to act does so, but at the instruction of a person or authority who or which is not empowered to take the decision
 - Taking irrelevant considerations into account – this is where a decision-maker takes account of considerations which he or she is not empowered or required to take account of
 - Failing to take relevant considerations into account – this is where a decision-maker does not take account of considerations which he or she is empowered and required to take account of

4.4 High Court ruling in *Swaziland Independent Publishers (Pty) Ltd T/A The Nation Magazine v the Minister of Public Service and Information*

In an important High Court of Swaziland decision, *Swaziland Independent Publishers (Pty) Ltd T/A The Nation Magazine v the Minister of Public Service and Information* (Case 1155/01), the court was asked to review and set aside a 2001 notice issued by the minister of public service and information in terms of the Proscribed Publications

Act, 1968 (the provisions of which are dealt with in some detail elsewhere in this chapter), which declared both the *Guardian* newspaper and *The Nation* magazine ‘proscribed publications’.

The case involved an application to the High Court to review and set aside the notice. The case turned upon the fact that section 3 of the Proscribed Publications Act empowers the minister to proscribe a publication if the publication is prejudicial or potentially prejudicial to the interests of defence, public safety, public order, public morality or public health. However, the minister did not give any reasons for declaring the publications to be ‘proscribed’, either in the notice or indeed in the various affidavits filed in the court pleadings (court papers). The court held that these ‘jurisdictional facts’ – that is, that the publications were, or were potentially, prejudicial to the interests of defence, public safety, public order, public morality or public health – had to exist before the minister was entitled to act, in terms of section 3 of the Proscribed Publications Act. The court found that by not stating in the notice that such jurisdictional facts exist and what they are, and by refusing to disclose his reasons in his affidavits, the minister had ‘precluded himself from establishing the jurisdictional facts which are the essential basis for the Ministerial act’. This means that the minister acted beyond the powers given to him by the statute. Consequently, the court declared the notice ‘invalid and of no force and effect’.

NOTES

- 1 Richard Rooney, The new Swaziland constitution and its impact on media freedom, *Global Media Journal Africa Edition*, 2(1), 2008. Available at <http://globalmedia.journals.ac.za/pub/article/view/34/0> [accessed 13 February 2012].
- 2 Ibid.
- 3 Ibid.
- 4 Ibid.

8

Zambia



1 INTRODUCTION¹

The Republic of Zambia has a population of just less than 13 million. The official language is English and there are over 70 local languages and dialects. Literacy rates are approximately 61% for women and 82% for men. Zambia is a former British protectorate. It gained independence in 1964. From 1973 until 1991 Zambia was a one-party state ruled by the United National Independence Party, headed by Kenneth Kaunda. During that time, the Zambian economy contracted severely.

The wave of democratisation that swept through Southern Africa in the early 1990s also resulted in a new democratic constitution coming into force in Zambia in 1991. Shortly thereafter a new political party, the Movement for Multi-party Democracy (MMD), was voted into power and remained in power until late 2011, when its presidential candidate, former President Banda, lost the presidential election to challenger Michael Sata. In 1996 a raft of constitutional amendments were enacted, and these were of such a nature that they effectively replaced the 1991 Constitution. Sadly, the post-1991 government did not bring about promised media law reform. Although it set up the Mwanakatwe Constitutional Review Commission in 1993, the government did little to implement the commission's many media reform-related recommendations, including, for example, that the Zambian National Broadcasting Corporation (ZNBC) be removed from government control.

The elections of 2001 saw interesting political power shifts. While the MMD remained the largest single party, it held only 76 seats, with the remaining six parties

holding 81 seats. Consequently, it was theoretically possible for opposition parties to pass legislation. Civil society organisations came together as the Media Law Reform Committee, with a strategy of presenting private member's bills (that is, legislation that did not originate within government). Three such bills were introduced in Parliament in 2002, namely, the Independent Broadcasting Authority Bill, the Broadcasting Bill and the Freedom of Information Bill. However, the government rapidly developed its own bills based to a large extent on the provisions of the three private member's bills.

The Independent Broadcasting Authority Act and the ZNBC Amendment Act were passed in 2002. Nearly 10 years later, however, they have not been implemented, apart from a few provisions dealing with issues such as television licence fees. Indeed, in recent years amendments have been made to the Independent Broadcasting Authority Act to dilute the independence of the Independent Broadcasting Authority provided for in the original legislation.

Note that Zambia has yet to pass freedom of information legislation. It remains to be seen whether or not the new president will press ahead with media freedom reform.

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

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

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

2 THE MEDIA AND THE CONSTITUTION

In this section you will learn:

- The definition of a constitution
- What is meant by constitutional supremacy

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

2.1 Definition of a constitution

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

The Constitution of Zambia sets out the foundational rules for the Republic of Zambia. These are the rules upon which the entire country operates. The Constitution contains the underlying principles, values and laws of Zambia.

A key constitutional provision in this regard is article 1(1), which states that 'Zambia is a unitary, indivisible, multi-party and democratic sovereign State'.

2.2 Definition of constitutional supremacy

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

The Constitution of Zambia makes provision for constitutional supremacy. Article 1(3) specifically states that '[t]his Constitution is the supreme law of Zambia and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void'.

2.3 Definition of a limitations clause

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

The Constitution of Zambia makes provision for legal limitations on the exercise and protection of rights contained in Part III of the Constitution of Zambia, ‘Protection of fundamental human rights and freedoms of the individual’.

Article 11 specifically provides that the various rights provided for in Part III are ‘subject to such limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest’.

This is an interesting provision that requires some explanation.

- It is clear that rights can be limited on two main bases: to protect the rights and freedoms of other individuals; and to protect the public interest.
- While article 3 of the Constitution contains the general criteria for constitutional limitations, it is not in itself a generally applicable limitations provision because it states that rights are ‘subject to the limitations contained in this Part’. As set out in detail below, each of the rights and freedoms contained in Part III of the Zambian Constitution is subject to the specific limitations provided for in the right itself.

Consequently, it is clear that the rights contained in Part III of the Constitution of Zambia are subject to the limitations contained within the provisions of the right itself. The limitations in respect of each right are dealt with below.

2.4 Constitutional provisions that protect the media

The Constitution of Zambia contains a number of important provisions in Part III, ‘Protection of fundamental rights and freedoms of the individual’, which directly protect the media, including publishers, broadcasters, journalists, editors and producers.

2.4.1 Freedom of expression

The most important provision that protects the media is article 20(1), part of the article headed ‘Protection of freedom of expression’, which states:

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

This provision needs some detailed explanation.

- This freedom applies to all persons and not just to certain people, such as citizens. Hence everybody (both natural persons and juristic persons, such as companies) enjoy this fundamental right.
- The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many different examples of this, including physical expression (such as mime or dance), photography or art.
- Article 20(1) specifies that the right to freedom of expression includes the ‘freedom to hold opinions without interference’, thereby protecting the media’s right to write opinion pieces and commentary on important issues of the day.
- Article 20(1) specifies that the right to freedom of expression includes the ‘freedom to receive ideas and information without interference’. This freedom of everyone to receive and impart ideas and information is a fundamental aspect of freedom of expression, and this subsection effectively enshrines the right to the free flow of information. Thus, the information rights of audiences, for example, as well as the expression rights of the media, are protected. This right is important because it also protects organisations that foster media development. These organisations facilitate public access to different sources and types of information, particularly in rural areas that traditionally have little access to the media.
- Article 20(1) specifies that the right to freedom of expression includes the ‘freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons’. This is a vitally important provision because it protects the right to communicate information and ideas *to the public* – a critically important role of

the press and the media more generally. Therefore, although the Constitution of Zambia does not specifically mention the press or the media, the freedom to perform that role – namely, to communicate information to the public – is protected.

- Article 20(1) specifies that the right to freedom of expression includes the ‘freedom from interference with his correspondence’. This protection of correspondence (which would presumably include letters, emails and telefaxes) is an important right for working journalists.

As discussed, constitutional rights are never absolute. Article 20(2) of the Zambian Constitution is a provision which states that ‘[s]ubject to the provisions of this Constitution no law shall make any provision that derogates from freedom of the press’.

This indicates that only limitations that are provided for in the Constitution itself may lawfully limit freedom of the press. However, article 20(3) goes on to detail the basis upon which the right to freedom of expression set out in article 20(1) may be limited. Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits the right to freedom of expression will not violate article 20(1) of the Constitution, provided that it:

- Is reasonably required in the interests of defence, public safety, public order, public morality or public health
- Is reasonably required for:
 - The purposes of protecting:
 - The reputations, rights and freedoms of other persons
 - The private lives of persons concerned in legal proceedings
 - Protecting information received in confidence
 - Maintaining the authority and independence of the courts
 - Regulating educational institutions in the interests of persons receiving instruction therein
 - Regulating the technical administration or operation of telephony, telegraphy, posts, wireless, broadcasting or television
- Imposes restrictions upon public officers
- Is reasonably justifiable in a democratic society

Although the limitations provisions in article 20(3) are many – indeed, the limitations provisions are much longer than the right itself – they are generally (see exceptions

immediately below) in accordance with internationally accepted standards. In this regard, it is important to note that the requirement that the limitation be ‘reasonably justifiable in a democratic society’ qualifies each of the separate grounds for limiting a right. Thus, any law that intends to limit a right on one of the stipulated grounds must also be reasonably justifiable in a democratic society. This is an objective test that a court can apply and is not dependent upon a government official’s view as to whether or not the limitation is justifiable.

There are, however, at least two provisions in the limitations set out in article 20(3) which stand out as not being internationally acceptable grounds for limiting speech:

- *The restriction imposed upon public officers.* Clearly, many public officials have secrecy obligations, particularly those in defence, intelligence and policing posts. Nevertheless, the general ability of whistleblowers in the public service to bring illegal conduct, including corruption, to the attention of the media, in the public interest, is a critical part of a functioning democracy. Consequently, such limitations provisions might have a chilling effect on public servants, unduly preventing the disclosure of official misconduct.
- *The restrictions upon educational institutions.* The rationale behind this limitation is unclear. Indeed, academic freedom is often specifically mentioned as a subset of the right to freedom of expression precisely because of the essential role that freedom of expression plays in the search for truth – one of the key rationales for protecting freedom of expression.

2.4.2 Protection for privacy of the home and other property

A second protection is contained in article 17 of the Constitution of Zambia, ‘Protection for privacy of the home and other property’. Article 17(1) specifies that ‘[e]xcept with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises’. This right is weak as it essentially protects only against searches.

Furthermore, this right is subject to an internal limitation. Section 17(2) states, in brief, that nothing done under any law shall be inconsistent with article 17 if the law in question makes provision:

- That is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources or in order to secure the development or utilisation of any property for a purpose beneficial to the community

- That is reasonably required for the purpose of protecting the rights of others
- For entries on premises for the purpose of any tax, rate or due, or in order to carry out work on government property
- For enforcing court orders

The provision itself and anything done under the authority of the law is reasonably justified in a democratic society.

2.4.3 Protection of freedom of conscience

A third protection is contained in article 19(1) of the Constitution of Zambia, which provides, in its relevant part: ‘Except with his or her own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this article the said freedom includes freedom of thought.’ Freedom of thought is important for the media as it provides additional protection for commentary on public issues of importance.

As discussed previously, constitutional rights are never absolute. Article 19(5) details the basis upon which the right to freedom of conscience set out in article 19(1) may be limited. Although the wording is complicated and legalistic, the essence of these provisions is that a law which limits freedom of conscience will not violate article 19(1) of the Constitution provided that it:

- Is in the interests of defence, public safety, public order, public morality or public health, or
- Protects the rights of others

Furthermore, the limitation must be reasonably justifiable in a democratic society.

2.4.4 Protection of freedom of assembly and association

Article 21(1) of the Constitution of Zambia provides: ‘Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.’ This right not only guarantees the rights of journalists to join trade unions but also of the press to form press associations and of entrepreneurs to form media houses and conduct media operations.

As discussed previously, constitutional rights are never absolute. Article 21(2) details the basis upon which the right to freedom of association contained in article 21(1) may be limited. Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits freedom of conscience will not violate article 21(1) of the Constitution provided that it:

- Is in the interests of defence, public safety, public order, public morality or public health
- Protects the rights of others
- Imposes restrictions on public officers
- Makes provision for the registration of political parties or trade unions

Furthermore, the limitation must be reasonably justifiable in a democratic society.

2.4.5 Provisions to secure protection of law

Article 18(10) of the Constitution of Zambia provides: ‘Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public.’

