

Media Law Handbook for Southern Africa

VOLUME 2

Media Law Handbook for Southern Africa

VOLUME 2

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: 978-0-9870243-2-9

© Konrad-Adenauer-Stiftung, 2013

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 could therefore not have been written without the very great assistance provided by lawyers, legal consultants and academics in the countries studied. As such, I am greatly indebted to Dr Tachilisa Balule (Botswana), Olivier Marc Mwamba Kabeya (Democratic Republic of the Congo, DRC), Adv. SP Sakoane (Lesotho), Kelvin Sentala (Malawi), 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, my French is not of a standard to engage properly in lengthy statutes and regulations, so I relied heavily on my able French translator, Laurent Badibanga, for the chapter on the DRC. Mr Badibanga was also responsible for rewriting the entire chapter into French, which French translation appears on the Konrad-Adenauer-Stiftung (KAS) website (www.kas.de/MediaLawAfrica). Again, I am indebted to him.

Finally, this project would not have happened without the 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; the irrepressible Markus Brauckmann brought the first volume to fruition, and ensured that lawyers and journalists on the subcontinent started talking about media law reform again; Christian Echle has been at the helm for the second volume and has made it clear that KAS will support those helping rid the subcontinent of laws that criminalise expression.

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

For over a decade, the Konrad-Adenauer-Stiftungs (KAS) Media Programme for sub-Saharan Africa has been focusing on the regulatory framework for journalists in Africa. Volume 2 of the *Media Law Handbook for Southern Africa* is an important milestone in this on-going work. It is a practical guide for journalists practising in the Democratic Republic of the Congo, Lesotho, Namibia, Zimbabwe and Tanzania. Volume 1 covered Botswana, Malawi, South Africa, Swaziland and Zambia. The handbook not only contains a comprehensive overview of applicable media laws (governing both the print and broadcast media) for each country reviewed, it also contains suggestions on possible law reforms to improve the protection of media in the countries under review.

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 in 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.

Volumes 1 and 2 of the handbook are designed to fill that gap and empower both media owners and journalists to deal with the legal aspects of their work. A digital version of both volumes can be found online at www.kas.de/MediaLawAfrica.

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.

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. But 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.

KAS Media Africa promotes a free media through its support of:

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

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

In supporting this project, KAS Media Africa 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 stood her in good stead in understanding the legal environments in Southern Africa.

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

Christian Echle
Head of the Regional Media Programme
Sub-Saharan Africa, KAS

Abbreviations

General

ACHPR	African Commission on Human and People's Rights
AU	African Union
CPA	Criminal Procedure Act
DRC	Democratic Republic of the Congo
ICT	Information and communication technology
JSC	Judicial Service(s) Commission
KAS	Konrad-Adenauer-Stiftung
MP	Member of Parliament
PAP	Pan-African Parliament

Democratic Republic of the Congo

CPA	Congolese Press Agency
HCB	High Council of Broadcasting
HCBC	High Council of Broadcasting and Communication
RTNC	<i>Radio Télévision Nationale Congolaise</i> – Congolese National Radio and Television Broadcaster

Lesotho

CPEA	Criminal Procedure and Evidence Act
LCA	Lesotho Communications Authority
LENA	Lesotho News Agency
LNBS	Lesotho National Broadcasting Service

Namibia

NAMPA	Namibia Press Agency
NBC	Namibian Broadcasting Corporation
NCC	Namibian Communications Commission

Tanzania

CCM	Chama Cha Mapinduzi
EPCA	Electronic and Postal Communications Act
HRGG	Human Rights and Good Governance

PFP	Police Force and Prisons
TBC	Tanzania Broadcasting Corporation
TCRA	Tanzania Communications Regulatory Authority
UCSAA	Universal Communications Service Access Act

Zimbabwe

AIPPA	Access to Information and Protection of Privacy Act
BAZ	Broadcasting Authority of Zimbabwe
CPEA	Criminal Procedure and Evidence Act
MCC	Media Complaints Committee
MDC	Movement for Democratic Change
PTC	Posts and Telecommunications Corporation
VMCZ	Voluntary Media Council of Zimbabwe
ZANU-PF	Zimbabwe African National Union – Patriot Front
ZBC	Zimbabwe Broadcasting Corporation

Contents

CHAPTER 9	DEMOCRATIC REPUBLIC OF THE CONGO	397
1	INTRODUCTION	397
2	THE MEDIA AND THE CONSTITUTION	398
2.1	Definition of a constitution	399
2.2	Definition of constitutional supremacy	399
2.3	Definition of a limitations clause	400
2.3.1	<i>State of emergency derogations</i>	400
2.3.2	<i>Rights-specific limitations</i>	401
2.4	Constitutional provisions that protect the media	401
2.4.1	<i>Rights that protect the media</i>	402
	<i>Freedom of expression</i>	402
	<i>Access to information and freedom of the press</i>	402
	<i>Privacy</i>	403
	<i>Freedom of thought, conscience and religion</i>	403
	<i>Freedom of association</i>	404
2.4.2	<i>Other constitutional provisions that assist the media</i>	404
	<i>Provisions regarding illiteracy eradication</i>	404
	<i>Provisions regarding intellectual property rights and cultural heritage protection</i>	405
	<i>Provisions regarding the functioning of Parliament</i>	405
	<i>Provisions regarding the functioning of the courts</i>	405
2.5	Constitutional provisions that might require caution from the media or might conflict with media interests	405
2.5.1	<i>Right to dignity</i>	406
2.5.2	<i>Right to privacy</i>	406
2.5.3	<i>Respecting the rights of others</i>	406
2.5.4	<i>States of emergency provisions</i>	406
2.6	Key institutions relevant to the media established under the Constitution of the DRC	407
2.6.1	<i>The High Council of Broadcasting and Communication</i>	407
2.6.2	<i>The judiciary</i>	407
2.7	Enforcing rights under the Constitution	409

2.8	The three branches of government and separation of powers	410
2.8.1	<i>Branches of government</i>	410
	<i>The executive</i>	410
	<i>The legislature</i>	411
	<i>The judiciary</i>	412
2.8.2	<i>Separation of powers</i>	412
2.9	Weaknesses in the Constitution that ought to be strengthened to protect the media	413
3	THE MEDIA AND LEGISLATION	413
3.1	Legislation: An introduction	413
3.1.1	<i>What is legislation?</i>	413
3.1.2	<i>The difference between a bill and an act</i>	414
3.2	Statutes governing the operations of the media in general	415
3.2.1	<i>Ordinance 23-113 of 25 April 1956: Travel Documents for the Press</i>	415
3.2.2	<i>Criminal Code, 1940</i>	417
3.2.3	<i>Ordinance 81-012 of 2 April 1981: Statute to Govern Journalists</i>	417
3.2.4	<i>High Council of Broadcasting and Communications Act 11/001 dated 10 January 2011</i>	421
	<i>The HCBC's main functions</i>	421
	<i>Sanctions</i>	422
3.3	Statutes governing the making of films	423
3.4	Statutes governing the broadcast media generally	424
3.4.1	<i>Statutes that regulate broadcasting generally</i>	424
3.4.2	<i>Establishment of the HCBC and the Regulatory Authority</i>	424
	<i>The HCBC</i>	424
	<i>The Regulatory Authority</i>	424
3.4.3	<i>Main functions</i>	424
	<i>The HCBC</i>	424
	<i>The Regulatory Authority</i>	425
3.4.4	<i>Appointment of members</i>	426
	<i>The HCBC</i>	426
	<i>The Regulatory Authority</i>	426
3.4.5	<i>Funding for the regulators</i>	426
	<i>The HCBC</i>	426
	<i>The Regulatory Authority</i>	427
3.4.6	<i>Licensing regime for broadcasters and signal distributors in the DRC</i>	427
	<i>Broadcast licensing</i>	427
	<i>Frequency spectrum licensing</i>	428

3.4.7	<i>Responsibilities of broadcasters in the DRC</i>	428
	<i>Adherence to licence conditions and other requirements</i>	428
	<i>Adherence to local content requirements</i>	429
	<i>Right of reply</i>	429
	<i>Adherence to ownership and control limitations for private broadcasting services</i>	430
	<i>Adherence to statutory prohibitions on broadcasting content</i>	430
	<i>Providing information regarding a service</i>	430
3.4.8	<i>Are the HCBC and the Regulatory Authority independent regulators?</i>	430
	<i>The HCBC</i>	431
	<i>The Regulatory Authority</i>	431
3.4.9	<i>Weaknesses in the legislation which should be amended</i>	431
3.5	<i>Statutes that regulate the state broadcast media</i>	432
3.5.1	<i>Establishment of the RTNC</i>	432
3.5.2	<i>The RTNC's mandate</i>	432
3.5.3	<i>The RTNC's governing structures and member appointment</i>	433
	<i>Board of directors</i>	433
	<i>Managerial Committee</i>	433
	<i>Office of Chartered Accountants</i>	433
3.5.4	<i>Funding for the RTNC</i>	434
3.5.5	<i>The RTNC: Public or state broadcaster?</i>	434
3.5.6	<i>Weaknesses in Ordinance 050 which should be amended</i>	435
3.6	<i>Statutes that govern the state newsgathering agency</i>	435
3.6.1	<i>Establishment of the Congolese Press Agency</i>	436
3.6.2	<i>The CPA's main mandate</i>	436
3.6.3	<i>The CPA's governing structures and member appointment</i>	436
3.6.4	<i>Funding for the CPA</i>	437
3.7	<i>Statutes that undermine a journalist's duty to protect his or her sources</i>	438
3.8	<i>Statutes that prohibit the publication of certain kinds of information</i>	438
3.8.1	<i>Prohibition on the publication of information relating to legal proceedings</i>	439
3.8.2	<i>Prohibition on the publication of state security-related information</i>	440
	<i>Press Freedom Act, 96-002 of 1996</i>	440
	<i>High Council of Broadcasting Act, Act 11/001 of 2011</i>	440
	<i>Criminal Code, 1940</i>	440
3.8.3	<i>Prohibition on the publication of information relating to state secrets</i>	441
3.8.4	<i>Prohibition on the publication of false information that alarms the nation</i>	441