The formulation of this right to ‘open justice’ in the Constitution of Zambia is interesting because it effectively allows the parties to a case to agree to the proceedings not being public. This is an unusual formulation and detracts from the openness of the proceedings because the right to a public trial is not just important for the protection of litigants, it is also important to secure public faith in the judiciary. In other words, the public (and, as part of that, the media) generally ought to have a right to attend judicial proceedings.

As discussed previously, constitutional rights are never absolute, besides the limitation already contained in article 18(10) allowing the exclusion of the public by the parties involved in the litigation, article 18(11) provides that the above general right to open court hearings shall not prevent a court (or similar body) from limiting public access:

- To the extent that the court considers this necessary or expedient in circumstances where publicity would prejudice the interests of justice

- Where this is empowered by the law in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of 18 years or the protection of the private lives of persons involved in the proceedings.

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

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

The Constitution of Zambia does not contain many provisions that ordinarily are used against the media, such as the right to dignity or personal privacy (except in relation to seizure of property). However, there are provisions that allow for the derogation or departure from fundamental rights and freedoms during declared emergencies, which may affect the media.

It is important to note the provisions of articles 25 and 30 of Part III of the Constitution of Zambia, which deal with derogations from fundamental rights during a declaration of public emergency.

In terms of article 30, the president may by proclamation published in the Gazette declare that a ‘state of public emergency exists’, which declaration shall cease to have effect after:

- Seven days (if the National Assembly is sitting and does not approve same or if there has been a change of president while a declaration has been in force), or
- Three months from the date of the National Assembly resolution of approval or such earlier date as may be specified in Parliament’s resolution of approval.

Note that the National Assembly can extend the declaration of public emergency for up to three months at a time.

It is important to note that the Constitution of Zambia’s emergency provisions are not in accordance with international best practice standards. This is because there are no objective preconditions to such a declaration. In other words, there is nothing in the Constitution which requires that a real threat to the public must in fact exist before a declaration of public emergency or threatened emergency can be made by the president.

Importantly, article 25 of the Zambian Constitution specifically allows laws passed when Zambia is at war or under a state of emergency to derogate from all of the rights and protections in the Constitution, except for:

- The right to life
- Protection from slavery and forced labour
- Protection from inhuman treatment
- Protection of law

The effect of this is that the right to freedom of expression and a number of other rights which support the media can be derogated from in a declared public emergency.

2.6 Key institutions relevant to the media established under the Zambian Constitution

While there are no media-specific institutions established under the Constitution of Zambia, the Constitution does establish three institutions that indirectly affect the media, namely, the judiciary, the Judicial Service Commission (JSC) and the Human Rights Commission.

2.6.1 The judiciary

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

Part VI of the Constitution of Zambia is headed 'The judicature'. In terms of Article 91(1), the judicature (or judiciary) of Zambia consists of:

- The Supreme Court
 - In terms of article 92(1) of the Constitution of Zambia, the Supreme Court of Zambia is the 'final court of appeal' and has such jurisdiction and powers as may be conferred on it by the Constitution and any other law.
 - In terms of article 92 of the Zambian Constitution, the Supreme Court consists of: the chief justice; the deputy chief justice; and at

least seven Supreme Court judges. All of the above are appointed by the president, subject to ratification by the National Assembly, in terms of article 93 of the Zambian Constitution.

■ The High Court

- In terms of article 94 of the Zambian Constitution, the High Court has unlimited or original jurisdiction (except in relation to matters determined by the Industrial Relations Court) to determine any civil or criminal proceedings under law. Effectively this ambit allows the High Court to enquire into any matter of law in Zambia.
- In terms of article 94 of the Zambian Constitution, the High Court is made up of the chief justice (as an *ex officio* judge) and such number of puisne judges (judges other than the chief justice) as may be prescribed by Parliament. In terms of article 95 of the Zambian Constitution, the puisne judges shall be appointed by the president on the advice of the JSC, but subject to ratification by the National Assembly.

■ The Industrial Relations Court

- In terms of article 94(1), this court has exclusive jurisdiction to deal with matters under the Industrial and Labour Relations Act, Act No. 27 of 1993. The chairman and deputy chairman of the Industrial Relations Court are appointed by the president on the advice of the JSC.

■ The subordinate courts

■ The local courts

- Such other courts as may be prescribed by an act of Parliament.

In terms of article 98 of the Constitution of Zambia, a judge of the Supreme or High courts holds office until the age of 65. Furthermore, such judges and the chairman or deputy chairman of the Industrial Relations Court may be removed from office only for inability to perform the functions of his office, incompetence or misbehaviour. The process for removal is set out in article 98(3).

If the president considers that the issue of removal ought to be investigated then:

- He appoints a tribunal of at least three members, all of whom have held high judicial office

- The tribunal must investigate and report on the matter to the president, including advising as to whether or not the judge ought to be removed from office
- If the tribunal advises in favour of removal, the president shall remove the judge from office

2.6.2 The Judicial Service Commission

The JSC is a constitutional body that is established in terms of article 123(1) of the Zambian Constitution to participate in the appointment of:

- Judges to the Supreme and High courts
- The chairman and deputy-chairman of the Industrial Court

The JSC is relevant to the media because of its critical role in the appointment of senior judges to the judiciary, the proper functioning and independence of which are essential for democracy. Unfortunately, the Zambian Constitution does not specify how the JSC is to be appointed and how it is to function. Its level of independence is therefore open to question and is not guaranteed by the Constitution itself.

Indeed, section 3(1) of the Service Commission Act (1991) provides that the JSC is made up of 10 members, namely: the chief justice (the chairman); the attorney-general; the chairman of the Public Service Commission; the secretary to Cabinet; a judge nominated by the chief justice; the solicitor-general; a member of the National Assembly appointed by the speaker; a representative and nominee of the Law Association of Zambia appointed by the president; the dean of the Law School of the University of Zambia; and a member appointed by the president. Of these 10 members, six are clearly executive or ruling party appointments. This leaves some doubt as to the real independence of the JSC.

2.6.3 The Human Rights Commission

Article 125(1) of the Zambian Constitution establishes the Human Rights Commission (HRC) which shall, according to article 125(2), be 'autonomous'. Unfortunately, given that the functions, funding and procedures of the HRC are to be prescribed by an act of Parliament, the level of genuine independence of the HRC is open to question and is not guaranteed by the Constitution itself.

Bodies such as an HRC are important for the media because, if they are truly independent of government, ordinary people as well as institutions such as the media can turn to them for protection of their human rights, such as the right to freedom

of expression. Such bodies are important in preserving human rights and can act as a bulwark against heavy handed or illegal government restrictions on fundamental rights. It goes without saying that the effectiveness of such institutions is usually linked to the level of genuine independence they enjoy.

2.7 Enforcing rights under the Constitution

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

Article 28 of the Constitution of Zambia, ‘Enforcement of protective provisions’, deals specifically with contraventions of the rights contained in Part III, articles 11–26 of the Constitution. It allows a person to apply to the High Court when a provision of those articles of Part III ‘has been, is being or is likely to be’ contravened.

Perhaps one of the most effective ways in which rights are protected under the Zambian Constitution is through the provisions of the Constitution that entrench the rights contained in Part III, ‘Protection of fundamental rights and freedoms of the individual’. Article 79(3) of the Constitution requires that a constitutional amendment of Part III needs to be put to a national referendum and supported by not less than 50% of the persons entitled to be registered as voters. Furthermore, the bill must, thereafter, be supported by not less than two-thirds of all members of the National Assembly.

2.8 The three branches of government and separation of powers

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

2.8.1 Branches of government

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

THE EXECUTIVE

Article 33(2) of the Constitution of Zambia provides that the executive power of Zambia vests in the president and shall be exercised by him or her directly or through officers subordinate to him.

Article 33(1) of the Constitution of Zambia provides that the president of the Republic of Zambia shall be the head of state and government as well as the commander-in-chief of the defence force. The president is elected whenever Parliament is dissolved or the office of the president becomes vacant, in terms of article 34 read with article 38 of the Constitution. The election procedure is set out in article 34, and the election of the president shall be direct by universal adult suffrage (citizens over the age of 18) and by secret ballot.

Article 49 of the Constitution of Zambia provides for a Cabinet consisting of the president, the vice-president and the ministers. The main role of Cabinet is to advise the president with respect to the policy of the government, in terms of article 50. In terms of article 51, Cabinet and deputy ministers are accountable collectively to the National Assembly.

The vice-president is appointed by the president from among the elected members of the National Assembly, in terms of article 45(2) of the Constitution of Zambia. The general role of the vice-president is to perform functions specified in the Constitution, any other law and as assigned to him by the president, in terms of article 45(4) of the Zambian Constitution.

In terms of article 46 of the Constitution of Zambia, there shall be such ministers as may be appointed by the president from among the members of the National Assembly. Furthermore, in terms of article 47, the president may also appoint such deputy ministers from among the members of the National Assembly as he considers necessary to assist the ministers.

THE LEGISLATURE

Legislative or law-making power in Zambia vests in Parliament which, in terms of article 62 of the Zambian Constitution, consists of the president and the National Assembly. Article 78(1) provides that legislative power of Parliament is exercised through bills passed by the National Assembly and assented to by the president.

In terms of article 63(1), the National Assembly consists of:

- 150 elected members. The process for the election of members of the National Assembly shall be direct, by universal adult suffrage (citizens over the age of 18) and by secret ballot. In terms of article 76, the Electoral Commission is required to review the boundaries of the constituencies into which Zambia is divided for the purposes of elections to the National Assembly. The number of constituencies shall be equal to the number of seats of elected members in the National Assembly,

in terms of article 77(1). Each constituency elects one member to the National Assembly

- Not more than eight nominated members. In terms of article 68, the president may nominate not more than eight people that he considers necessary to enhance the representation of the National Assembly as regards special interests or special skills, to be members of the National Assembly
- The speaker of the National Assembly. In terms article 69 of the Zambian Constitution, the speaker is elected by members of the National Assembly from among persons who are qualified to be elected as members of the National Assembly but who are not members of the National Assembly

THE JUDICIARY

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

2.8.2 Separation of powers

It is important in a functioning democracy to divide governmental power between different organs of the state in order to guard against the centralisation of power, which may lead to abuses of power. This is known as the separation of powers doctrine. The aim, as the Constitution of Zambia has done, is to separate the functions of the three branches of government – the executive, the legislature and the judiciary – so that no single branch is able to operate alone, assume complete state control and amass centralised power. While each branch performs a number of different functions, each also plays a ‘watchdog’ role in respect of the other. This helps to ensure that public power is exercised in a manner that is accountable to the general public and in accordance with the constitution.

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

There are a number of respects in which the Constitution of Zambia is weak. If these provisions were strengthened, there would be specific benefits for Zambia’s media.

2.9.1 Remove internal constitutional qualifiers to certain rights

The Constitution of Zambia, as has been set out above, makes provision for certain

rights to be subject to ‘internal’ limitations – that is, the provision dealing with rights contains its own limitations clause, setting out ways in which a government can legitimately limit the ambit of the right.

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

The rights contained in the provisions dealing with fundamental human rights and freedoms, set out in Part III of the Constitution of Zambia, would be strengthened if the rights were subject to a single generally applicable limitations clause rather than each having their own limitations clause.

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

2.9.2 Objective grounds for declaring a state of emergency

The Zambian Constitution at article 30 empowers the president to declare a state of emergency. In so doing, a number of rights that protect the media can be derogated or departed from, in terms of article 25. However, article 30 does not set out objective grounds for such a declaration. As such, it is suggested that amending this provision to provide that there must be an objective emergency would provide additional safeguards to the exercise and protection of a number of important civil rights.

2.9.3 Independent broadcasting regulator and public broadcaster

There is no doubt that the broadcasting sector would be greatly strengthened if the Zambian Constitution gave constitutional protection for an independent broadcasting regulator and for a public broadcaster. Given the importance of both of these institutions for ensuring access to news and information by the public, it is suggested that such amendments to the Constitution would be in the public interest and would serve to strengthen both the media and democracy more generally in Zambia.

2.9.4 Strengthen the independence of institutions

While it is laudable that the Zambian Constitution makes provision for institutions such as the JSC and the HRC, the fact that the structural independence and appointments procedures of these institutions are not provided for sufficiently in the Constitution is a weakness and undermines their independence.

3 THE MEDIA AND LEGISLATION

In this section you will learn:

- What legislation is and how it comes into being
- Key legislative provisions governing the publication of print media
- Key legislative provisions governing the making of films
- Key legislative provisions governing the broadcasting media generally
- Key legislative provisions governing the state broadcasting sector
- Generally applicable statutes that threaten a journalist's duty to protect sources
- Generally applicable statutes that prohibit the publication of certain kinds of information
- Legislation that codifies and clarifies aspects of the law of defamation
- Generally applicable statutes that specifically assist the media in performing its functions

3.1 Legislation: An introduction

3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed by Parliament, the legislative authority. As already discussed, legislative authority in Zambia vests in Parliament, which is made up of the president and the National Assembly. It is important to note, however, that in certain limited cases some pieces of legislation can also be referred to a body called the House of Chiefs, established in terms of article 130 of the Zambian Constitution.

As a general rule the National Assembly and the president are ordinarily involved in passing legislation. There are detailed rules in the Constitution of Zambia which set out the different law-making processes that apply to different types of legislation. It is important for journalists and others in the media to be aware that the Constitution of Zambia requires different types of legislation to be passed in accordance with particular procedures. The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the Constitution of

Zambia, there are four kinds of legislation, each of which has particular procedures and/or rules applicable to it. These are:

- Legislation that amends the Constitution – the procedures and/or applicable rules are set out in article 79 of the Constitution
- Ordinary legislation – the procedures and/or applicable rules are set out in article 78 of the Constitution
- Legislation that deals with financial measures – the procedures and/or applicable rules are set out in article 81 of the Constitution
- Legislation that would affect customary or traditional matters – the procedures and/or applicable rules are set out in section 131 of the Constitution

3.1.2 The difference between a bill and an act

A bill is a piece of draft legislation that is debated and usually amended by parliament during the law-making process. If a bill is passed by Parliament in accordance with the various applicable procedures required for different types of bills, as set out above, it becomes an act once it is assented to by the president, in terms of article 78(6) of the Constitution of Zambia. An act must be published in the Gazette and becomes law only when it has been so published. Note, however, that it is possible for Parliament to make retrospective laws, in terms of article 78(7).

Also be aware that some laws governing certain media-related aspects came into force prior to the coming into effect of the 1966 Constitution of Zambia. As they were passed by the governing authority of the time and have yet to be repealed, they are still good law.

3.2 Statutes governing the print media

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

There are certain key requirements laid down by the Printed Publications Act in respect of a newspaper or book. The definition of a newspaper is extremely broad and includes 'any periodical publication published in intervals of not more than one

month and consisting wholly, or for the greater part, of political or other news ... or to other current topics'. Note that publications which are 'proved not to be intended for public sale or public dissemination' are excluded from the definition. The key aspects of the Printed Publications Act are discussed below.

- Section 6(1) of the Printed Publications Act requires the director of the National Archives to establish and maintain a register of newspapers.
- Section 5(2) of the Printed Publications Act makes it an offence to print or publish a newspaper without having registered the newspaper prior to printing and publication, and if found guilty the perpetrator will be liable to a fine.
- In terms of section 5(1) of the Printed Publications Act, the particulars required for registration are title of the newspaper, name and residential address of the proprietor (owner), editor, printer or publisher, and a description of the premises where the newspaper is to be published. Any change to these registration details must also be registered.
- Besides the newspaper registration requirements, set out above, section 3(1) of the Printed Publications Act also requires every book (defined extremely broadly to include 'every part of a ... newspaper' or document intended to be issued for distribution, by sale or otherwise, to the public or any section thereof in Zambia) printed and published in Zambia to have printed on one of its pages in legible type the names and addresses of the printer and publisher and the year of publication. Any person who prints a book without complying with the requirement of section 3(1) is guilty of an offence and liable to a fine, and, in default of payment of such a fine, to a period of imprisonment, in terms of section 3(2) of the Printed Publications Act.
- There is a duty to provide copies of books (including newspapers). Section 4(1) of the Printed Publications Act requires the printer of every book (note again that the definition of 'book' includes a newspaper) to deliver, at his or her own expense, a copy of such book to the director of the National Archives. Any person who fails to comply with section 4(1) is guilty of an offence and liable to a fine, in terms of section 4(3) of the Printed Publications Act.

3.3 Statutes governing the exhibition of films

Section 8 of the Theatres and Cinematograph Exhibition Act provides that no picture or series of pictures shall be presented at any cinematograph exhibition to which the public is admitted, nor shall any advertising posters therefor be displayed, without a

permit from the Film Censorship Board (which is appointed by the minister) having previously been obtained. Failure to obtain the necessary permit is an offence and is punishable by a fine or a period of imprisonment.

3.4 Statutes governing the broadcast media generally

3.4.1 Statutes that regulate broadcasting generally

Generally, broadcasting in Zambia is regulated in terms of the Independent Broadcasting Authority (IBA) Act, Act 17 of 2002. Radio frequency spectrum licensing is regulated in terms of the Information and Communications Technology (ICT) Act, Act 15 of 2009. It is critical to note that the IBA Act has yet to be implemented – in other words, while the legislation is on the statute books, it is not used in practice. Nevertheless, its provisions are set out in full because this is the official broadcasting-related statute that is in force in Zambia.

3.4.2 Establishment of the IBA

Section 4 of the IBA Act establishes the IBA. Section 7 also constitutes the nine-member IBA Board, which performs the functions of the IBA under the IBA Act.

3.4.3 Main functions of the IBA

In terms of section 5(1) of the IBA Act, the IBA's overall function is to regulate the broadcasting industry in Zambia. Section 5(2) sets out a number of the IBA's specific functions, and these include to:

- Promote a pluralistic and diverse broadcasting industry
- Establish various guidelines, including for:
 - Development of broadcasting
 - Issuing of licences
 - Required levels of local content
- Safeguard efficient use of the frequencies allocated to broadcasters
- Grant, renew, suspend and cancel licences and frequencies for broadcasting
- Enforce compliance with licence conditions
- Develop programme standards

- Receive, investigate and decide upon complaints concerning broadcasting services
- Develop regulations in regard to advertising, sponsorship, local content and media diversity and ownership

3.4.4 Appointment of IBA board members

In terms of section 7(2) of the IBA Act, all of the nine part-time members of the IBA Board (who hold office for a renewable period of three years, in terms of section 10) are appointed by the minister (although the specific minister responsible is not stated in the IBA Act, it is presumably the minister responsible for the administration of the IBA Act, namely the minister for information and broadcasting services), on the recommendation of an appointments committee and subject to ratification by the National Assembly.

Section 8(1) requires the minister to constitute an appointments committee consisting of five nominees – one nominated by each of the following:

- The Law Association of Zambia
- A non-governmental organisation active in human rights
- Religious organisations
- A media support organisation
- The ministry responsible for information and broadcasting

In terms of section 8(4), the functions of the appointments committee are to:

- Invite applications from persons with suitable qualifications (In terms of section 7(3), a person is not qualified unless he/she ‘is committed to fairness, freedom of expression, openness and accountability’ and ‘when viewed collectively the persons so appointed shall be representative of a broad cross-section of the population’.)
- Interview the nominees and applications
- Select candidates for appointment to the IBA Board and submit a recommendation to the minister (See the cases section at the end of this chapter for a discussion on litigation surrounding the ministerial appointment of IBA board members.)

3.4.5 Funding for the IBA

Section 39 of the IBA Act sets out the various sources of funding for the IBA. In brief, these include:

- Moneys appropriated by Parliament – in other words, funding that is specified annually in the national budget
- Moneys from sources such as grants, subsidies, bequests, donations and gifts
- Moneys derived from the sale of IBA property
- Fees payable in respect of licences issued under the IBA Act

3.4.6 Making broadcasting regulations

In terms of section 47 of the IBA Act, the minister may, on the recommendation of the IBA, make regulations on matters relating to the IBA Act. The effect of this is that the minister cannot make regulations on his or her own as he or she cannot make regulations unless the IBA recommends that such regulations be made.

3.4.7 Licensing regime for broadcasters in Zambia

BROADCASTING LICENCE REQUIREMENT

Section 19(1) of the IBA Act prohibits any person from providing a broadcasting service otherwise than in accordance with the terms and conditions of a licence issued by the IBA.

Anyone who does not comply with section 19(1) (or indeed any other provision of the IBA Act) is guilty of an offence and upon conviction shall be liable to a fine, imprisonment or both, in terms of section 45(i) of the IBA Act.

CATEGORIES OF BROADCASTING LICENCES

Section 19(2) of the IBA Act empowers the IBA to issue five categories of broadcasting licences. These are:

- **Commercial**
 - This is defined in section 1 as ‘a broadcasting service operated for profit and controlled by a person who is not a public or community broadcaster’.
 - Section 21 deals specifically with commercial broadcasting. Key aspects of the regulatory framework for commercial broadcasting are:
 - That commercial broadcasters provide a diverse range of programming addressing a wide section of the population

- That programming is to be provided in the official language or in any other local languages widely spoken in the republic as a whole or in any particular area
- That they provide comprehensive coverage of all areas they are licensed to serve
- That they provide programmes that:
 - Reflect the culture, character, needs and aspirations of the audience in the licence area
 - Contain an appropriate amount of local or national programming
 - Include news and information on a regular basis, including of national, regional and local significance
 - Meet the highest standards of journalistic professionalism

■ Community

- This is defined in section 1 as a broadcasting service which:
 - Is fully controlled by a non-profit entity and carried on for non-profitable purposes
 - Serves a particular community
 - Encourages members of the community serviced by it or persons associated with or promoting the interests of such community to participate in the selection and provision of programmes to be broadcast
 - May be funded by donations, grants, sponsorships, advertising or membership fees, or by any combination of these
- It is also important to note that the IBA Act defines a ‘community’ in section 1 as including ‘a geographically defined community’ or ‘any group of persons or sector of the public having a specific, ascertainable, common interest’.
- Section 22(3) of the IBA Act requires a community broadcaster’s programming to:
 - Provide distinct programming dealing with issues not dealt with by other broadcasting services in the area
 - Be informative, educational and entertaining
 - Focus on highlighting grassroots community issues, including developmental, educational, environmental, local, international and current affairs
 - Reflect local culture
 - Promote the development of a sense of common purpose and improved quality of life

■ Religious

- This is defined in section 1 as being ‘a broadcasting service which transmits programmes of a religious nature’.
- Section 22(5) requires that programming provided by a licensed religious broadcasting service shall reflect the religious beliefs and needs of the people and shall:
 - Provide a distinct service dealing specifically with religious issues
 - Be informative, educational and entertaining
 - Focus on the provision of programmes that highlight grassroots issues, including developmental issues, health care, basic information, general education, environmental affairs and spiritual matters
 - Promote the development of a sense of common religious purpose and improve the quality of life

■ Subscription

- This term is undefined in section 1 of the IBA Act.
- Section 23 sets out the essential characteristics of subscription broadcasting services, and these are that:
 - Revenues may be drawn from subscriptions, as well as from advertising and sponsorship
 - Subscription broadcasters may not acquire exclusive rights to the broadcasting of ‘any national, sporting, or other event’ that the IBA identifies as being ‘in the public interest’

■ Public

- This is defined in section 1 as ‘a broadcasting service which serves the overall public interest and is accountable to the public as represented by an independent board, and defined by the Zambia National Broadcasting Corporation Act’.

Besides these five categories of broadcasting licence, section 25 also empowers the IBA to issue a licence for a diffusion service, which is defined in section 1 as essentially being the provision of a broadcasting service or music or speech by means of wires.

BROADCASTING LICENSING PROCESS

Section 20 of the IBA Act sets out the broadcasting licensing process. In brief, the process is as follows:

- If the IBA determines that there is a need for an additional broadcasting service, it shall publish a notice in the Government Gazette and in a national newspaper inviting applications for licences to provide the specified broadcasting service.
- Applications are made to the IBA in the prescribed form and manner, and shall be accompanied by the prescribed fee and such information and documents as may be prescribed or as the IBA may require.
- The IBA examines all applications and shortlists those who, in its opinion, qualify to be licensed.
- Every shortlisted applicant is invited to attend a public inquiry conducted by the IBA to determine the applicant's suitability to be licensed.
- After considering an application, the IBA may issue or refuse to issue a broadcasting licence to the applicant and shall notify the applicant in writing of the decision and, if the application is refused, provide reasons for the refusal.

In terms of section 27, the IBA Board may issue a licence 'subject to such conditions as the Board may specify in the licence when it is granted and to such other conditions as may be prescribed by regulation'. Note that in terms of section 28 the period of each licence is specified therein.