3.8.5	<i>Prohibition on the publication of expression which insults the president</i>	441
3.8.6	<i>Prohibition on the publication of expression which offends against public morals</i>	441
3.8.7	<i>Prohibition on the publication of expression which constitutes xenophobia</i>	441
3.8.8	<i>Prohibition on the publication of expression which promotes hate speech or discrimination</i>	441
4	REGULATIONS AFFECTING THE MEDIA	442
4.1	Definition of regulations	442
4.2	Key regulations governing the media	442
4.2.1	<i>Press, Radio, Television and Advertising Fees Decree</i>	442
4.2.2	<i>Broadcast Press Freedom and Professional Practice Decree</i>	442
4.2.3	<i>Radio and Television and Compliance Commission, Ministerial Decree</i>	445
	<i>Establishment of the Compliance Commission</i>	445
	<i>Mandate of the Compliance Commission</i>	445
	<i>Funding of the Compliance Commission</i>	446
4.2.4	<i>Administrative Fees on Photographic or Filmed Reportage Ministerial Decree</i>	446
4.2.5	<i>Broadcasting Press Freedom and Professional Practice Implementing Measures – Ministerial Decree</i>	446
4.2.6	<i>The Code of Conduct for Congolese Journalists Regulations</i>	447
5	CASE LAW AND THE MEDIA	448
	Notes	449
CHAPTER 10	LESOTHO	451
1	INTRODUCTION	451
2	THE MEDIA AND THE CONSTITUTION	452
2.1	Definition of a constitution	452
2.2	Definition of constitutional supremacy	453
2.3	Definition of a limitations clause	453
2.4	Constitutional provisions that protect the media	454
2.4.1	<i>Freedom of expression</i>	454
2.4.2	<i>Freedom from arbitrary search or entry</i>	456

2.4.3	<i>Freedom of conscience</i>	457
2.4.4	<i>Freedom of association</i>	457
2.4.5	<i>Right to a fair trial</i>	458
2.5	Constitutional provisions that might require caution from the media or might conflict with media interests	458
2.5.1	<i>Right to respect for private and family life</i>	458
2.5.2	<i>States of emergency and derogations from fundamental human rights and freedoms provisions</i>	459
2.6	Key institutions relevant to the media established under the Constitution of Lesotho	459
2.6.1	<i>The judiciary</i>	459
2.6.2	<i>The Judicial Service Commission</i>	460
2.6.3	<i>The Ombudsman</i>	460
2.7	Enforcing rights under the Constitution	461
2.8	The three branches of government and separation of powers	461
2.8.1	<i>Branches of government</i>	461
	<i>The executive</i>	461
	<i>The legislature</i>	463
	<i>The judiciary</i>	463
2.8.2	<i>Separation of powers</i>	463
2.9	Weaknesses in the Constitution that ought to be strengthened to protect the media	463
2.9.1	<i>Remove internal constitutional qualifiers to certain rights</i>	464
2.9.2	<i>Strengthen procedural consultation provisions</i>	464
2.9.3	<i>Bolster independence of the broadcasting regulator and of the public broadcaster</i>	465
3	THE MEDIA AND LEGISLATION	465
3.1	Legislation: An introduction	465
3.1.1	<i>What is legislation?</i>	465
3.1.2	<i>The difference between a bill and an act</i>	466
3.2	Statutes governing the print media	467
3.3	Statutes governing the broadcast media generally	468
3.3.1	<i>Statutes that regulate broadcasting generally</i>	468
3.3.2	<i>Establishment of the LCA</i>	468
3.3.3	<i>Main functions of the LCA</i>	468
3.3.4	<i>Appointment of LCA board members</i>	468
3.3.5	<i>Funding for the LCA</i>	469
3.3.6	<i>Making broadcasting regulations</i>	469
3.3.7	<i>Licensing regime for broadcasters in Lesotho</i>	469
	<i>Broadcasting licence requirement</i>	469

	<i>Classes of broadcasting licences</i>	470
	<i>Broadcasting licensing process</i>	470
	<i>Frequency spectrum licensing</i>	470
3.3.8	<i>Responsibilities of broadcasters under the LCA Act</i>	470
	<i>Adherence to licence conditions</i>	470
	<i>Reporting obligations</i>	471
	<i>Adherence to broadcasting rules and regulations</i>	471
3.3.9	<i>Is the LCA an independent regulator?</i>	471
3.3.10	<i>Amending the legislation to strengthen the broadcast media generally</i>	472
3.4	<i>Statutes that regulate the state broadcast media and the state news agency</i>	473
3.4.1	<i>State broadcast media</i>	473
3.4.2	<i>State news agency</i>	474
3.5	<i>Statutes governing broadcasting signal distribution or transmission</i>	475
3.6	<i>Statutes that undermine a journalist's duty to protect his or her sources</i>	475
3.6.1	<i>Criminal Procedure and Evidence Act, 1981</i>	475
	<i>Preparatory examinations</i>	475
	<i>Criminal trial proceedings</i>	476
3.6.2	<i>Internal Security (General) Act, 1984</i>	476
3.7	<i>Statutes that prohibit the publication of certain kinds of information</i>	477
3.7.1	<i>Prohibition on the publication of a minor's identity in legal proceedings</i>	477
3.7.2	<i>Prohibition on the publication of certain kinds of information relating to legal proceedings</i>	478
	<i>Sexual Offences Act, 2003</i>	478
	<i>Criminal Procedure and Evidence Act, 1981</i>	478
3.7.3	<i>Prohibition on the publication of state security-related information</i>	479
	<i>Printing and Publishing Act of 1967</i>	479
	<i>Official Secrets Act, 1967</i>	479
	<i>Internal Security (General) Act, 1984</i>	479
	<i>Police Service Act, 1998</i>	480
	<i>Prisons Proclamation of 1957</i>	480
	<i>Sedition Proclamation 44 of 1938</i>	480
	<i>National Security Regulations, 2000</i>	481
3.7.4	<i>Prohibition on expression that is obscene</i>	481
3.7.5	<i>Prohibition on expression that violates fundamental rights</i>	481
3.7.6	<i>Prohibition on expression relating to financial institutions</i>	482
3.8	<i>Legislation that specifically assists the media in performing its functions</i>	482
3.8.1	<i>Introduction</i>	482
3.8.2	<i>Local Government Elections Act, 1998</i>	482
3.8.3	<i>National Assembly Election Order (No. 10) 1992</i>	483
3.8.4	<i>Parliamentary Powers and Privileges Act, 1994</i>	484

3.8.5	<i>National Assembly Standing Orders, 2008</i>	484
3.8.6	<i>High Court Act, 1978</i>	485
3.8.7	<i>Subordinate Courts Order, 1988</i>	485
4	REGULATIONS AND RULES AFFECTING THE BROADCAST MEDIA	485
4.1	Definition of regulations and rules	485
4.2	Key regulations governing broadcasting	486
4.2.1	<i>Broadcasting Rules 2004</i>	486
	<i>Code of Practice</i>	486
	<i>Advertisement and Sponsorship Code</i>	489
	<i>Compliance issues</i>	490
4.2.2	<i>Broadcasting Classification Regulations, 2007</i>	490
4.2.3	<i>Licensing Fees Rules, 2008</i>	491
4.2.4	<i>Administrative, Procedural and Service Provision Rules, 2000</i>	491
5	MEDIA SELF-REGULATION	492
6	COMMON LAW AND THE MEDIA	492
6.1	Definition of common law	492
6.2	Defamation	493
6.2.1	<i>Definition of defamation</i>	493
6.2.2	<i>Defences to an action for defamation</i>	493
6.2.3	<i>Remedies for defamation</i>	496
6.3	Privacy	496
6.4	Contempt of Court	497
6.4.1	<i>The sub-judice rule</i>	497
6.4.2	<i>Scandalising the court</i>	498
	Notes	498
CHAPTER 11	NAMIBIA	499
1	INTRODUCTION	499
2	THE MEDIA AND THE CONSTITUTION	500
2.1	Definition of a constitution	500
2.2	Definition of constitutional supremacy	500
2.3	Definition of a limitations clause	501
2.3.1	<i>Internal limitations</i>	501
2.3.2	<i>General limitations</i>	501

2.4	Constitutional provisions that protect the media	502
2.4.1	<i>Freedom of expression</i>	502
2.4.2	<i>Administrative justice</i>	503
2.4.3	<i>Privacy</i>	503
2.4.4	<i>Emergency provisions</i>	504
2.4.5	<i>Public access to sittings of the National Assembly</i>	504
2.4.6	<i>State policy principles encourage public debate</i>	505
2.5	Constitutional provisions that might require caution from the media or might conflict with media interests	505
2.5.1	<i>Internal limitations on freedom of expression</i>	505
2.5.2	<i>Dignity</i>	506
2.5.3	<i>Privacy</i>	506
2.6	Key institutions relevant to the media established under the Namibian Constitution	507
2.6.1	<i>The judiciary</i>	507
2.6.2	<i>The Ombudsman</i>	507
2.6.3	<i>The Judicial Services Commission</i>	507
2.7	Enforcing rights under the Constitution	508
2.8	The three branches of government and separation of powers	509
2.8.1	<i>Branches of government</i>	509
	<i>The executive</i>	509
	<i>The legislature</i>	510
	<i>The judiciary</i>	510
2.8.2	<i>Separation of powers</i>	510
2.9	Weaknesses in the Constitution that ought to be strengthened to protect the media	510
2.9.1	<i>Remove internal limitations on fundamental rights and freedoms</i>	511
2.9.2	<i>Recognise the right to information</i>	511
2.9.3	<i>Provide for an independent broadcasting regulator and public broadcaster</i>	511
3	THE MEDIA AND LEGISLATION	511
3.1	Legislation: An introduction	512
3.1.1	<i>What is legislation?</i>	512
3.1.2	<i>The difference between a bill and an act</i>	512
3.1.3	<i>Why do some pieces of old South African legislation continue to be law in Namibia?</i>	512
3.2	Statutes governing state media – Newsgathering	512
3.2.1	<i>Establishment of the Namibian Press Agency</i>	512
3.2.2	<i>NAMPA's main mandate</i>	513
3.2.3	<i>Appointment of the NAMPA Board</i>	513

3.2.4	<i>Funding for NAMPA</i>	513
3.3	Statutes that govern state media – state newspaper	513
3.3.1	<i>Establishment of the state-sponsored newspaper</i>	513
3.3.2	<i>Main functions</i>	513
3.3.3	<i>Board appointments</i>	514
3.3.4	<i>Funding</i>	514
3.3.5	<i>Is the newspaper independent?</i>	514
3.3.6	<i>Weaknesses in the statute that should be amended to strengthen the media generally</i>	514
3.4	Statutes governing state media: The Namibian Broadcasting Corporation	515
3.4.1	<i>Establishment of the NBC</i>	515
3.4.2	<i>The NBC's mandate</i>	515
3.4.3	<i>Appointment of the NBC Board</i>	515
3.4.4	<i>Funding for the NBC</i>	515
3.4.5	<i>NBC: Public or state broadcaster?</i>	516
3.4.6	<i>Weaknesses in the NBC statute that should be amended to strengthen the media generally</i>	517
3.5	Statutes governing media more generally: Registration of newspapers	517
3.5.1	<i>Introduction</i>	517
3.5.2	<i>Requirements associated with registration?</i>	517
3.5.3	<i>Penalties for non-compliance with the registration and associated requirements</i>	518
3.5.4	<i>Amending the legislation to strengthen the media generally</i>	518
3.6	Statutes governing media more generally: Broadcasting	518
3.6.1	<i>Statutes that regulate broadcasting</i>	518
3.6.2	<i>Establishment of the NCC</i>	518
3.6.3	<i>Main functions of the NCC</i>	518
3.6.4	<i>Appointment of NCC commissioners</i>	519
3.6.5	<i>Funding for the NCC</i>	519
3.6.6	<i>Making broadcasting regulations</i>	519
3.6.7	<i>Licensing regime for broadcasters in Namibia</i>	520
3.6.8	<i>Responsibilities of broadcasters in Namibia</i>	520
	<i>Adherence to licence conditions</i>	520
	<i>General content requirements</i>	520
	<i>Political broadcasting obligations</i>	521
	<i>Right of reply</i>	521
	<i>Submission of financial statements</i>	521
	<i>Obligation to broadcast material in the interest of national security</i>	521
3.6.9	<i>Is the NCC an independent regulator?</i>	521
3.6.10	<i>Amending the legislation to strengthen the media generally</i>	522

3.7	Statutes that undermine a journalist's duty to protect his or her sources	523
3.7.1	<i>Criminal Procedure Act, Act 51 of 1977</i>	523
3.7.2	<i>Security Commission Act, Act 18 of 2001</i>	523
3.8	Statutes that prohibit the publication of certain kinds of information	524
3.8.1	<i>Prohibition on the publication of a minor's identity in legal proceedings</i>	524
	<i>General Law Amendment Ordinance, 22 of 1958</i>	524
	<i>Criminal Procedure Act, Act 51 of 1977</i>	525
3.8.2	<i>Prohibition on the publication of certain information relating to criminal proceedings</i>	525
3.8.3	<i>Prohibition on the publication of identities involved in protection order proceedings</i>	526
3.8.4	<i>Prohibition on the publication of information relating to defence, security and prisons</i>	526
	<i>Defence Act, Act 1 of 2002</i>	526
	<i>Protection of Information Act, Act 84 of 1982</i>	526
	<i>Prisons Act, Act 17 of 1998</i>	527
3.8.5	<i>Prohibition on the publication of obscene photographic matter</i>	527
3.8.6	<i>Prohibition on the publication of advertising on roadsides</i>	527
3.8.7	<i>Prohibition on the disclosure of Bank of Namibia information</i>	528
3.8.8	<i>Prohibition on the publication of racist publications</i>	528
4	REGULATIONS AFFECTING THE MEDIA	529
4.1	Definition of rules	529
4.2	The different types of broadcasting licences and media diversity	529
4.3	Restrictions on broadcasters	530
4.3.1	<i>News commentary</i>	530
4.3.2	<i>Party election broadcasting</i>	530
4.3.3	<i>Advertising</i>	532
4.3.4	<i>Sponsored programming</i>	532
5	COMMON LAW AND THE MEDIA	532
5.1	Definition of common law	532
5.2	Defamation	532
5.2.1	<i>Definition of defamation</i>	532
5.2.2	<i>Defences to an action for defamation</i>	533
5.2.3	<i>Remedies for defamation</i>	534
5.3	Contempt of court	535
5.3.1	<i>The sub-judice rule</i>	535
5.3.2	<i>Scandalising the court</i>	535

CHAPTER 12 TANZANIA	537
1 INTRODUCTION	537
2 THE MEDIA AND THE CONSTITUTION	538
2.1 Definition of a constitution	538
2.2 Definition of constitutional supremacy	539
2.3 Definition of a limitations clause	540
2.3.1 <i>State of emergency limitations</i>	540
2.3.2 <i>General limitations</i>	541
2.3.3 <i>Internal limitations</i>	542
2.4 Constitutional provisions that protect the media	542
2.4.1 <i>Rights that protect the media</i>	543
<i>Freedom of expression</i>	543
<i>Privacy and personal security</i>	543
<i>Freedom of association</i>	544
<i>Freedom to participate in public affairs</i>	544
2.4.2 <i>Provisions regarding the functioning of Parliament</i>	545
2.5 Constitutional provisions that might require caution from the media or might conflict with media interests	545
2.5.1 <i>Right to dignity</i>	545
2.5.2 <i>Right to privacy</i>	545
2.5.3 <i>States of emergency provisions</i>	546
2.5.4 <i>Fundamental duties</i>	546
2.6 Key institutions relevant to the media established under the Tanzania Constitution	546
2.6.1 <i>The judiciary</i>	547
2.6.2 <i>The Judicial Service Commission</i>	548
2.6.3 <i>Commission for Human Rights and Good Governance</i>	549
2.7 Enforcing rights under the Constitution	551
2.8 The three branches of government and separation of powers	551
2.8.1 <i>Branches of government</i>	551
<i>The executive</i>	551
<i>The legislature</i>	552
<i>The judiciary</i>	553
2.8.2 <i>Separation of powers</i>	553
2.9 Weaknesses in the Constitution that ought to be strengthened to protect the media	553
2.9.1 <i>Remove internal constitutional limitation on the right to privacy</i>	554
2.9.2 <i>Improve the general limitations clause</i>	554
2.9.3 <i>Improve independence of the HRGG Commission</i>	554

2.9.4	<i>Provide constitutional protection for the broadcasting regulator</i>	555
2.9.5	<i>Provide constitutional protection for the public broadcaster</i>	555
3	THE MEDIA AND LEGISLATION	555
3.1	Legislation: An introduction	556
3.1.1	<i>What is legislation?</i>	556
3.1.2	<i>The difference between a bill and an act</i>	556
3.2	Statutes governing print media	557
3.2.1	<i>Registration of newspapers</i>	557
3.2.2	<i>Bonds to be paid by newspapers</i>	558
3.2.3	<i>Information to be published in every newspaper and copies to be kept and produced</i>	558
3.2.4	<i>Seizures of newspapers, searches of premises and destruction of newspaper</i>	558
3.3	Statutes governing films	559
3.4	Statutes governing the broadcast media generally	560
3.4.1	<i>Statutes that regulate broadcasting generally</i>	560
3.4.2	<i>Establishment of the TCRA, the Content Committee and the Council</i>	560
	<i>The Tanzania Communications Regulatory Authority</i>	560
	<i>The Content Committee</i>	560
	<i>The TCRA Consumer Consultative Council</i>	560
3.4.3	<i>Main functions of the TCRA, the Content Committee and the Council</i>	561
	<i>The TCRA</i>	561
	<i>The Content Committee</i>	562
	<i>The TCRA Consumer Consultative Council</i>	563
3.4.4	<i>Appointment of TCRA Board, Content Committee and Council members</i>	563
	<i>The TCRA Board</i>	563
	<i>The Content Committee</i>	564
	<i>The TCRA Consumer Consultative Council</i>	564
3.4.5	<i>Funding for the TCRA, the Content Committee and the Council</i>	565
	<i>The TCRA</i>	565
	<i>The Content Committee</i>	565
	<i>The TCRA Consumer Consultative Council</i>	565
3.4.6	<i>Making broadcasting regulations</i>	566
3.4.7	<i>Licensing regime for broadcasters in Tanzania</i>	567
	<i>Categories of broadcasting services</i>	567
	<i>Frequency spectrum licensing</i>	568
3.4.8	<i>Responsibilities of broadcasters in Tanzania</i>	568