FREQUENCY SPECTRUM LICENSING

Unfortunately, this issue is confusing because it is dealt with in two different statutes, namely the IBA Act but also the Information and Communication Technologies (ICT) Act, Act 15 of 2009, which regulates electronic communications in Zambia. In terms of section 6(2)(b) of the ICT Act, one of the functions of the Zambia Information and Communications Technology Authority (ZICTA) is to 'provide for national frequency ... plans and facilitate the efficient use and allocation of ... frequencies'.

Part IV of the ICT Act deals with radio communication services, and section 29(1) requires a person intending to operate a radio station (note this is a technical term for a transmitter) to apply to ZICTA for a licence. While it is important to note that the IBA Act also deals with radio frequency spectrum licensing in the context of broadcasting, the ICT Act contains a supremacy clause.

Section 3 of the ICT Act provides that where there is any inconsistency between the provisions of it and any other written law relating to the regulation of information and communication technologies, the provisions of the ICT Act shall prevail.

Consequently, in relation to radio frequency spectrum issues, the provisions of the ICT Act must be adhered to rather than those of the IBA Act.

Section 29 of the ICT Act sets out the process to be followed when applying for a licence to operate a radio station. The process is simple, namely:

- Make an application for a licence in the prescribed manner to ZICTA
- ZICTA must make a decision within 60 days
- If ZICTA rejects an application, written reasons must be provided by it

In terms of section 31 of the ICT Act, there are two types of conditions applicable to such a radio communication services licence, namely:

- Licence conditions specified in the licence by ZICTA
- Conditions prescribed by the minister, on the advice of ZICTA

3.4.8 Responsibilities of broadcasters under the IBA Act

The IBA Act contains no substantive provisions setting out responsibilities of broadcasters. However, section 27(1) of the IBA Act provides that a licence issued under the IBA Act shall be subject to such conditions as the IBA Board may specify. This power is very broad. Section 27(2) sets out examples of the kinds of matters that can be contained in licence conditions. These include:

- Transmitter sites and apparatus to be used
- Licence fees
- Requiring the licensee to provide documents, accounts and other information to the IBA
- Providing for the arbitration of disputes
- The payment of fines and penalties for breaches of licence conditions

3.4.9 Is the IBA an independent regulator?

The IBA cannot be said to be fully independent. Indeed, while section 6 of the IBA Act states that the IBA ‘shall not be subject to the direction of any other person or authority’, this is subject to the proviso ‘except as otherwise provided in this Act’.

While the appointments process does give a ratification role to Parliament, appointments ought to be made by the president on the recommendation of the National Assembly, rather than by the minister on the recommendation of the nominations committee, subject to ratification by Parliament.

Furthermore, the National Assembly must require public nominations, and must conduct a public interview and short-listing process.

Lastly, it is disappointing that broadcasting regulations are made by the minister. The IBA ought to be able to make broadcasting regulations on its own without any ministerial intervention.

3.4.10 Amending the legislation to strengthen the broadcast media generally

There are a number of weaknesses with the legislative framework for the regulation of broadcasting generally in Zambia:

- There ought to be more public participation in the broadcasting service licensing process. While the process of licensing radio frequency spectrum requires a public notice and comment procedure, this is not specified in the broadcasting licensing process.
- There is concern that the IBA Board is not sufficiently independent. Appointments ought to be made by the president on the recommendation of the National Assembly, following a public nominations, interview and short-listing process.
- The IBA should be empowered to make its own regulations without ministerial intervention.
- The legislative overlap in responsibilities in respect of radio frequency spectrum issues between the IBA and ZICTA ought to be clarified in order to avoid competing and conflicting applicable regulatory frameworks for broadcasters.

3.5 Statutes that regulate the state broadcast media

The state broadcaster, the Zambia National Broadcasting Corporation (ZNBC), is ostensibly regulated in terms of the Zambia National Broadcasting Corporation Act. In 2002, at the time that new legislation was introducing the IBA, the ZNBC Act was significantly amended in order to transform it from a state to a public broadcaster. However, the ZNBC Act was never implemented or operationalised, and the ZNBC continued to report to the Ministry of Information and Broadcasting Services.²

Even that halting and unimplemented trend towards becoming a public broadcaster has recently come under severe threat with the passage of the ZNBC Amendment Act of 2010. The amendment act has entrenched executive influence over the ZNBC, making it once more a state as opposed to a public broadcaster.

3.5.1 Establishment of the ZNBC

Section 3 of the ZNBC Act established the ZNBC as a body corporate with perpetual succession, and generally empowered to do all acts necessary for the carrying out of its powers and functions under the ZNBC Act. Section 4 also constitutes the ZNBC Board, which performs the functions of the ZNBC.

3.5.2 The ZNBC's mandate

Section 7(1) of the ZNBC Act sets out the functions of the ZNBC. Briefly, these are to:

- Provide varied and balanced programming
- Serve the public interest
- Meet high professional quality standards
- Offer programmes that provide information, entertainment and education
- Contribute to the development of free and informed opinions
- Reflect the range of opinions and political, philosophical, religious, scientific and artistic trends
- Reflect and promote Zambia's national culture, diversity and unity
- Reflect human dignity and human rights, and contribute to the tolerance of different opinions and beliefs
- Further international understanding and the public's sense of peace and social justice
- Defend democratic freedoms
- Contribute to the realisation of equal treatment between men and women
- Broadcast news and current affairs programmes that are comprehensive, unbiased, and independent, and commentary which is clearly distinguished from news
- Promote local productions
- Operate other services, including diffusion services

3.5.3 Appointment of the ZNBC Board

The ZNBC is controlled by a board of directors. In terms of the newly amended section 4(2) of the ZNBC Act, the ZNBC Board is made up of nine part-time directors appointed by the minister, subject to ratification of the National Assembly. In terms of section 5 of the ZNBC Act, the directors hold office for a renewable period of three years. It is important to note that the effect of the 2010 amendments to the ZNBC Act is to do away with the role of an appointments committee, which used to be in control of the appointments process and which would make recommendations to the minister on appointments to the ZNBC Board in much the same way as the IBA Board is appointed. (See the cases at the end of this chapter for a discussion on litigation surrounding the ministerial appointment of ZNBC Board members.)

Section 4(3) continues to set out criteria for appointment to the ZNBC Board. Essentially, this is a citizen permanently residing in Zambia with a commitment ‘to fairness, freedom of expression, openness and accountability, and when viewed collectively the persons appointed shall be representative of a broad section of the population of the Republic’.

Importantly, section 4(5) sets out people who are disqualified from being appointed as a member of the ZNBC Board. These include: anyone who has been sentenced to a term of imprisonment for more than six months; anyone convicted for an offence involving fraud or dishonestly; an undischarged bankrupt; members of Parliament or any local authority; or an office bearer or employee of any political party, or an immediate family member thereof.

3.5.4 Funding for the ZNBC

Section 21 of the ZNBC Act sets out the allowable sources of funding for the ZNBC. These are:

- Funds payable to the corporation in terms of the ZNBC Act. For example, all television levies (which are levied on possession of television receivers) are payable to the ZNBC
- Monies appropriated by Parliament – that is, specifically allocated to the ZNBC in the national budget
- Grants or donations
- Other monies accruing to the ZNBC

3.5.5 The ZNBC: Public or state broadcaster?

There are some aspects of the regulatory framework for the ZNBC which suggest that it is a public as opposed to a state broadcaster. Importantly, a multiparty body (in this case the National Assembly) has to ratify ministerial appointments to the ZNBC Board. However, the process for this is not clearly set out. Furthermore, the recent legislative amendments which centralised the minister's appointment powers by doing away with the role of the appointments committee also indicate the intention to ensure that the ZNBC operates as a state as opposed to a public broadcaster.

In addition, the ZNBC Board is not free to appoint or terminate the services of the director-general without prior consultation with the minister. Also, while the ZNBC Board makes an annual report, this is not made to the National Assembly but rather to the minister, in terms of section 24 of the ZNBC Act.

Thus, the ZNBC's accountability appears to be to the executive rather than to the public's elected representatives in the National Assembly. While it is true that the minister is obliged to lay the report before the National Assembly within seven days, the report ought to be given directly to the National Assembly by the ZNBC.

3.5.6 Weaknesses in the ZNBC provisions of the ICT Act which should be amended

A number of important weaknesses ought to be addressed through legislative amendments:

- Appointments of ZNBC board members ought to be made by the president on the recommendation of the National Assembly following a public nominations, interview and short-listing process.
- The ZNBC Board ought to be able to appoint and dismiss the director-general of the ZNBC without any involvement from the minister.
- The ZNBC's annual report ought to be made directly to the National Assembly rather than via the minister.

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

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

and protected by a journalist. This is particularly true of so-called whistleblowers – inside sources who are able to provide journalists with information regarding illegal activities, whether by company or government personnel.

Consequently, democratic countries often provide special protection for journalists' sources. It is recognised that without such protection, information that the public needs to know would not be given to journalists.

3.6.1 Criminal Procedure Code, 1933

The Criminal Procedure Code was enacted in 1934, long before Zambia's independence, but has been amended numerous times since then. At least one provision of the Criminal Procedure Code might be used to compel a journalist to reveal confidential sources:

- Section 143 of the Criminal Procedure Code empowers a court dealing with any criminal matter to issue a summons to any person requiring his or her attendance before court if it is made to appear that material evidence is in the possession of such person. The summons can also require the person to bring and produce documents and writings in his possession, which may be specified in the summons. Failure to comply with a summons can result in an arrest warrant being issued to force the person to attend at court, in terms of section 144 of the Criminal Procedure Code.
- Section 148 of the Criminal Procedure Code makes it an offence to fail to attend at court after having been summoned to do so, 'without lawful excuse'. The punishment is a fine.

3.6.2 Penal Code, Act 42 of 1930

The Penal Code was enacted prior to Zambia's independence but has been amended numerous times since then. Chapter XI of the Penal Code contains offences relating to the administration of justice.

Section 116 makes it an offence, as part of the offence of contempt of court, for any person who has been called upon to give evidence in judicial proceedings, to:

- Fail to attend such proceedings, or
- Refuse to answer a question or produce a document

Punishment is a period of imprisonment or a fine.

3.6.3 Subordinate Courts Act, 1934

Section 41 of the Subordinate Courts Act empowers a subordinate court to summon any person to give evidence or to produce a document in his possession. In terms of sections 42 and 43, a person failing to attend at court or refusing to answer a question put to him/her shall be guilty of an offence. The penalty is a period of imprisonment or a fine.

3.6.4 High Court Act, Act 36 of 1933

Section 27(1) of the High Court Act empowers the court to summon any person to give evidence or to produce a document in his/her possession. In terms of sections 27(2) and 28, any person failing to attend at court or refusing to answer a question put to him/her shall be guilty of an offence.

3.6.5 Supreme Court of Zambia Act, Act 41 of 1973

Section 25(1)(b) of the Supreme Court of Zambia Act empowers the court, on hearing an appeal in a civil matter, to:

- Order the production of any document or any other thing connected with the proceedings, which is necessary for the determination of the case
- Order any witness who would have been a compellable witness at the trial to attend and be examined before the court, whether or not he was or was not called at the trial

3.6.6 National Assembly (Powers and Privileges) Act, Act 34 of 1956

Section 10 of the National Assembly Act empowers the National Assembly or any authorised committee to order any person to attend before the National Assembly or a committee and to give evidence or to produce any paper, books, record or document which is in that person's possession.

Note that section 13 of the National Assembly Act empowers such a person to raise privacy objections to such an order.

Clearly, these provisions might well conflict with a journalist's ethical obligation to protect his or her sources. However, it is important to note that whether or not requiring a journalist to reveal a source is in fact an unconstitutional violation of the right to freedom of expression will depend on the particular circumstances in each

case, particularly on whether the information is available from any other source. Consequently, it is extremely difficult to state that these provisions are, by themselves, a violation of the right to freedom of expression under the Constitution.

3.7 Statutes that prohibit the publication of certain kinds of information

A number of statutes contain provisions which, looked at closely, undermine the public's right to receive information and the media's right to publish information. These statutes are targeted and prohibit the publication of certain kinds of information, including:

- Information regarding legal proceedings
- The publication of state security–related issues, such as prohibited, seditious and alarming publications, insults to the national anthem and to the president, defamation of foreign princes, inducing a boycott, and information relating to prisons, intelligence and state security
- Expression which relates to the Citizenship Board
- Expression which is obscene or contrary to public morality
- Expression which constitutes criminal defamation
- Expression which poses a danger to public health
- Expression which promotes hatred
- Expression relating to corruption
- Expression relating to voting
- Publication of information relating to parliamentary proceedings

3.7.1 Prohibition on the publication of information relating to legal proceedings

PUBLICATION THAT CONSTITUTES CONTEMPT OF COURT

Penal Code, Act 42 of 1930

The Penal Code was enacted prior to Zambia's independence but has been amended

numerous times since then. Chapter XI of the Penal Code contains offences relating to the administration of justice. Section 116, 'Contempt of court', contains various instances of the offence of contempt of court, which is punishable by a period of imprisonment or a fine.