<i>Adherence to licence conditions</i>	568
<i>Adherence to content requirements or restrictions</i>	568
Prohibitions against transmitting certain types of information communication	568
Adherence to a Code of Conduct	568
Requirements regarding events of national interest	569
Requirements regarding news and current affairs	569
Adherence to local content quotas	570
Official languages	570
Advertising and sponsorship	570
Educational content	571
Content for the visually- and hearing-impaired	571
Political content	572
Counter-versions or right of reply	572
<i>Adherence to ownership and control requirements</i>	572
<i>Adherence to pricing and billing requirements</i>	572
<i>Adherence to duty of customer confidentiality</i>	573
<i>Payment of universal service levy</i>	573
3.4.9 <i>Is the TCRA an independent regulator?</i>	573
3.4.10 <i>Amending the legislation to strengthen the broadcast media generally</i>	573
3.5 Statutes that regulate the public broadcast media	574
3.5.1 <i>Introduction</i>	574
3.5.2 <i>Establishment of the TBC</i>	574
3.5.3 <i>The TBC's mandate</i>	574
3.5.4 <i>Appointment of the TBC Board</i>	575
3.5.5 <i>Funding for the TBC</i>	575
3.5.6 <i>The TBC: Public or state broadcaster?</i>	576
3.5.7 <i>Weaknesses in the broadcasting legislation which should be addressed to strengthen the TBC</i>	576
3.6 Statutes governing broadcasting signal distribution	576
3.7 Statutes that undermine a journalist's duty to protect his or her sources	577
3.7.1 <i>Criminal Procedure Act [CAP 20 R.E. 2002]</i>	577
3.7.2 <i>Public Leadership Code of Ethics Act, Act 13 of 1995</i>	577
3.7.3 <i>Penal Code [Cap 16]</i>	578
3.8 Statutes that prohibit the publication of certain kinds of information	578
3.8.1 <i>Prohibition on the publication of information prejudicial to a child</i>	579
3.8.2 <i>Prohibition on the publication of certain kinds of information relating to legal proceedings</i>	579
<i>Law of the Child Act, Act 21 of 2009</i>	579
<i>Criminal Procedure Act [CAP 20 R.E. 2002]</i>	579

	<i>Penal Code [Cap 16]</i>	579
	<i>Newspapers Act, Act 3 of 1976</i>	580
3.8.3	<i>Prohibition on the publication of state security-related information</i>	580
	<i>National Security Act, 1970</i>	580
	<i>Tanzania Intelligence and Security Service Act, 1996</i>	581
	<i>Police Force and Prisons Commission Act, Act 8 of 1990</i>	581
	<i>Films and Stage Plays Act, 1976</i>	581
	<i>Penal Code [Cap 16]</i>	581
	<i>Newspapers Act, Act 3 of 1976</i>	582
3.8.4	<i>Prohibition on publications which the president considers to be contrary to the public interest</i>	582
3.8.5	<i>Prohibition on publications which promote ill-will or hostility between classes of the population</i>	583
3.8.6	<i>Prohibition on obscene publications</i>	583
	<i>Law of the Child Act, Act 21 of 2009</i>	583
	<i>Penal Code [Cap 16]</i>	583
	<i>Films and Stage Plays Act, 1976</i>	583
3.8.7	<i>Prohibition on the publication of incitement to violence</i>	583
3.8.8	<i>Prohibition on the publication of children and extreme violence</i>	584
3.8.9	<i>Prohibition on the publication of false news</i>	584
3.8.10	<i>Prohibition on the publication of misleading information regarding HIV and AIDS</i>	584
3.8.11	<i>Prohibition on the publication of information regarding the civil service</i>	584
3.8.12	<i>Prohibition on the publication of election-related information</i>	585
3.8.13	<i>Prohibition on the publication of criminal defamation</i>	585
	<i>Offence of libel</i>	585
	<i>Defamation of a foreign dignitary</i>	587
3.9	Legislation that specifically assists the media in performing its functions	587
4	REGULATIONS AFFECTING THE BROADCAST MEDIA	588
4.1	Definition of regulations	588
4.2	Key regulations governing broadcasting content	588
4.3	Other key broadcasting-related regulations	596
5	MEDIA SELF-REGULATION	596
5.1	Code of practice for media owners/publishers	597
5.2	Code of ethical practice for media managers/editors	597
5.3	The Professional Code of Ethics for Journalists	599
	Notes	602

CHAPTER 13 ZIMBABWE	603
1 INTRODUCTION	603
2 THE MEDIA AND THE CONSTITUTION	604
2.1 Definition of a constitution	604
2.2 Definition of constitutional supremacy	605
2.3 Definition of a limitations clause	606
2.3.1 <i>Public emergency limitations</i>	606
2.3.2 <i>General limitations</i>	607
2.4 Constitutional provisions that protect the media	608
2.4.1 <i>Rights that protect the media</i>	608
<i>Freedom of expression and freedom of the media</i>	608
<i>Right of access to information</i>	610
<i>Right to administrative justice</i>	612
<i>Privacy</i>	613
<i>Freedom of assembly and association</i>	613
<i>Freedom of conscience</i>	613
<i>Freedom of profession, trade or occupation</i>	614
2.4.2 <i>Other constitutional provisions that assist the media</i>	614
<i>Provisions regarding good governance</i>	614
<i>Provisions regarding the functioning of Parliament</i>	616
2.5 Constitutional provisions that might require caution from the media or might conflict with media interests	617
2.5.1 <i>Right to human dignity</i>	617
2.5.2 <i>Right to privacy</i>	617
2.5.3 <i>Internal limitation to the right to freedom of expression</i>	617
2.5.4 <i>States of emergency provisions</i>	618
2.6 Key institutions relevant to the media established under the Constitution of Zimbabwe	618
2.6.1 <i>The judiciary</i>	619
2.6.2 <i>The Judicial Service Commission</i>	619
2.6.3 <i>The Human Rights Commission</i>	620
2.6.4 <i>The Zimbabwe Media Commission</i>	621
2.6.5 <i>National Peace and Reconciliation Commission</i>	622
2.6.6 <i>Zimbabwe Anti-Corruption Commission</i>	623
2.6.7 <i>Important features of the independent commissions supporting democracy</i>	624
2.7 Enforcing rights under the Constitution	625
2.8 The three branches of government and separation of powers	625
2.8.1 <i>Branches of government</i>	625

<i>The executive</i>	625
<i>The legislature</i>	626
<i>The judiciary</i>	627
2.8.2 <i>Separation of powers</i>	627
2.9 Weaknesses in the Constitution that ought to be strengthened to protect the media	628
2.9.1 <i>Remove internal constitutional limitations</i>	628
2.9.2 <i>Licensing powers to be given to the Zimbabwe Media Commission</i>	628
2.9.3 <i>Constitutional protection for the public broadcaster</i>	628
3 THE MEDIA AND LEGISLATION	628
3.1 Legislation: An introduction	629
3.1.1 <i>What is legislation?</i>	629
3.1.2 <i>The difference between a bill and an act</i>	630
3.2 Statutes governing the print media	630
3.2.1 <i>Printed Publications Act, 1975</i>	631
3.2.2 <i>Access to Information and Protection of Privacy Act, 2002</i>	632
<i>Registration of the media</i>	632
<i>Registration of journalists</i>	633
<i>Regulation of the media</i>	634
<i>Media and Information Fund</i>	637
3.3 Statutes governing news agencies	638
3.4 Statutes governing the broadcast media generally	638
3.4.1 <i>Statutes that regulate broadcasting generally</i>	638
3.4.2 <i>Establishment of the Broadcasting Authority of Zimbabwe</i>	639
3.4.3 <i>Main functions of the BAZ</i>	639
3.4.4 <i>Appointment of BAZ board members</i>	641
3.4.5 <i>Funding for the BAZ</i>	642
3.4.6 <i>Making broadcasting regulations</i>	642
3.4.7 <i>Licensing regime for broadcasters in Zimbabwe</i>	642
<i>Categories of broadcasting services</i>	642
<i>Broadcasting licensing processes</i>	644
<i>Frequency spectrum licensing</i>	644
3.4.8 <i>Responsibilities of broadcasters in Zimbabwe</i>	645
<i>Adherence to licence conditions, including statutory standard terms and conditions</i>	645
<i>Adherence to local content conditions</i>	647
<i>Adherence to codes of conduct</i>	649
<i>Adherence to ownership and control requirements</i>	649
3.4.9 <i>Is the BAZ an independent regulator?</i>	650

3.4.10	<i>Weaknesses in the legislation that should be amended to strengthen the broadcast media generally</i>	650
3.5	Statutes regulating the public broadcast media	651
3.5.1	<i>Introduction</i>	651
3.5.2	<i>Establishment of the ZBC</i>	651
3.5.3	<i>The ZBC's mandate</i>	651
3.5.4	<i>Appointment of the ZBC Board</i>	652
3.5.5	<i>Funding for the ZBC</i>	652
3.5.6	<i>The ZBC: Public or state broadcaster?</i>	652
3.5.7	<i>Weaknesses in the Broadcasting Act which should be addressed to strengthen the public broadcaster</i>	653
3.6	Statutes governing broadcasting signal distribution	653
3.6.1	<i>Licences required by broadcasting signal distribution providers</i>	653
3.6.2	<i>The regulatory framework for broadcasting signal distributors</i>	654
3.7	Statutes that undermine a journalist's duty to protect his or her sources	654
3.7.1	<i>Access to Information and Protection of Privacy Act</i>	655
3.7.2	<i>Criminal Procedure and Evidence Act</i>	655
3.8	Statutes that prohibit the publication of certain kinds of information	656
3.8.1	<i>Prohibition on the publication of a minor's identity in legal proceedings</i>	656
3.8.2	<i>Prohibition on the publication of certain kinds of information relating to legal proceedings</i>	657
	<i>Censorship and Entertainments Control Act [Chap. 10:04]</i>	657
	<i>Criminal Procedure and Evidence Act [Chap 9:07]</i>	657
3.8.3	<i>Prohibition on the publication of state security-related information</i>	658
	<i>Censorship & Entertainments Control Act [Chap. 10:04]</i>	658
	<i>Official Secrets Act [Chap. 11:09]</i>	658
	<i>The Police Act [Chap. 11:10]</i>	658
	<i>Prisons Act [Chap 7:11]</i>	659
3.8.4	<i>Prohibition on the publication of false news</i>	659
	<i>Access to Information and Protection of Privacy Act [10:27]</i>	659
	<i>Criminal Law (Codifications and Reform) Act [Chap 9:23]</i>	660
3.8.5	<i>Prohibition on insulting the president</i>	661
3.8.6	<i>Prohibition on the publication of criminal insult</i>	661
3.8.7	<i>Prohibition on invasion of privacy</i>	661
3.8.8	<i>Prohibition on the publication of criminal defamation</i>	662
3.8.9	<i>Prohibition on the publication of obscenity</i>	662
	<i>Censorship & Entertainments Control Act [Chap. 10:04]</i>	662
	<i>Materials regulated under the Censorship Act</i>	662

<i>Bodies established under the Censorship Act, appointment of members, key functions</i>	662
<i>Classification of publications</i>	664
<i>Classification of films</i>	664
3.8.10 <i>Prohibition on the publication of threats to public health</i>	666
3.8.11 <i>Prohibition on the publication of threats to the economic interests of the state</i>	666
3.8.12 <i>Prohibition on the publication of statements causing offence to persons of a particular race, religion, ethnicity, etc.</i>	667
3.8.13 <i>Prohibition on advertising on roadsides or near railways</i>	667
3.9 <i>Legislation prohibiting interception of communication</i>	668
3.10 <i>Legislation that specifically assists the media in performing its functions</i>	668
3.10.1 <i>Access to Information and Protection of Privacy Act [10:27]</i>	668
3.10.2 <i>Mandatory non-disclosure provisions</i>	670
3.10.3 <i>Discretionary non-disclosure provisions</i>	672
4 REGULATIONS AFFECTING THE BROADCAST MEDIA	674
4.1 <i>Definition of regulations</i>	674
4.2 <i>Key regulations governing broadcasting</i>	675
4.3 <i>Other key media-related regulations</i>	681
5 MEDIA SELF-REGULATION	681
6 COMMON LAW AND THE MEDIA	687
6.1 <i>Definition of common law?</i>	687
6.2 <i>Defamation</i>	687
6.2.1 <i>Can an organ of state sue for defamation and does a statutory corporation constitute an organ of state?</i>	687
6.2.2 <i>Factors to be taken into account in assessing damages</i>	688
6.3 <i>Constitutionality of provisions prohibiting the publication of false news</i>	688
6.4 <i>A journalist's right to protect sources</i>	689
6.5 <i>Constitutionality of provisions granting the Zimbabwe Broadcasting Corporation a monopoly in respect of broadcasting</i>	689
 CHAPTER 14 MEDIA LAW IN THE REGION: WHERE TO FROM HERE?	 691
1 INTRODUCTION	691
2 A BIRD'S-EYE VIEW OF COUNTRY COMPLIANCE WITH THE TEN KEY PRINCIPLES OF DEMOCRATIC MEDIA REGULATION	692

2.1	Principle 1: Freedom of the press and other media	692
2.2	Principle 2: An independent media	692
2.3	Principle 3: Diversity and pluralism in the media	693
2.4	Principle 4: Professional media	693
2.5	Principle 5: Protecting confidentiality of sources	693
2.6	Principle 6: Access to information	694
2.7	Principle 7: Commitment to transparency and accountability	695
2.8	Principle 8: Commitment to public debate and discussion	695
2.9	Principle 9: Availability of local content	695
2.10	Principle 10: Ensuring that states do not use their advertising power to influence content	696
3	A BIRD'S-EYE VIEW OF COUNTRY COMPLIANCE WITH THE EIGHT KEY PRINCIPLES OF DEMOCRATIC BROADCASTING REGULATION	696
3.1	Principle 1: National frameworks for the regulation of broadcasting must be set down in law	696
3.2	Principle 2: Independent regulation of broadcasting	696
3.3	Principle 3: Pluralistic broadcasting environment with a three-tier system for broadcasting: public, commercial and community	697
3.4	Principle 4: Public as opposed to state broadcasting services	697
3.5	Principle 5: Availability of community broadcasting services	698
3.6	Principle 6: Equitable, fair, transparent and participatory licensing processes, including of frequencies	698
3.7	Principle 7: Universal access to broadcasting services, and equitable access to signal distribution and other infrastructure	699
3.8	Principle 8: Regulating broadcasting content in the public interest	700
4	WHAT ARE INTERNATIONAL ORGANISATIONS ON THE CONTINENT DOING TO PROMOTE MEDIA FREEDOM?	700
5	WHAT KEY CHALLENGES REMAIN TO MEDIA FREEDOM?	702
5.1	Introduction – the censorship legacy of colonialism	702
5.2	Media registration laws	703
5.3	Broadcasting laws	703
5.4	Criminal defamation laws	703
5.5	Insult laws	704
5.6	Obscenity laws	704
5.7	Sedition laws	705
5.8	Other security laws	705
6	CONCLUSION	706

9

Democratic Republic of the Congo



1 INTRODUCTION

The Democratic Republic of the Congo (DRC) is the second-largest country in Africa, with a population of approximately 75 million people. The DRC gained independence from Belgium in 1960. Its post-independence history is bloody: the first post-independence leader, Patrice Lumumba, was assassinated in 1961. In 1965, military officer Mobutu Sese Seko assumed power after a period of civil war. Mobutu ruled his one-party state (which he renamed Zaire) until 1996, when he was ousted by an armed coalition led by Laurent Kabila. However, the country remained dangerously unstable and effectively in a state of civil war. In 2001, Laurent Kabila was assassinated (allegedly by his personal bodyguards) and was succeeded by his son, Joseph Kabila. Although Joseph Kabila is credited with introducing a number of important reforms, most notably a new Constitution, his democratic credentials remain extremely poor. The last election which he won (in 2011) is disputed and lacked credibility due to widespread irregularities. The eastern part of the DRC remains in a state of armed conflict, and most of the population lives in dire poverty despite the country having an abundance of natural resources.¹

Still, the twenty-first century has, in a number of respects, heralded a new era for the media in the DRC. Since the fall of Mobutu, independent newspapers and broadcasters – both radio and television – have flourished. There have also been significant changes in the regulation of the broadcast media, particularly through the establishment of the High Council for Broadcasting and Communications, a

This chapter is also available in French as a downloadable pdf file at www.kas.de/MediaLawAfrica.

constitutionally recognised body. However, the DRC continues to be a country that clearly does not foster freedom of the press. A number of laws still limit the ability of the press to inform the public about matters of the day. All too often journalists are arrested and detained, and independent media houses are often raided and banned. In the case of broadcasters, many have had their broadcasting distribution signals suspended without notice.² The DRC features regularly on international lists of poor media environments, and there is little doubt that the country is, sadly, not in line 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 the DRC. The chapter is divided into four sections:

- Media and the constitution
- Media-related legislation
- Media-related regulations
- Media-related case law

The aim of this chapter is to equip the reader with an understanding of the main laws governing the media in the DRC. Key weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in the DRC, 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 DRC 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 DRC 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 current Constitution of the DRC was adopted after a national referendum held in 2005. It came into force on 18 February 2006 and has been amended since then. The Constitution of the DRC sets out the foundational rules for the entire country. The Constitution contains the underlying principles, values and laws of the DRC.

A key constitutional provision in this regard is the introductory section entitled 'Description of rationales'. This section sets out a number of foundational principles of the DRC Constitution. In brief, these are:

- *State and sovereignty*: This principle sets out that the DRC is divided into the capital and 25 provinces, with juristic personality and powers. It is important to note though that, in practice, the DRC still operates with 11 provinces and has yet to implement these provincial constitutional provisions. Furthermore, this principle reaffirms the democratic principle that all governmental authority emanates from the Congolese people.
- *Human rights, fundamental freedoms and duties of the citizen and the state*: This principle reaffirms the DRC's commitment to internationally accepted human rights and fundamental freedoms. Note that gender equality is specifically mentioned.
- *Organisation of governmental authority*: This principle lists the new institutions of the DRC, namely: the president, Parliament, Cabinet and the courts. The objectives of all governmental institutions are to: ensure harmonious functioning of the state; avoid conflicts; institutionalise the rule of law; counter any tendency towards dictatorship; guarantee good governance; combat impunity; and preserve the principle of democratic succession.

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 the DRC does not explicitly refer to constitutional supremacy. In addition, the Constitution is contradictory as to whether or not constitutional supremacy is in fact recognised. For example, section 221 stipulates that: ‘[p]rovided that they are not contrary to the present Constitution, legislative and regulatory texts currently in force, remain valid until abolition or amendment.’ This demonstrates an intention towards constitutional supremacy.

On the other hand, almost every fundamental right and freedom contained in the DRC Constitution is subject to an internal limitation, which essentially provides that the right is subject to ordinary legislation. Clearly, such provisions (and there are many in the DRC Constitution) undermine the notion of constitutional supremacy.

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 DRC Constitution makes provision for two types of legal limitations on the exercise and protection of rights, which are contained in Part II of the Constitution, ‘Human rights, fundamental freedoms and duties of the citizen and the state’.

2.3.1 State of emergency derogations

Section 85 of the Constitution of the DRC provides that the president may declare a state of emergency when threatening circumstances exist that endanger the independence or territorial integrity of the country, or which disrupt the proper functioning of state institutions.