- In terms of section 116(1)(d), it is an offence while a judicial proceeding is pending, to make use of writing:
 - Misrepresenting such proceeding
 - Capable of prejudicing any person in favour of or against any parties to the proceeding, or
 - Calculated to lower the authority of the presiding officer
- In terms of section 116(1)(e), it is an offence and contempt of court to publish a report on evidence taken in any judicial proceeding which has been directed to be held in private.

Contempt of Court Act, Act 32 of 1965

Section 3(1) of the Contempt of Court Act provides that the publication of information (other than the actual court order) relating to any court sitting in private shall constitute contempt of court in respect of:

- Proceedings involving adoption, guardianship, custody and maintenance of an infant
- Proceedings involving the control, care, detention and property of mentally disordered people
- Where the court sits in private for national security reasons
- Where the information relates to a secret process, discovery or invention in issue in the proceedings
- Where the court expressly prohibits publication of such information
- Where the proceedings constitute an income tax appeal

Local Courts Act, 1966

Section 47(1) of the Local Courts Act sets out conduct that, without lawful excuse, constitutes the offence of contempt of court. This includes:

- Intentionally insulting the court or any member or assessor thereof

- Misrepresenting, in writing, court proceedings while they are pending
- Writing anything about the court proceedings, while they are pending, which is capable of prejudicing any person in favour of or against any party to such proceedings
- Wilfully disobeying a lawful court order

The offence is punishable by a fine, a period of imprisonment or both.

PUBLICATION OF SKETCHES OR PHOTOGRAPHS THAT DEAL WITH COURT PROCEEDINGS

Chapter XI, section 117 of the Penal Code, Act 42 of 1930, is headed ‘Prohibition on taking photographs’. Section 117(1)(b) makes it an offence to publish any photograph, portrait or sketch of any person involved in court proceedings, whether these are civil or criminal, including, judges, jurors, witnesses or parties. The offence is punishable by a fine. Note, however, that there is an exception for photographs taken with the consent of the chief justice, or where the occasion is the opening of any session of the High Court and with the consent of the presiding judge.

PUBLICATION OF INFORMATION REGARDING MATRIMONIAL PROCEEDINGS

Section 4(1)(b) of the Contempt of Court Act, Act 32 of 1965, provides that it is not lawful to publish any particulars about judicial proceedings for: the dissolution or nullity of marriage, judicial separation or for restitution of conjugal rights, other than: names, addresses and occupations of the parties and witnesses; concise statements of charges and defences in support of which evidence has been given; submissions on points of law and the decisions of the court on these; the judgment of the court and provided that such details do not constitute indecent matters. The penalty is a fine, a period of imprisonment or both. Note, however, that in terms of section 4(2) only a proprietor, editor, master printer or publisher is liable to conviction (in other words, not the journalist involved).

PUBLICATION OF INFORMATION REGARDING INDECENT MATTERS IN LEGAL PROCEEDINGS

Section 4(1)(a) of the Contempt of Court Act, Act 32 of 1965, provides that it is not lawful to publish, in relation to any judicial proceedings, any indecent matter or any indecent medical, surgical or physiological details, where publication is calculated to injure public morals. The penalty is a fine, a period of imprisonment or both. Note, however, that in terms of section 4(2), only a proprietor, editor, master printer or publisher is liable to conviction (in other words, not the journalist involved).

3.7.2 Prohibition on the publication of state security–related information

PENAL CODE, ACT 42 OF 1930

The Penal Code was enacted prior to Zambia’s independence but has been amended numerous times since then. Part II of the Penal Code deals with crimes, and Division I sets out a list of offences against public order, which is divided into three parts:

- Treason and other offences
- Offences affecting relations with foreign states and external tranquillity
- Unlawful assemblies, riots and other offences against public tranquillity

The prohibitions on publication relating to the above grounds contained in each are dealt with in turn.

Treason and other offences

Prohibited publications

Section 53 of the Penal Code falls under the heading ‘Treason and other offences’ and deals with prohibited publications. In terms of section 53(1), if the president is of the opinion that a publication is contrary to the public interest (which is defined in section 62 of the Penal Code as including the interest of defence, public safety and public order), he may, in his absolute discretion, declare it to be a prohibited publication. Note that:

- The order must be published in the Gazette and such local newspapers as he considers necessary
- The order can declare the following to be prohibited publications:
 - A particular publication
 - A series of publications
 - All publications published by a particular person or association
- If the order specifies the name of a periodical publication, then all subsequent issues and any substitution thereof will also be prohibited publications – section 53(2)
- If the order prohibits the publications of any class published by a specified person, then the order applies to all publications published by that person after the date of the order too – section 53(3)
- Any person who prints, imports, publishes, sells, supplies or even possesses a prohibited publication is guilty of an offence and is liable, upon conviction, to a period of imprisonment, or to the payment of a fine or both – section 54

- Section 56 empowers any police or administrative officer such as a postmaster or a collector in the Department of Customs and Excise to seize any suspected prohibited publication

A clear problem with the provisions of section 53 of the Penal Code is that they are not objective. In other words, the publication does not have to pose a genuine, realistic or objective threat to the public interest in defence, public safety or public order, the president just has to be of the opinion that this is the case before he makes an order prohibiting a publication. This does not comply with internationally accepted standards for prohibiting the publication of information.

Seditious publications

Section 57(1) of the Penal Code provides, among other things, that any person who prints, publishes, sells, distributes or even possesses a seditious publication is guilty of an offence and is liable to a period of imprisonment, a fine or both. Furthermore, any seditious publication is to be forfeited to the state. Note the following:

- In terms of section 60(1), a seditious intention is an intention, among other things, to:
 - Advocate the desirability of overthrowing the government by unlawful means
 - Bring into hatred or contempt or to excite disaffection against the government established by law
 - Excite the inhabitants of Zambia to procure the alteration, by illegal means, of any matter established by law
 - Excite disaffection against the administration of justice in Zambia
 - Raise discontent or disaffection among the inhabitants of Zambia
 - Promote feelings of ill-will or hostility between different classes of the population of Zambia
 - Advocate the desirability of any part of Zambia becoming an independent state
 - Incite resistance, either active or passive, or disobedience to any law or the administration thereof

- However, section 60(1) also explicitly provides that a publication is not seditious by reason only that it intends to:
 - Show the president has been misled or is mistaken in any of his measures
 - Point out errors or defects in the government or Constitution of Zambia, or in the legislation or administration of justice in Zambia, with a view to remedying these

- Persuade the inhabitants of Zambia to attempt to procure changes by lawful means
- Point out with a view to their removal, any matters which are producing feelings of ill-will between different classes in the population

Alarming publications

Section 67(1) of the Penal Code provides, among other things, that any person who publishes any false statement, rumour or report that is likely to cause fear and alarm to the public or to disturb the public peace is guilty of an offence and is liable, upon conviction, to a period of imprisonment. However, note that section 67(2) specifically provides a defence to this offence, namely, that prior to publication, the person took 'such measures to verify the accuracy of such statement, rumour or report'.

Insulting the national anthem

Section 68 of the Penal Code provides, among other things, that any person who publishes any writing with intent to insult or bring into contempt or ridicule the official national anthem of Zambia is guilty of an offence and is liable to a period of imprisonment.

Insulting the president

Section 69 of the Penal Code provides, among other things, that any person who, with intent to bring the president into hatred, ridicule or contempt, publishes any defamatory or insulting matter is guilty of an offence and is liable to a period of imprisonment. (See the case law section at the end of this chapter for a discussion of a case dealing with this provision.)

Offences affecting relations with foreign states and external tranquillity

Defamation of foreign princes

Section 71 of the Penal Code falls under the heading 'Offences affecting relations with foreign states and external tranquillity'. It makes it an offence to, with such justification and excuse as would be sufficient in the case of the defamation of a private person, publish anything tending to degrade, revile, expose to hatred or contempt any foreign prince, potentate, ambassador or other foreign dignitary with intent to disturb the peace and friendship between Zambia and that person's country.

Unlawful assemblies, riots and other offences against public tranquillity

Inducing a boycott

Section 92 of the Penal Code makes it an offence to print, publish, sell, distribute or reproduce a publication to further a designated boycott. A designated boycott is one which the president has identified as being conducted with the intention or effect of:

- Bringing into hatred or contempt or undermining the authority of the government
- Endangering law and order
- Jeopardising the economic life of the country
- Raising discontent or feelings of ill-will among the inhabitants of Zambia

The offence is punishable by a period of imprisonment, in terms of section 92(2).

PRISONS ACT, ACT 56 OF 1965

Subsections 79(3) and (4) of the Prisons Act make it an offence to publish any part of a letter or document which the person has reasonable cause to believe was written in a prison by or on behalf of a prisoner, and which has not been endorsed by the officer in charge (stating the name of the prison and authorising the removal of the document from the prison). The penalty is a fine, a period of imprisonment or both.

ZAMBIAN SECURITY INTELLIGENCE SERVICE ACT, ACT 14 OF 1998

Section 11(3) of the Zambian Security Intelligence Service Act makes it an offence to publish any information obtained in contravention of section 11(1). Section 11(1) prohibits any intelligence officer or employee of the Intelligence Service from disclosing any information obtained as a result of his office without the written consent of the president. The penalty for such publication is a fine, a period of imprisonment or both.

PRESERVATION OF PUBLIC SECURITY ACT, ACT 5 OF 1960

Section 3 of the Preservation of Public Security Act deals with a public emergency declared under the Constitution. Section 3 empowers the president to make regulations prohibiting the publication or dissemination of matter prejudicial to public security (defined as including: safety of persons and property; maintenance of essential supplies and services; prevention and suppression of violence, intimidation, disorder, crime, mutiny, rebellion, defiance of law and lawful authority; and the maintenance of the administration of justice). Section 3 also empowers the president to make regulations for the control of production, publishing, sale, distribution and possession of publications.

STATE SECURITY ACT, ACT 36 OF 1969

The State Security Act contains a number of provisions which not only prohibit the publication of certain information but which would also hinder the media's ability to perform its news-gathering functions.

Activities prejudicial to Zambia

Section 3 of the State Security Act sets out a list of activities which are prejudicial to Zambia if they are done for ‘any purpose prejudicial to the safety or interests of the Republic’. The penalty for violating this provision is a term of imprisonment for up to 30 years. The activities that are particularly relevant to the media include:

- Being in or in the vicinity of a ‘prohibited place’. Note that this means a place where any work of defence is taking place or any place declared to be a prohibited place by the president
- Making a sketch or note that might be useful to a foreign power or disaffected person (that is, someone carrying on ‘seditious activity’)
- Obtaining or publishing any secret official codes, passwords, documents or information that might be useful to a foreign power or disaffected person (that is, someone carrying on ‘seditious activity’)

Wrongful communication of information

Section 4 of the State Security Act sets out a list of prohibited communication-related activities. The penalty for violating this provision is a term of imprisonment for up to 25 or 30 years. The activities that are particularly relevant to the media include:

- Having in one’s possession a secret official code, password, document or information that relates to a prohibited place or which has been obtained in contravention of the State Security Act, and communicating the code, password, document or information to any unauthorised person or retaining it when having no right to do so – section 4(1)
- Having in one’s possession a secret official code, password, document or information that relates to munitions of war, and communicating same to any person for any purpose prejudicial to the safety or interests of Zambia – section 4(2)
- Receiving any secret official codes, passwords, documents or information knowing or having reasonable grounds to believe that the codes, passwords, documents or information have been communicated in contravention of the State Security Act – section 4(3)
- Communicating any information relating to the defence or security of Zambia to any person other than someone to whom he is authorised by an authorised officer to communicate it, or to whom it is, in the interests of Zambia, his duty to communicate it – section 4(4)

Protection of classified information

Section 5 of the State Security Act makes it an offence to communicate any classified matter to any person other than someone to whom he is authorised by an authorised officer to communicate it or to whom it is in the interests of Zambia his duty to communicate it.