The president is required first to consult with the prime minister and with the presidents of both parliamentary chambers, that is, the National Assembly and the Senate. Section 85 further provides that the state of emergency is to be regulated by law.

Importantly, section 61 sets out the fundamental rights that may not be derogated from, even in a declared state of emergency. Unfortunately, the only right of real relevance to the media that is so protected from emergency provisions is the right to freedom of thought, conscience and religion.

2.3.2 Rights-specific limitations

The second type of limitation that unfortunately litters the Constitution of the DRC is the undermining of a right contained in Part II in the actual wording of the right itself. Many constitutions contain 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. These general limitations provisions usually contain wording which makes it clear that statutory limitations of rights can be enacted only if these are reasonable and recognised internationally as being necessary in an open and democratic society.

The DRC Constitution, however, contains no such general limitations clause, and each right that ostensibly protects the public and the media is subject to an internal limitation of that right in the wording of the right itself.

The wording of the internal limitations contained in the provisions of Part II is consistent. In brief, such internal limitations take the following form:

- The right is subject to legislation.
- There are no limitations on the nature of the legislation (or restrictions) that can be passed, such as being reasonable, in line with international rights and freedoms, or being necessary in an open and democratic society.

The effect of this limitation formulation is the almost universal undermining of the very concept of constitutional supremacy. The protection given by a constitutional right is entirely subjugated to the content of legislation passed by Parliament, and no special requirements in respect of such rights-limiting legislation are required. The content of the various applicable limitations is dealt with in the discussion on the specific rights, below.

2.4 Constitutional provisions that protect the media

The Constitution of the DRC contains a number of important provisions in Part II, ‘Human rights, fundamental freedoms and duties of the citizen and the state’, which

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 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 23, which states: ‘Every person has the right to freedom of expression. This right implies the freedom to express one’s opinions or beliefs, notably through speech, writings or pictures; in compliance with statutory provisions, public order and good morals.’

This provision needs some detailed 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 (whether oral or written) but extends to non-verbal or non-written ‘expression’. This provision expressly includes pictures within the right to freedom of expression.

There are, however, some serious concerns with the formulation of this right given that it contains the internal limitation that the right is exercised ‘in compliance with statutory provisions, public order and good morals’. Clearly, legislation that governs freedom of expression trumps the constitutional right to such expression. This renders the right effectively meaningless.

ACCESS TO INFORMATION AND FREEDOM OF THE PRESS

Linked to the right to freedom of expression, but of more explicit importance for the media, is section 24, which provides that:

[e]veryone has the right of access to information. Press freedom, freedom of access to information and broadcasting through radio and television, the print media or by the use of any other means of communication, are guaranteed, subject to the preservation of public order, good morals and the rights of others. Legislation is to govern the exercise of these rights. State-owned audio-visual and print media are public entities, to which fair access is guaranteed to all political and social trends. The status of the State-owned media is governed by

national law which guarantees the objectivity, impartiality and pluralistic approach to opinions in the processing and dissemination of information.

This provision is very important for a number of reasons:

- It specifically and explicitly guarantees the right of access to information and does not distinguish between state-held or privately-held information.
- It specifically protects the right to broadcast, and to use the print media and other forms of communication.
- It specifically mentions state-owned media (broadcast and print) and stipulates that these are to be governed by laws guaranteeing objectivity, impartiality and pluralism.

There are, however, some serious concerns with the formulation of this right given that it contains the internal limitation that ‘legislation is to govern the exercise of these rights’. Clearly, legislation that governs the exercise of the right to access to information and press freedom trumps the constitutional right to such freedoms. Again, this renders the rights effectively meaningless.

PRIVACY

Section 31 of the DRC Constitution provides that ‘[e]veryone has the right to privacy and is entitled to confidentiality in respect of personal correspondence, telecommunications or any other form of communication’. These rights may be infringed upon only in instances provided for in legislation. It is important to note the protection given to personal communication, and this protects journalists’ notebooks, computers and general communication with their sources.

There are, however, some serious concerns with the formulation of this right given that it contains the internal limitation that ‘these rights may be infringed upon in instances provided for in legislation’. Clearly, legislation that details how rights may be infringed upon trumps the constitutional right to such rights. Again, this renders the rights effectively meaningless.

FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

The right to freedom of opinion is specifically provided for in section 23, dealt with above. However, it is important to note that section 22 also protects the right to freedom of thought, conscience and religion. Section 22 specifically recognises the

right of everyone freely to express his or her ‘personal convictions’, either alone or in a group, and either privately or in public. However, this is subject to law, public order, good morals and the rights of others. Furthermore, section 22 specifically provides that this freedom is to be governed by legislation.

The freedom to hold and impart opinions is important for the media as it protects journalistic commentary on public issues of importance.

There are, however, some serious concerns with the formulation of this right given that it contains the internal limitation that these rights are ‘subject to law, public order, good morals and the rights of others’. Clearly, legislation that details how rights may be infringed upon trumps the constitutional right to such rights. Again, this renders the rights effectively meaningless.

FREEDOM OF ASSOCIATION

Another important protection is provided for in section 37, in which the state guarantees freedom of association. Section 37 also stipulates that public authorities are to cooperate with those associations that promote the social, economic, intellectual, educational, moral and spiritual development of society. This protects the rights of the press to form press associations as well as to form media houses and operations. Similarly, section 38 guarantees the right to form trade unions. This protects journalists and media workers who want to form media-related trade unions.

There are, however, some serious concerns with the formulation of these rights given that both sections 37 and 38 specifically provide that laws are to prescribe how the rights are to be exercised. Clearly, legislation that details how rights may be infringed upon trumps the constitutional right to such rights. Again, this renders the rights effectively meaningless.

2.4.2 Other constitutional provisions that assist the media

Note that there are provisions in the DRC Constitution, apart from the human rights provisions, which are important and which assist the media in performing its functions.

PROVISIONS REGARDING ILLITERACY ERADICATION

Section 44 specifically commits the state to eradicating illiteracy, and the government is under a constitutional obligation to develop a programme to do so. Having a literate population is particularly important for the growth and development of the print and online media.

PROVISIONS REGARDING INTELLECTUAL PROPERTY RIGHTS AND CULTURAL HERITAGE PROTECTION

Section 46 of the DRC Constitution protects, among other things, the rights of authors. Intellectual property rights are guaranteed and stated to be protected by law. Furthermore, the state undertakes in this section to protect the ‘national cultural heritage’ to ensure its promotion. Arguably, the latter state undertaking could support local media.

PROVISIONS REGARDING THE FUNCTIONING OF PARLIAMENT

Section 107 of the Constitution deals with actions that can be taken against members of Parliament (MPs). The first sentence in section 107 specifically states that no MP may be prosecuted, arrested, detained or convicted on the basis of opinions expressed or votes taken while in office. However, the next three sentences of section 107 provide for a number of instances in which MPs can be arrested, prosecuted or detained. These are for crimes outside of Parliament and special protections, including authorisation by Parliament itself, are required. The provisions enable MPs to speak freely during parliamentary proceedings without facing arrest or legal proceedings for what they say.

Section 118 of the Constitution provides that sessions of the National Assembly and the Senate (that is, of Parliament) are open to the public, unless held in camera. This means that, generally speaking, the media has access to the workings of Parliament by being able to be physically present in Parliament.

PROVISIONS REGARDING THE FUNCTIONING OF THE COURTS

Section 20 provides that court proceedings are to be held in public unless such proceedings will endanger public order or offend against public morality. Section 21 further provides, among other things, that all judgments must be read out in public.

The effect of these provisions is that unless proceedings are held in camera, the media will have access to the workings of the courts by being able to be physically present in court, both for proceedings and judgments.

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

As set out above, all the rights or freedoms that ostensibly protect the media contain internal limitations, which give law-makers the power to limit or otherwise deny individuals and the media their fundamental rights and freedoms. Furthermore, there

are other rights or freedoms that can be used to 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 DRC Constitution.

2.5.1 Right to dignity

The right to human dignity is provided for in section 11, which provides that '[a]ll human beings have equal status in dignity'. Dignity is a right that is often raised in defamation or slander 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. Interestingly, there is no internal limitation on the right to dignity.

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 subjects of press attention asserting their rights not to be photographed, written about or followed in public, etc. The media does have to be careful in this regard. Journalists 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 Respecting the rights of others

Section 16 contains an interesting provision which may affect the work of journalists and the media generally. The second sentence of this section provides that everyone has the right to life, physical integrity and to freely develop his or her personality, while abiding by the law, public order, public morality and avoiding infringing upon the rights of others. This is an extraordinary provision because it not only envisages a balancing of rights between individuals, but it elevates legislation and public order and public morality to the same level as the constitutional rights of individuals. This provision could be used to justify a number of limitations on the expressive rights of the press and the media, as well as on the informational rights of individuals, because it is so broadly framed.

2.5.4 States of emergency provisions

It is also important to note the provisions in sections 85 and 61 of the DRC Constitution, which deal with states of emergency and non-derogation of rights,

respectively, 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 the DRC

There are a number of important institutions in relation to the media which are established under the DRC Constitution. These include the High Council of Broadcasting and Communication and the judiciary.

2.6.1 The High Council of Broadcasting and Communication

Section 212 of the DRC Constitution establishes the High Council of Broadcasting and Communication (HCBC), which is vested with legal personality. The section provides that the HCBC's role, in compliance with the law, is to:

- Protect and preserve freedom of the press
- Protect and preserve all means of mass communication
- Enforce compliance with a code of conduct regarding matters relating to information
- Monitor fair access to state-owned media by all political parties, associations and citizens

The HCBC is therefore confined to operating within the strictures of broadcasting and/or related communications legislation. Section 212 also provides that the HCBC's composition, powers, organisation and functions are to be governed by parliamentary legislation (as opposed to presidential ordinances).