3.7.3 Prohibition on the publication of expression relating to the Citizenship Board

Section 29(3) of the Citizenship of Zambia Act, Act 26 of 1975, makes it an offence to publish any information obtained in contravention of section 29(1). Section 29(1) prohibits any Citizenship Board member or any other person from disclosing any information obtained as a result of his office without the written consent of the chairman of the Citizenship Board. The penalty for such publication is a fine, a period of imprisonment or both.

3.7.4 Prohibition on the publication of expression that is obscene or contrary to public morality

PENAL CODE, ACT 42 OF 1930

Public morality

Section 53 of the Penal Code falls under the heading ‘Treason and other offences’ and deals with prohibited publications. In terms of section 53(1), if the president is of the opinion that a publication is contrary to the public interest (which is defined in section 62 of the Penal Code as including the interest of ‘public morality’), he may, in his absolute discretion, declare it to be a prohibited publication. Note that:

- The order must be published in the Gazette and such local newspapers as he considers necessary
- The order can declare the following to be prohibited publications:
 - A particular publication
 - A series of publications
 - All publications published by a particular person or association
- If the order specifies the name of a periodical publication, then all subsequent issues and any substitution thereof will also be prohibited publications – section 53(2)
- If the order prohibits all the publications of any class published by a specified person, then the order applies to all publications published by that person after the date of the order too – section 53(3)

- Any person who prints, imports, publishes, sells, supplies or even possesses a prohibited publication is guilty of an offence and is liable, upon conviction, to a period of imprisonment, to the payment of a fine or both – section 54
- Section 56 empowers any police or administrative officer such as a postmaster or a collector in the Department of Customs and Excise to seize any suspected prohibited publication.

A clear problem with the provisions of section 53 of the Penal Code is that they are not objective. In other words, the publication does not have to pose a genuine, realistic or objective threat to the public interest in public morality, the president just has to be of the opinion that this is the case before he makes an order prohibiting a publication. This does not comply with internationally accepted standards for prohibiting the publication of information.

Obscenity

Section 177 of the Penal Code falls under the broad heading ‘Offences injurious to the public in general’ and deals with ‘Obscene matters or things’. In terms of section 177(1)(a), it is an offence to make, produce or possess obscene writings, drawings, printed matter, photographs, cinematograph film or any other object ‘tending to corrupt morals’. The punishment is a period of imprisonment or a fine.

3.7.5 Prohibition on the publication of expression that constitutes criminal defamation

Part II of the Penal Code, Act 42 of 1930, contains ‘Offences injurious to the public in general’. Chapter XVIII, which falls within Division III, is headed ‘Defamation’, and makes criminal defamation an offence.

WHAT IS CRIMINAL DEFAMATION?

Section 191 of the Penal Code provides for the misdemeanour offence of libel, which is, in the part that is relevant for the media, the unlawful publication by print or writing of any defamatory matter (defined in section 192 as matter ‘likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation’) concerning another person, with the intent to defame that person.

WHEN IS THE PUBLICATION OF DEFAMATORY MATTER UNLAWFUL?

Section 194 provides that any publication of defamatory matter will be unlawful unless:

- The matter is true and publication was for the public benefit
- Publication is privileged

Two types of privilege are recognised under the Penal Code: absolute privilege and conditional privilege.

ABSOLUTE PRIVILEGE

In terms of section 195 of the Penal Code, the publication of defamatory matter is absolutely privileged in the following cases:

- Publications published by the president
- Publications published by the Cabinet or the National Assembly in any official document or proceeding
- Publications published by a minister or any member of the National Assembly in Cabinet or in the National Assembly
- Publications to and by a person having authority over an individual who is subject to military or naval discipline about that person's conduct
- Publications arising out of judicial proceedings
- Fair reports of anything said, done or published in Cabinet or the National Assembly
- If the publisher was legally bound to publish the matter

Once the publication of defamatory matter is absolutely privileged, it is immaterial if the matter is false or published in bad faith.

CONDITIONAL PRIVILEGE

In terms of section 196 of the Penal Code, the publication of defamatory matter is conditionally privileged provided:

- It is published in good faith
- The relationship between the parties by and to whom the publication is made is such that the persons publishing and receiving the matter are under a legal, moral

or social duty to publish/receive same or have a legitimate personal interest in publishing/receiving same

- Publication does not exceed, either in extent or subject matter, what is reasonably sufficient for the occasion

And in any of the following cases, namely, if the matter published:

- Is a fair and substantially accurate report of court proceedings which were not being held in camera
- Is a copy or a fair abstract of any matter which has previously been published and which was absolutely privileged
- Is an expression of opinion in good faith as to the conduct of a person in a judicial, official or other public capacity, or as to his personal character, in so far as it appears in such content
- Is an expression of opinion in good faith as to the conduct of a person in relation to any public question or matter, or as to his personal character, in so far as it appears in such conduct
- Is an expression of opinion in good faith as to the conduct of a person as disclosed by evidence given in a public legal proceeding, or as to the conduct or character of any person as a party or witness in any such proceeding
- Is an expression of opinion in good faith as to the merits of any book, writing, painting, speech or other work, performance, or act published or publicly made or otherwise submitted by the person to the judgment of the public, or as to the character of the person in so far as it appears in such work
- Is a censure passed by a person in good faith on the conduct or character of another person in any matter where he or she has authority over that person
- Is a complaint or accusation about an individual's conduct or character made by a person of good faith to a person having authority over the individual and having authority to hear such complaints
- In good faith for the protection of the rights or interests of:
 - The person publishing it
 - The person to whom it was published

DEFINITION OF GOOD FAITH

In terms of section 197 of the Penal Code, a publication of defamatory matter will not be deemed to have been made in good faith if it appears that either:

- Publication was made with an intention to injure to a substantially greater degree than was necessary in the public interest or for a private interest in respect of which a conditional privilege is claimed, or
- The matter was untrue and the person publishing it did not believe it to be true (unless there was a duty to publish irrespective of whether it was true or false)

However, there is a presumption of good faith if defamatory matter was published on a privileged occasion, unless the contrary is proved, in terms of section 198 of the Penal Code.

3.7.6 Prohibition on the publication of expression that poses a danger to public health

Section 53 of the Penal Code, Act 42 of 1930, falls under the heading ‘Treason and other offences’ and deals with prohibited publications.

In terms of section 53(1), if the president is of the opinion that a publication is contrary to the public interest (which is defined in section 62 of the Penal Code as including the interest of ‘public health’), he may, in his absolute discretion, declare it to be a prohibited publication. Note that:

- The order must be published in the Gazette and such local newspapers as he considers necessary
- The order can declare the following to be prohibited publications:
 - A particular publication
 - A series of publications
 - All publications published by a particular person or association
- If the order specifies the name of a periodical publication, then all subsequent issues and any substitution thereof will also be prohibited publications – section 53(2)
- If the order prohibits all the publications of any class published by a specified person, then the order applies to all publications published by that person after the date of the order too – section 53(3)

- Any person who prints, imports, publishes, sells, supplies or even possesses a prohibited publication is guilty of an offence and is liable, upon conviction, to a period of imprisonment, the payment of a fine or both – section 54
- Section 56 empowers any police or administrative officer such as a postmaster or a collector in the Department of Customs and Excise to seize any suspected prohibited publication

A clear problem with the provisions of section 53 of the Penal Code is that they are not objective. In other words, the publication does not have to pose a genuine, realistic or objective threat to the public interest in public health, the president just has to be of the opinion that this is the case before he makes an order prohibiting a publication. This does not comply with internationally accepted standards for prohibiting the publication of information.

3.7.7 Prohibition on the publication of expression that promotes hatred

Division I of Part II of the Penal Code, Act 42 of 1930, contains ‘Offences against public order’, which are divided into three parts, one of which is ‘Treason and other offences’. Section 70 of this part makes it an offence to publish any writing expressing or showing hatred, ridicule or contempt for any person mainly because of their race, tribe, place of origin or colour. The penalty is a period of imprisonment.

3.7.8 Prohibition on the publication of expression that relates to corruption

Section 14(3) of the Anti-Corruption Commission Act, Act 46 of 1996, makes it an offence to publish any information obtained in contravention of section 14(1). Section 14(1) prohibits any person (note that in terms of section 25 this specifically includes staff of the Anti-Corruption Commission) from disclosing any information obtained as a result of his duties under the Anti-Corruption Commission Act without the written consent of the Anti-Corruption Commission. The penalty for such publication is a fine, a period of imprisonment or both.

3.7.9 Prohibition on the publication of expression relating to voting

Section 90(2) of the Electoral Act, Act 12 of 2006, is an important provision for the media. While it does not prohibit the publication of voting-related information, it does prohibit any person (except for certain election officials) from attempting to obtain information in a polling station as to the candidate for whom any person in the polling station is about to vote or has voted, and it prohibits the communication of such information. Any contravention of this provision is an offence, and the

penalty is a fine, a period of imprisonment or both, in terms of section 90(4). This affects the media's ability to conduct exit polls in polling station precincts.

3.7.10 Prohibition on the publication of information relating to parliamentary proceedings

Section 25 of the National Assembly (Powers and Privileges) Act, Act 34 of 1956, makes it an offence to:

- Publish a report of any proceedings of the National Assembly or any committee which were not held in public
- Publish any false or scandalous libel on the National Assembly or any report which wilfully misrepresents its proceedings
- Publish any paper, report or other document prepared expressly for submission to the National Assembly before it has been laid on the Table of the National Assembly, without the general or special leave of the National Assembly
- Publish or print any libel on any member concerning his character or conduct as a member

The penalty for any such publication is a fine, a period of imprisonment (with or without hard labour) or both. Note, however, that in terms of section 32, such publication must have been made in bad faith and with malice to be liable for publication in civil or criminal proceedings.

3.8 Legislation that codifies and clarifies aspects of the law of defamation

3.8.1 Introduction

Most of the countries examined in this handbook deal with defamation or libel (other than criminal defamation or libel) as a matter of common law – that is, judge-made law, through the cases. Zambia is different because it enacted the Defamation Act, Act 46 of 1953, to consolidate and amend the civil libel laws. Thus, the Zambian Penal Code (dealt with above) addresses criminal libel while the Defamation Act deals with many issues concerning civil libel.

Note, however, that the Defamation Act specifically states that its provisions do not affect privilege in respect of parliamentary or Cabinet proceedings – section 19(2).

Many of the provisions of the Defamation Act are extremely legalistic and deal with

burden of proof issues involving damages. The focus here, however, will be on the key aspects of the Defamation Act, which indicate the areas of defamation law that give guidance to the media on what can be published. The term ‘privileged’, in this context, means that the subject matter is allowed to be published even if it is defamatory.

3.8.2 Justifications for libel or slander

FAIR COMMENT

Section 7 of the Defamation Act provides that the defence of fair comment will be good even if some of the facts that form the basis for the commentary are not true. Thus, a defence will exist provided the expression of opinion constitutes ‘fair comment’, having regard to the facts that are proved.

NEWSPAPER AND ZNBC REPORTAGE OF COURT PROCEEDINGS ABSOLUTELY PRIVILEGED

In terms of section 8 of the Defamation Act, a fair and accurate report by any newspaper or by the ZNBC of any court proceedings is absolutely privileged provided it is:

- Published contemporaneously with the proceedings
- Not blasphemous or obscene

QUALIFIED PRIVILEGE FOR NEWSPAPERS AND THE ZNBC

Section 9 of the Defamation Act read with the schedule thereto gives a qualified privilege to newspaper and ZNBC reportage of all matters set out in the schedule, provided that the publication was made without malice, and subject to certain other exceptions. The matters set out in the schedule include:

Statements that are privileged without explanation or contradiction

- Fair and accurate reporting of the legislatures of British dominions outside Zambia.
- Fair and accurate reporting of public proceedings of international organisations in which Zambia or the United Kingdom is a member or is participating.
- Fair and accurate reporting of the proceedings of the International Court of Justice or any other judicial or arbitral tribunal deciding matters in dispute between states.

- Fair and accurate reporting of the court(s) martial proceedings in British dominions outside of Zambia.
- Fair and accurate reporting of any public enquiry proceedings in British dominions outside of Zambia.
- A fair and accurate copy of or extract from:
 - Any public register required to be kept by Zambian law that is open to public inspection
 - Any other document required to be kept open to public inspection
- A notice or advertisement published on the authority of any Zambian court, judge or court officer.

Statements privileged subject to explanation or contradiction

- A fair and accurate report of a decision of any of the following bodies:
 - A Zambian association promoting art, science, religion or learning and empowered to exercise control over matters of concern or over the conduct of people subject to its control.
 - A Zambian association promoting a trade, business, industry or profession and empowered to exercise control over matters of concern or over the conduct of people subject to its control.
 - An association formed for safeguarding the interests of any game, sport or pastime to which the public is invited, and which is empowered to exercise control over matters of concern or over the conduct of people subject to its control.
 - Any lawful public meeting held in Zambia, whether admission is general or restricted.
 - Any Zambian local authority, public enquiry or tribunal, board, committee or body established by law that is not closed to the public.
 - A general meeting of any registered company or association, except for a private company as defined in the Companies Act.
 - A notice issued for public information by the government, a local authority or superior police officer.

The exceptions to these statements being privileged are as follows:

- Statements privileged subject to explanation or contradiction will not be privileged if the defendant newspaper or ZNBC was requested by the plaintiff to also publish a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so or has done so in an unreasonable manner.

- None of the statements in the schedule will be privileged if the publication is:
 - Prohibited by law
 - Not of public concern
 - Not for the public benefit

- Defence of publication without malice and with apology.

A newspaper may defend itself in an action for libel by pleading that publication took place without actual malice and without gross negligence, and that a full apology was published.

LIMITATION ON PRIVILEGE AT ELECTIONS

A defamatory statement published by or on behalf of a candidate in any local or national election shall not be deemed to be published on a privileged occasion.

3.9 Legislation that specifically assists the media in performing its functions

3.9.1 Introduction

In countries that are committed to democracy, governments pass legislation which specifically promotes accountability and transparency of both public and private institutions. Such statutes, while not specifically designed for use by the media, can and often are used by the media to uncover and publicise information in the public interest. One piece of legislation that assists the media is the National Assembly (Powers and Privileges) Act, 2006, and another is the recently passed Public Interest Disclosure (Protection of Whistleblowers) Act, Act 4 of 2010.

3.9.2 National Assembly (Powers and Privileges) Act, 2006

The National Assembly Act governs the operations of the National Assembly. A number of provisions assist the media in reporting on the activities and proceedings of the National Assembly.

- Section 3 provides that there shall be freedom of speech and debate in the National Assembly and that that freedom cannot be questioned in any court or place outside the National Assembly.

- Section 4 provides that no civil or criminal proceedings may be instituted against any member of the National Assembly for words spoken before or written in a report, motion, bill or resolution to (a committee of) the National Assembly.

- Section 32 provides that provided a court is satisfied that publication was in good faith and without malice, no civil or criminal liability may result from the publication of an extract of any report, paper, votes or proceedings referred to in section 25.

3.9.3 Public Interest Disclosure (Protection of Whistleblowers) Act, Act 4 of 2010

INSTITUTIONS TO WHICH THE WHISTLEBLOWERS ACT APPLIES

Section 3(2) specifies that the Whistleblowers Act applies to any government agency, any private or public company, institution, organisation, body or organ established under any law. Hence, it applies to virtually every type of institution.

PROTECTION GIVEN TO WHISTLEBLOWERS

Section 10 provides that an employer shall not subject an employee to any occupational detriment on account of the employee having made a protected disclosure or public interest disclosure. The following definitions are important:

- Occupational detriment includes: disciplinary action, dismissal, suspension, demotion, harassment or intimidation; forced transfer, being refused transfer or promotion, disadvantageous changes in employment or retirement conditions; being refused a reference; or threats of any of the above.
- Protected disclosure means a disclosure made to a legal practitioner or employer.
- Public interest disclosure means a disclosure that the person believes shows, among other things: public wastage, environmental risk or danger, unlawful reprisal, public health or safety danger, evidence of a criminal offence; failure to comply with a legal obligation; the occurrence of a miscarriage of justice; or deliberate concealment of any of the above.

WHO ARE PUBLIC INTEREST DISCLOSURES MADE TO?

Section 11 of the Whistleblowers Act provides that a person may make a public interest disclosure to an investigating authority. Section 12 provides that these may be made anonymously, and section 25 provides that these must be made voluntarily. An investigating authority means the auditor-general, the Anti-Corruption Commission, the Drug Enforcement Commission, the investigator-general, the Police Public Complaints Authority, the Judicial Complaints Authority or any other person prescribed by law.

ON WHAT GROUNDS CAN AN INVESTIGATING AUTHORITY DECLINE TO ACT ON A PUBLIC INTEREST DISCLOSURE?

In terms of section 13(1), an investigating authority may decline to act if it believes:

- The disclosure is malicious, frivolous, vexatious or made in bad faith
- The disclosure is lacking in substance
- The disclosure is trivial
- There is a more appropriate method of dealing with the matter
- The disclosure has already been dealt with adequately
- The disclosure is made for pecuniary gain or other illegal reasons

Making a disclosure such as those listed above is, in terms of section 13(3), an offence and a person is liable, upon conviction, to a fine, a period of imprisonment or both.

REMEDIES TO ENSURE THAT A WHISTLEBLOWER'S CLAIMS ARE INVESTIGATED

Section 19 empowers a person who makes a public interest disclosure to request the investigating authority to provide a progress report. This must be provided within 14 days of the request, and additional reports must be provided at least once during every 90-day period thereafter and upon completion of the action. Furthermore, section 58 specifies that an investigating authority must notify the person making the disclosure of the action taken, or proposed to be taken, within six months.

PROVISIONS RELATING TO DEFAMATION IN THE WHISTLEBLOWERS ACT

Section 56 states that in proceedings for defamation arising out of a public interest disclosure, the person making such a disclosure, and in providing additional information to an investigating authority, has a defence of absolute privilege unless the disclosure constitutes an offence in terms of section 13.

4 REGULATIONS AFFECTING THE MEDIA

In this section you will learn:

- What regulations or rules are
- Key regulations that affect the media when covering elections

4.1 Definition of regulations

Regulations are subordinate legislation. They are legal rules made in terms of a

statute. Regulations are legal mechanisms for allowing a body other than parliament to make legally binding rules governing an industry or sector, without needing parliament to pass a specific statute thereon.

4.2 Key regulations governing the media

Section 109 of the Electoral (Code of Conduct) Regulations, 2006, empowers the Electoral Commission of Zambia to issue an Electoral Code of Conduct. Many of the provisions of the Code of Conduct relate specifically to obligations of election candidates and contesting parties. A number of provisions are, however, relevant to the media:

- Regulation 6 gives every person the right to:
 - Express political opinions
 - Debate the policies and programmes of political parties
 - Publish and distribute notices and advertisements
- The rights in regulation 6 are subject to regulation 7 of the Code of Conduct. Sub-regulation 7(1), in the parts that are relevant to the media, prohibits a person from:
 - Causing violence or using language that is likely to lead to violence or intimidation during election campaigns or elections
 - Making false, defamatory or inflammatory allegations concerning any person or party in connection with an election
 - Propagating any opinion which is prejudicial to:
 - The sovereignty, integrity or security of the country
 - Maintenance of public order
 - The independence of any institution
- In terms of sub-regulation 7(2), any person who does not comply with sub-regulation 7(1) commits an offence, and the penalty upon conviction is a fine, a period of imprisonment or both.
- Regulation 12 sets out the duties of the media. It requires all print and electronic media to:
 - Provide fair and balanced reporting of campaigns, policies, meetings, rallies and press conferences of registered parties and candidates during the campaign period
 - Provide news of the electoral process up to the declaration of results
 - Abide by this code and by regional codes of conduct, provided these do not conflict with this code

-
- Recognise, in liaison with the Electoral Commission of Zambia, a representative media body authorised to receive complaints and provide advice regarding fair coverage of the elections
 - Endeavour to:
 - Undertake capacity building of media personnel in their organisations
 - Report election news in an accurate manner and not make abusive editorial comment, incite violence or advocate hatred based on race, ethnicity, tribe, gender, political or religious conviction
 - Identify editorial comment they wish to make and separate it from news
 - Heads and other management staff of public or private media organisations are not to intimidate media practitioners and must allow them to exercise professional judgment without undue influence
 - Public and private media personnel shall:
 - Conduct interviews with candidates with fairness in respect of both interview style and amount of time given
 - Refrain from broadcasting their own political opinion, commentary or assessment, and where they wish to do so, they shall clearly identify the opinion, commentary and assessment as their own and shall carefully balance it to avoid bias
 - Section 13 deals with public radio and television broadcasters, and the key provisions are as follows:
 - Air-time must be allocated equally to all political parties for their political broadcasts
 - No more than 30 minutes of air-time in any one language in any week on public television or radio may be bought by a political party
 - No party political broadcasts, political discussions or interviews, opinion poll results or predictions of the result may be scheduled on radio or television on polling day until after the polls have closed
 - Broadcasters must inform the public as to the source of a public opinion poll and shall indicate the margin of error
 - Section 14 provides for the media's handling of election results, and the key provisions are as follows:
 - All media must disclose accurate election results and provide updates on the vote counting process. The media must not speculate on

results but broadcast confirmed election results as they are announced by presiding officers.

- Television and radio stations must:
 - Maintain full records of news bulletins and recordings of all programming relating to the election, including party political broadcasting
 - Institute a monitoring system to ensure balance throughout the campaign until the close of the poll
 - Provide the Electoral Commission of Zambia with recordings as it may require to fulfil its monitoring role
 - The print media must make available back copies of newspapers for inspection by the Electoral Commission of Zambia in the event of a complaint.
 - A process for making written complaints to the Electoral Commission of Zambia regarding media coverage is set out. This includes that where a right of reply, a retraction or a correction is necessary, it shall be made in a like manner and with equal prominence as the original report or publication.
- Section 17 sets out general penalties for contravening the Electoral Code of Conduct, and where no specific penalty is provided, a contravention is punishable by a fine, a period of imprisonment or both.

5 MEDIA SELF-REGULATION

In this section you will learn:

- What self-regulation is
- Key self-regulatory provisions intended to govern the media in Zambia

5.1 Definition of self-regulation

Self-regulation is a form of regulation that is established voluntarily. A grouping or body establishes its own mechanisms for regulation and enforcement that are not imposed, for example, in a statute or regulation. Media bodies often introduce self-regulation in the form of codes of media ethics and good governance.

5.2 The Zambia Media Council

The Zambia Media Council (ZAMEC) was officially launched in May 2011. ZAMEC sees media self-regulation as ‘a *social contract* between media practitioners and

society at large’, according to its ‘Rationale for Media Codes of Ethics’. Unfortunately, to date, it appears that media outlets which are operated by the Zambian government, including newspapers and the ZNBC, will not participate in ZAMEC. This raises doubt about its effectiveness and whether it will be able to operate as a self-regulatory body for the Zambian media as a whole.

Nevertheless, the ZAMEC Draft Code of Ethics has six main aims, which are, in brief to:

- Protect the public from irresponsible, anti-social or propaganda use of the media
- Enable the public to enjoy basic rights, especially the freedom to receive and impart information
- Protect media practitioners from being forced to act in ways that are contrary to the dictates of their conscience
- Keep open communication channels within the media industry and within the public sphere
- Ensure public access to information and that ordinary people can register their opinions through the media
- Help practitioners understand the principles and values that give the profession credibility

5.3 Key provisions of the ZAMEC Draft Code of Ethics

The key provisions of the ZAMEC Draft Code of Ethics are, in summary, as follows:

- **Reporting of news**
 - Report news truthfully, accurately and fairly.
 - Use fair methods in obtaining news, photographs and documents, except where an overriding public interest justifies the use of other methods. News must be presented in context and in a balanced manner, without any intentional or negligent departure from the facts, whether by distortion or exaggeration.
 - Present as fact only what may be reasonably true having regard to the sources of the news, and such reports shall be published fairly with due regard to context and importance. Where a report is founded on opinion, allegation or supposition, this must be indicated clearly.