It is important to note that section 212 is the only section under Part V, 'Institutions that support democracy'.

2.6.2 The judiciary

Part III of the DRC Constitution is headed 'Judicial authority'. In terms of section 149, judicial authority is exercised in the DRC by the following courts and tribunals:

- *Constitutional Court*: In terms of sections 160, 161 and 164, the Constitutional Court is responsible for:

- Certifying the constitutionality of legislation
- Interpreting provisions of the Constitution
- Adjudicating disputes regarding elections
- Adjudicating disputes between branches (for example, the executive versus the legislature) and tiers of government (for example, national versus provincial)
- Hearing appeals from the Supreme Court of Appeal or the State Council regarding jurisdictional issues
- Operating as a criminal hearing for charges against the president or prime minister

The composition of the Constitutional Court is provided for in section 158 of the Constitution. The Constitutional Court is made up of nine judges. Three of these are personally appointed by the president, three are appointed by Parliament and three are nominated by the High Council of the Judiciary.

At least two-thirds of the judges of the Constitutional Court must be jurists from either the judiciary, the bar or legal academia.

- *Supreme Court of Appeal*: This is the final court of appeal in all matters heard by civil and military courts, in terms of section 153 of the Constitution of the DRC. Further, it is also the court of first instance in respect of offences alleged to have been committed by people holding high public office, including MPs, Cabinet members, the judiciary and provincial premiers.
- *State Council*: This is the final court of appeal dealing with infringements of measures, regulations and decisions of central administrative authorities, in terms of section 155 of the Constitution.
- *Military High Court*: In terms of section 156, military courts deal with offences committed by members of the armed forces and the police.
- Other civil and military courts and tribunals.

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 150 of the DRC Constitution provides that the judiciary is the custodian of individual freedoms and fundamental rights of citizens. It further provides that judges are subject to the authority of the law alone. Section 151 emphasises that members of the executive and the legislature may not:

- Instruct judges in matters relating to jurisdiction or judgments
- Obstruct the course of justice
- Oppose the execution of a judicial decision

Section 151 also specifically renders null and void any legislation designed to circumvent pending litigation.

Section 152 deals with the High Council of the Judiciary, which is the body established to perform managerial functions in the exercise of judicial authority. It issues recommendations for the appointment, promotion and dismissal of judicial officers, and is the disciplinary authority of judicial officers. The High Council may also issue advisory opinions regarding applications for pardon.

Legislation determines organisational matters and functions of the High Council of the Judiciary. According to section 152, the High Council comprises: the judge president of the Constitutional Court; the state prosecutor assigned to the Constitutional Court; the judge president of the Supreme Court of Appeal; the state prosecutor assigned to the Court of Appeal; the judge president of the State Council; the state prosecutor assigned to the State Council; the judge president of the Military High Court; the state attorney assigned to the Military High Court; the judge presidents of the courts of appeal and the state prosecutors assigned to these courts; the judge presidents of administrative courts of appeal and the state prosecutors assigned to these courts; the judge presidents of military courts and the state attorneys assigned to those military courts; two chief magistrates of the circuit courts of appeal elected by the magistrates of such circuits; two magistrates of the circuit courts of appeal elected by the magistrates of such circuits; one chief magistrate and one magistrate per military high court jurisdiction.

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 properly. Section 150 specifies that the judiciary is the custodian of individual freedoms and fundamental rights of citizens.

An interesting aspect of the DRC Constitution is Principle 4 of the objects of the

Constitution, which provides that no constitutional amendment whatsoever can be made to constitutional provisions regarding the republican form of state, universal suffrage, the representative form of government, terms of office of the president, judicial independence and political pluralism.

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 DRC Constitution differs somewhat from international norms because section 68 recognises that the state institutions in the DRC are the president, Parliament, government, and courts and tribunals. Nevertheless, it is clear that the executive comprises both the president and the government, so these will be discussed under the same heading.

THE EXECUTIVE

In terms of section 69 of the DRC Constitution, executive power vests in the president. The president appoints the prime minister and all other members of Cabinet, in terms of section 78 of the Constitution.

Sections 79–89 set out a number of the functions of the president. These include:

- Chairing the Council of Ministers, essentially the Cabinet
- Promulgating legislation passed by Parliament
- Legislating by means of issuing ordinances
- Appointing provincial premiers and deputy premiers
- Appointing, suspending or dismissing various high-ranking public officials, including members of the Cabinet, ambassadors, civil servants, members of the military, and state-owned enterprise officials

- Appointing, suspending or dismissing judges or public prosecutors on the recommendation of the High Council of the Judiciary
- Chairing meetings of the Defence High Council
- Conferring honours
- Declaring states of emergency or states of war
- Granting pardons

Section 90 sets out the composition of the Ministerial Cabinet, namely:

- The prime minister and deputy prime minister
- Ministers and their deputies
- Ministers of state and delegated ministers, if any

Section 91 sets out the functions of the Ministerial Cabinet. These are to define, together with the president, state policies and to assume responsibility therefor.

Section 92 of the DRC Constitution sets out the responsibilities of the prime minister. These are to:

- Implement legislation
- Issue regulations
- Appoint lower-ranking civil servants and army officers

Note that the prime minister is empowered to delegate the above powers to other ministers in the Cabinet.

Section 93 of the DRC Constitution sets out the responsibilities of individual ministers. These are to:

- Assume responsibility for their own departments
- Oversee the implementation of Cabinet's programme within their ministry, subject to the direction of the prime minister
- Issue regulations by way of ministerial decrees

THE LEGISLATURE

Section 100 of the DRC Constitution provides that legislative authority is exercised

by Parliament, consisting of the National Assembly and the Senate. However, as discussed above, the president has legislative powers through his/her ability to issue ordinances. There is therefore an overlap between the legislative authority of the legislature (ie. Parliament) and the president (who is head of the executive). Indeed, section 130 specifically provides that the right to initiate legislation belongs concurrently to Cabinet, each member of the National Assembly and each member of the Senate.

In terms of section 101 of the DRC Constitution, members of the National Assembly are elected by universal, direct and secret suffrage. Candidates to membership of the Senate are nominated by political parties or by individuals, in terms of section 104, and are elected by provincial assemblies.

Note that in terms of sections 101 and 104, respectively, the number and eligibility of members of the National Assembly and the Senate are determined by electoral law and not by the Constitution.

THE JUDICIARY

As already discussed, judicial power in the DRC vests in the courts and military tribunals.

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.

Unfortunately, the Constitution of the DRC does not protect the principle of separation of powers because the president has such overwhelming powers in respect of all aspects of government. For example, section 79 entitles the president ‘to legislate by means of ordinances’. In other words, presidential ordinances have the force of legislation. This is entirely out of step with international constitutional and democratic norms of the separation of powers.

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

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

- It is deeply troubling that the constitutional provisions regarding fundamental human rights all contain internal limitations, which essentially undermine the supremacy of constitutional rights by making such rights subject to legislation.
- The section in the Constitution establishing the HCBC does not specifically protect the independence of the Council, thereby undermining its ability to carry out media-related functions in support of democracy.
- The DRC Constitution does not sufficiently provide for the separation of powers, given the very real legislative functions provided to members of the executive, particularly the president. This undermines a key construct of democratic government, namely the legislature.

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 media in general
- Key legislative provisions governing the making and exhibition of films
- Key legislative provisions governing the broadcast media generally
- Key legislative provisions governing state broadcast media
- Key legislative provisions governing the state newsgathering agency
- Generally applicable statutes that threaten a journalist's duty to protect sources
- Generally applicable statutes that prohibit the publication of certain kinds of information

3.1 Legislation: An introduction

3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed by parliament, or ordinances issued by the president, both of which have legislative authority. Legislative authority in the DRC is a complex matter as it vests both in Parliament – which is made up of the National Assembly and the Senate – and in the president.

In respect of parliamentary legislation, the process is as follows:

- Parliament and the president are ordinarily involved in passing legislation – sections 135 and 136 of the Constitution of the DRC.
- Within six days of a statute's adoption by both chambers of Parliament, the statute is to be transmitted to the president for promulgation – section 136 of the Constitution of the DRC.
- Within 15 days of the adoption of the statute, the president is entitled to request Parliament to deliberate anew on the entire statute or particular provisions thereof, which request cannot be refused – section 137 of the Constitution of the DRC.
- Within 15 days of adoption, a statute may be referred to the Constitutional Court for a declaration of constitutionality by a range of actors including: the president; the prime minister; the presidents of either the National Assembly or the Senate; or by one-tenth of the total number of members of the National Assembly and of the Senate. Such a ruling must be issued within 30 days – section 139 of the Constitution of the DRC.
- The president promulgates the statute within 15 days of the expiry of the deadlines set out in sections 136, 137 and 139, failing which the statute is deemed to have been promulgated by operation of law – section 140 of the Constitution of the DRC.
- Statutes are published in the Government Gazette (section 141 of the Constitution) and acquire the force of law 30 days after such gazetting, unless the statute provides otherwise – section 142 of the Constitution of the DRC.

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 the DRC Parliament in accordance with the various applicable procedures set out above, it becomes an act once it is so passed.

As mentioned, an act must be published in the Government Gazette and becomes law only 30 days after it has been published, unless otherwise stated, in terms of section 142 of the DRC Constitution.

3.2 Statutes governing the operations of the media in general

The DRC has a number of colonial-era media laws that apply alongside post-independence media laws. Some laws dealing with the day-to-day employment and conduct of journalists and their accreditation include:

- Ordinance 23-113 of 25 April 1956
- Criminal Code, 1940
- Ordinance 81-012 of 2 April 1981
- The High Council of Broadcasting and Communications Act, Act No. 11-001 dated 10 January 2011

It is important to note that a number of colonial-era statutes or ordinances (as they were called when passed under the colonial administration) have not been repealed.