- Promptly rectify any harmful inaccuracies, and ensure the corrections and apologies receive due prominence and afford the right of reply to persons criticised when the issue is of sufficient importance.
 - Seek the views of the subjects of serious critical reportage in advance of publication, unless there are reasonable grounds for believing that by doing so a media organisation would be prevented from publication or where evidence may be destroyed or witnesses intimidated.
 - Reports, photographs or sketches relating to matters involving indecency or obscenity shall be presented with due sensitivity to the prevailing moral climate.
 - A visual presentation of sexual conduct may not be published unless a legitimate public interest dictates otherwise.
 - Pornography shall not be published.
 - The identity of victims of rape or other forms of sexual violence shall not be published without their consent, unless there is an overriding public interest in doing so.
 - The identities of child victims of sexual assaults shall not be identified whether directly or indirectly.
 - News obtained by dishonest or unfair means or breach of confidence should not be published, unless a legitimate public interest dictates otherwise.
 - In both news and comment, the media shall exercise exceptional care and consideration in matters involving the private lives and concerns of individuals, bearing in mind that the right to privacy may be overridden only by a legitimate public interest.
 - Journalists must respect the moral and cultural values of Zambian society.
- **Discrimination and hate speech**
- The media should avoid discriminatory references to people's race, colour, ethnicity, religion, gender, sexual orientation, physical or mental disability, illness or age.
 - The media should not refer to a person's race, colour, ethnicity, religion, gender, sexual orientation, physical or mental disability, or illness in a prejudicial or pejorative context, except where it is strictly relevant to the matter reported or adds significantly to the reader's understanding of the matter.
 - The media has the right and the duty to report on all matters of legitimate public interest. This must be balanced against the obligation not to publish hate speech.

■ **Advocacy**

A media organisation may advocate its own views on controversial topics provided that it treats its readers fairly by:

- Making fact and opinion clearly distinguishable
- Not misrepresenting relevant facts
- Not distorting the facts in text or headlines

■ **Comment**

- The media is entitled to comment on or criticise any actions or events of public importance provided such comment is fair and honestly made.
- Comment shall be clearly presented as such and shall be made on facts truly stated or fairly indicated and referred to.
- Comment shall be an honest expression of opinion without malice or dishonest motives, and shall take fair account of all available material facts.

■ **Headlines, posters, pictures and captions**

- Headlines and captions to pictures shall give a reasonable reflection of the content of the report or picture in question.
- Posters shall not be misleading and shall give a reasonable reflection of the content of the report in question.
- Pictures shall not misrepresent or mislead and shall not be manipulated to do so.

■ **Confidential sources**

- The media has an obligation to protect confidential sources of information.

■ **Payment for articles**

- No payment shall be made for articles to persons involved in crime or other notorious behaviour, or to convicted persons and their family, friends or associates, except where the publication is in the public interest and payment is necessary.

■ **Violence**

- Due care and responsibility shall be exercised with regard to the presentation of brutality, violence and atrocities.

It is also important to note that ZAMEC has published a draft Sector Codes of Ethics for specialised fields in the media, namely:

- Media owners/publishers
- Media managers and editors
- Broadcasters
- Media photographers and video producers
- News agency journalists
- Public information and media advertisers

The codes contain additional provisions that focus specifically on the responsibilities of these particular media sectors. However, given that the codes are currently in draft form and that it is not clear if ZAMEC will indeed be able to operate effectively, details of the provisions are not included here.

6 COMMON LAW AND THE MEDIA

In this section you will learn:

- The definition of common law
- How Zambia's courts have dealt with a number of media-related common law issues, including:
 - Deportation of foreign journalists
 - Ministerial discretion regarding appointments to independent media bodies
 - The publication of classified documents
 - Defamation, including remedies for defamation and criminal defamation of the president

6.1 Definition of common law

The common law is judge-made law. It is made up of judgments handed down in cases adjudicating upon disputes brought by people, whether natural (individuals) or juristic (for example, companies). In common law legal systems such as Zambia's, judges are bound by the decisions of higher courts and also by the rules of precedent. This requires that rules laid down by the court in previous cases be followed, unless they were clearly wrongly decided. Legal rules and principles are therefore decided on an incremental, case-by-case basis.

This section focuses on a number of judgments that have a bearing on media law or freedom of expression in some way.

6.2 Deportation of foreign journalists

In the 2004 case of *Attorney-General v Roy Clarke* (Appeal No, 96A/2004), the

Supreme Court of Zambia judicially reviewed a judgment of a lower court, which had nullified a deportation order made by the minister of home affairs of a foreign journalist resident in Zambia. The journalist had written an article in which he referred to the president and a number of senior ministers in offensive terms, including their being ‘red-lipped, long-fingered baboons’.

Although the Supreme Court dismissed the appeal, finding that deportation was ‘disproportionate’, it is important to note that the Supreme Court made it very clear in a number of pronouncements that it considered that the right to freedom of expression clearly has limits. Indeed, the court found that the trial judge misdirected himself when he held that the minister’s action to deport the journalist violated article 20 of the Constitution – article 20 contains a number of important limitations on the right to freedom of expression.

The court went on to comment that what it found ‘irritating and offending’ were the references to the concerned persons’ physical appearance in crude language. The court made it clear that the journalist ought to be sensitive to ‘the cultural values and norms of the Zambian people’. Nevertheless, the court did hold that deportation was disproportionate and too extreme an action, and dismissed the appeal.

6.3 Ministerial discretion regarding appointments to independent media bodies

In *Minister of Information and Broadcasting and Another v Fanwell Chembo and Others* (Appeal No 76/2005), the Supreme Court of Zambia reviewed a judgment of a lower court, which had nullified the refusal by the then-minister of information and broadcasting services to forward some of the names of candidates to sit on the boards of the Independent Broadcasting Authority and the ZNBC, recommended by an ad hoc appointments committee to the National Assembly. The wording of the relevant sections at that time essentially provided that the boards consist of members appointed by the minister, on the recommendation of the appointments committee, subject to ratification by the National Assembly.

The Supreme Court found that the lower court had not considered the proper meaning of the term ‘recommendation’. The Supreme Court held that the word recommendation ‘implies a discretion in the person to whom it is made to accept or reject the recommendation’ and that ‘[i]n constituting the Boards, the Minister is not bound to accept the names recommended by the Ad hoc Appointments Committee’. The Supreme Court found that there was no illegality in the minister vetting certain names recommended to her, and that her decision could not be said to have been outrageous or irrational. Consequently, the Supreme Court allowed the appeal and set aside the judgment of the lower court.

6.4 Publication of classified documents

In *The People v M'membe and Others 1996/HP/38*, the High Court considered a case in which three people (either owners or senior staff of a newspaper) were arrested and charged under the State Security Act. *The Post* newspaper had published an article in issue number 401 revealing an alleged plot by government to hold a secret referendum on the proposed constitutional amendments. The three accused were charged with publishing a classified document.

The court found that the document in the possession of the accused, and which had given rise to the article, was not marked 'secret' and was not classified, although it allegedly contained information from a classified document. The High Court held that the document in possession of the accused 'bore no indication whatever that it could be a secret document. Neither could the contents of the document make the accused have reasonable grounds to believe that the document ... could be secret'. Furthermore, the High Court cast doubt on whether or not the classified document was in fact properly classified as it 'may not, by reason of its contents, be brought within the ambit of the State Security Act' given that it dealt with referendum issues, the contents of which 'cannot subvert the interests of the State' and that it 'contains nothing new and secret but [are] matters that were publicly discussed during the constitutional reform debates, which matters are common knowledge and which I take judicial notice [of]'. All charges against the accused were dismissed.

6.5 Defamation

This chapter has already dealt extensively with the general issue of defamation as it arises in respect of criminal defamation. However, it is important to note that defamation is more usually dealt with as a civil matter, where a person who has been defamed seeks damages to compensate for the defamation. All of the cases dealt with in this section arise in the context of civil cases of defamation, which is also known as 'libel' in Zambia. That term will be used in this section.

6.5.1 The defence of fair comment to an action for libel

This case deals with the 'fair comment' defence to an action for libel. In *Sata v Post Newspapers Ltd and Another (1995) High Court*, the plaintiff was a minister in the government. The defendants published various articles and a cartoon in their newspapers, which gave rise to the libel action. Before considering the merits of the case, the judge dealt with an argument put forward by the defendants that the common law of defamation in Zambia needed to change as a result of the constitutional right to freedom of the press. After discussing the development of the

common law of defamation or libel in countries such as the United States, the United Kingdom and Australia, the judge stated as follows:

There is no need to formulate a new set of principles to impose new fetters on the right of a public official to recover damages. However in order to counter the inhibiting or chilling effect of litigation, I am prepared to draw a firm distinction between an attack on the official public conduct of a public official and imputations that go beyond this and attack the private character of such an official, which attack would be universally unsanctioned. I am also prepared, when considering the defence of fair comment on a matter of public interest arising from the conduct of a public official, to be more generous and expansive in its application ... it seems to me that where an allegation complained of can be regarded as comment on the conduct of a public official in the performance of his official duties or on conduct reflecting upon his fitness or suitability to hold such office, freedom of speech and press can best be served in Zambia by the courts insisting upon a higher breaking point, or a greater margin of tolerance than in the case of a private attack, before an obvious comment based on facts which are substantially true can be regarded as unfair.

The court proceeded to examine the facts of the case and the various defamatory or libellous instances. Certain of these are highlighted here.

- One of the articles said the plaintiff's 'political prostitution prompted the former President's decision to fire him'. The defendants said that this was comment based on fact, but the court found that no facts supporting the statement were to be found in the newspapers' articles. Furthermore, the judge said that even if the facts relied on had been published – that is, that the plaintiff had changed political parties at some earlier point in his career after the abolition of the one-party system – 'I cannot imagine that anyone would consider a person to be a political prostitute for joining a party of his own choice after the reintroduction of a new political dispensation allowing for the formation of other parties'.
- Another article went on to describe the plaintiff in terms that the judge described as 'extravagantly uncomplimentary'. Nevertheless, the judge found there was a sufficient substratum of facts on which to base the comments made. The judge held that the global conclusion in the article about the plaintiff not being honourable 'was certainly harsh and probably an opinion not shared by anyone else but ... was prefixed by the examples which were listed. The law protects even the minority opinion of a defendant who honestly comments on a public official and has facts to lean on'. Consequently, the court found for the defendants on these issues.

- An article dealt with a bar brawl involving the plaintiff and another minister. The court quickly rejected any libel here (the plaintiff argued that it insinuated that he was unable to defend himself) and found for the defendants.
- Another article was an editorial, which labelled the minister ‘greedy’. In finding for the plaintiff, the court held that this was a ‘very personal characteristic’ and that ‘[n]o evidence was lead to support greed on the part of the plaintiff’. Consequently, the court held that greed was not an inference ‘which a fair-minded person might reasonably draw from such facts and could not ... represent the honest opinion of the writer’. The court reiterated the principle that ‘fair comment cannot avail the defendant where the allegation made cannot fairly and reasonably be inferred from the facts’.
- The next issue concerned two articles and a cartoon regarding financial irregularities involving the plaintiff. The court found that given that the Anti-Corruption Commission had handed over a docket with a view to securing the prosecution of the plaintiff, the report was substantially the truth and that the inferences and comments on such true representations of the facts were not actionable.

6.5.2 Remedies for defamation

Sata v Post Newspapers Ltd and Another (1995) High Court is an important decision in respect of the remedies for defamation. At the end of the case, the court found that the plaintiff was successful in respect of certain of the defamatory instances and awarded him compensatory damages in the form of money. Importantly, the court refused to order that a perpetual injunction be imposed upon the defendants preventing them from repeating the libel, saying ‘[t]he plaintiff is a political public figure and a permanent injunction, like any excessive award, would be certain to inhibit free debate’.

6.5.3 Criminal defamation

The People v Bright Mwape and Another (1995) High Court was a case of criminal defamation charges being brought against two journalists in respect of derogatory statements having been made against the president in an article. The defendants challenged the constitutionality of section 69 of the Penal Code (creating the offence of defamation of the president and which has already been dealt with elsewhere in this chapter), which they were being charged under. They argued that the provision violated the right to freedom of expression as well as the right to equality because it established a particular defamation offence in relation to the president. The High

Court rejected both arguments, saying that legitimate criticism would not constitute an offence under section 69, and therefore their freedom of expression rights were sufficiently protected. Furthermore, the High Court rejected the argument that an offence aimed at a particular person, namely the president, violated the equality provisions of the Constitution. The High Court held that Parliament was entitled to ‘emphasize the status of these categories of people [such as the President, foreign princes, etc.] and the seriousness of the matter. The repercussions that follow the defaming of the President or a foreign potentate are not the same as those that follow the defamation of an ordinary person’.

NOTES

- 1 See generally Patrick Matibini, *The Struggle for Media Law Reforms in Zambia*. Media Institute of Southern Africa–Zambia Chapter, 2006 and <http://www.state.gov/r/pa/ei/bgn/2359.htm>.
- 2 See Fackson Banda, ‘Key Issues in Public Service Broadcasting in Sub-Saharan Africa’. Paper commissioned by the Open Society Institute, 2006.