3.2.1 Ordinance 23-113 of 25 April 1956: Travel Documents for the Press

This ordinance governs official accreditation documentation that is required by journalists when travelling around the country undertaking official press duties. It is extremely draconian, requiring journalists to apply for such travel passes at least every three years.

Articles 1 and 2, read together, require journalists (print or broadcast media) to obtain certain passes and badges issued by the director-general of the National Information Service. Journalists need these in order to conduct press business when they travel around the country to cover events. They include the following:

- *Individual travel passes and badges:* These are governed by articles 3, 4, 6, 9 and 12.
 - Any journalist employed in the print media, the broadcast media or in a news agency must make an application, in accordance with the prescribed form, for an individual press pass to travel within the DRC.
 - The application is required to include: the journalist's qualifications; the nature of the journalist's work (his/her habitual assignment); and the reason for the need to travel.
 - Importantly, article 5 specifies the application will be granted provided that the journalist's travel in the relevant area will not undermine public order and public safety.
 - The press pass is valid for a maximum period of three years, but this is left to the director-general's discretion.

- Once an individual press pass has been granted, the holder may then apply for a travel badge.
 - The travel badge is required to be worn in a visible place.
 - Note that the director-general can cancel the press pass at any time. It appears that the badge must be applied for each year as it ceases to be valid on 31 December annually, or upon the lapsing of the individual travel pass.
- *Vehicle travel passes and badges:* These are governed by articles 7 and 8, and 13–16.
- The holder of an individual press pass may also apply for a vehicle pass.
 - The application must be made in accordance with the prescribed form.
 - A vehicle pass has the same period of validity as the individual press pass that it relates to.
 - Importantly, article 8 also specifies the application will be granted provided that the journalist’s travel in the relevant area will not undermine public order and public safety.
 - Once a vehicle pass has been granted, the holder may then apply for a vehicle travel badge.
 - The travel badge is required to be placed on the car in a visible place.
 - Note that the director-general can cancel the vehicle badge pass at any time. It appears that the vehicle badge must be applied for each year as it ceases to be valid on 31 December annually, or upon the lapsing of the vehicle pass.
- *Special travel passes:* These are governed by articles 17–20.
- The provisions govern the issuing of ‘special’ travel passes for journalists (and their vehicles) depending on the needs of public order, peace and security.
 - The director-general may issue these special passes (which have a different colour and bear the word ‘Special’ thereon). They are exceptional, temporary and only valid for a particular locality.

Article 23 requires the director-general to keep a register of all individual, vehicle and special travel passes and badges granted by him or her.

Article 24 requires journalists who leave the profession to return all passes (whether valid, expired or cancelled) to the director-general.

3.2.2 Criminal Code, 1940

Most of the provisions of the Criminal Code do not pertain directly to the media; however, it is important to note the provisions of section 150(h). This makes it an offence not to publish the full and correct name and address of any author or publisher of any published writing. The penalty is a period of imprisonment or a fine.

3.2.3 Ordinance 81-012 of 2 April 1981: Statute to Govern Journalists

This general statute governs the day-to-day work of journalists in the DRC. It contains a number of provisions governing the employment and operations of journalists. The statute is implemented by the Ministry of Information.

- *Press cards:* Articles 5 and 6 of the ordinance require all journalists, including trainee journalists, to apply for a card (either a press card or a trainee press card) from the Press Union of the DRC. The card is cancelled upon the person leaving the profession or for violating professional ethics.
- *Qualifications:* Articles 7 and 8 provide that after completing studies at a recognised school of journalism, the candidate must pass a national examination to be recognised as a professional journalist. No press outlet can employ a person who has not passed such examination as a professional journalist. Note that trainee journalists (who serve an apprenticeship for 24 months or, if they have educational qualifications from a recognised journalism institution, for 12 months) may not constitute more than one-third of the workforce within a press outlet. In addition, all trainee journalists must be declared fit and proper persons before taking the national examination.
- *Categories of journalistic employment:* Articles 9–11 set out the various employment positions within a press outlet. These are:
 - Executive positions:
 - Editorial director
 - Editorial secretary general
 - Editor-in-chief
 - Deputy editor
 - Editorial secretary
 - Contributing staff:
 - General administrator
 - Heads of various departments and design
 - Senior reporters
 - Junior reporters

Note that these are guidelines and press outlets are free to structure themselves differently if they so wish. Promotions are governed by the press outlets' internal rules and procedures. However, section 11 specifies that vacancies are to be filled temporarily by the immediate subordinate (with corresponding pay increases and the like) until such time as the position is filled. If the position is not filled within 12 months, the immediate subordinate assumes the position on a permanent basis.

■ *Professional status of journalists:* Articles 12–27 deal with the professional status of journalists. Every journalist is required to be categorised into one of four statuses:

■ **Active:** This is where the journalist actively conducts his/herself as a professional journalist on behalf of his/her employer. Note that the ordinance sets out employment-related provisions for active journalists including that:

- Journalists be paid in accordance with work performed
- 'Risky' assignments require the journalist to be covered by life insurance
- Leave be given: annual – 30 days; sick leave; 15 days' study leave every three years; and public holidays

■ **On secondment:** This is where a journalist, whether in the public or private sector, stops conducting his/herself as a journalist in order to take up a temporary position:

- In an organisation which acts in the public interest, or is foreign or professional
- In the military during wartime
- In accordance with a Cabinet resolution, based either in the military or in any other capacity in the public interest
- In public office

Note that when the secondment expires the journalist automatically reassumes his/her previous position. The employment requirements of this ordinance do not apply while the journalist is on secondment if these contradict the employment tenets of the organisation to which the journalist is seconded. The institution is responsible for remuneration. In addition, the secondment activities are required to count towards promotion.

■ **Available:** A journalist is considered to be 'available':

- If he/she has taken up further studies or is on a professional development course
- If he/she is sick

The editorial director of a press outlet must declare a particular journalist as being 'available'. The duration of 'availability' is taken into account in the calculation of the length of service of the particular journalist.

- **Suspended:** A journalist may be 'suspended' by the editorial director or his/her deputy of the press outlet for a period of between 48 hours and one month, if there are sufficiently grave grounds. Note that disciplinary proceedings must be instituted and completed within a month otherwise the suspension is withdrawn. Note, however, that if the misconduct constitutes an offence then the suspension continues until the completion of the judicial process. If the judicial process results in an acquittal then the journalist is retrospectively reinstated and all his/her rights are retrospectively restored, including salary and so forth.
- *Working hours:* Article 28 provides that journalists are to work six days a week. Overtime requires compensatory rest periods.
- *Remuneration of journalists and other benefits:*
 - Articles 29–34 regulate the remuneration of journalists. Essentially, a journalist's basic salary is based on the particular employment position in question (and the schedules to the statute contain these). The basic salary increases depending on the number of years worked in that position and the results of performance assessments, based on particular prescribed percentages. Further, the editorial director has discretion to pay additional amounts for seniority, educational qualifications and long-service awards. The press outlet may make additional payments in accordance with its capabilities.
 - Article 35 provides for social and other benefits for journalists, including child benefits, medical and disability benefits, accommodation, vacation benefits and travel expenses. The rates thereof are determined through a process of collective bargaining within the press outlet concerned.
- *Disciplinary procedure:* Articles 36–39 deal with disciplinary action against journalists.
 - In brief, there are three disciplinary measures that can be taken against a journalist:
 - Reprimand
 - Temporary suspension
 - Dismissal

Note that in terms of section 46, grounds for immediate dismissal include acts of dishonesty (such as theft and fraud), insubordination, corruption, intentional prejudice caused to the press outlet, and acts of violence.

- The statute is, however, entirely silent on what conduct would warrant disciplinary action.
 - Furthermore, the actual rules of procedure in any disciplinary matter are to be determined by the press outlet concerned.
 - In the event of legal proceedings against a journalist arising out of facts that have also given rise to disciplinary proceedings, the administrative authority (which essentially regulates bureaucratic matters) has the power to review a disciplinary proceeding finding of guilt if a court of law finds the journalist not guilty for lack of evidence.
 - Where a journalist is sentenced by a court to three or more months in prison, the media outlet may dismiss the journalist without a hearing.
 - A journalist has the right to appeal a disciplinary finding and to be represented by his/her trade union.
- *Rights, duties and conflicts of interest:* These are dealt with in articles 40-43. In brief, these are the following:
- A journalist must fulfil his/her duties with professionalism.
 - A journalist must accept the terms of his/her employment that are in conformity with this statute.
 - A journalist must personally fulfil his/her responsibilities.
 - A journalist is personally accountable to his/her superiors for the performance of specific instructions.
 - It is strictly forbidden for journalists to demand gifts and benefits of any kind whatsoever.
 - A journalist must adhere strictly to the relevant code of conduct applicable to journalists.
 - A press outlet is expected to protect its journalists against personal threats and physical attacks while on assignment and, where applicable, to compensate its journalists for injuries suffered.
- *Termination of employment:* Articles 44–52 cover the provisions regarding termination of employment. In brief, these are the following:
- A journalist's employment (and accreditation) terminates upon death, dismissal, resignation and retirement (the retirement age is 55, but a journalist may apply for retirement after 20 years of service). Note that the statute provides for so-called 'deemed' resignations, which include being absent without leave, refusing to perform

functions during his/her notice period in the case of a voluntary resignation, and after being incapacitated (this requires medical certification) for a period of two years.

- Note that the administrative authority plays a role in that it has to accept a letter of resignation from a journalist.
 - The statute contains a number of detailed provisions regarding pension benefits for journalists.
 - The statute also provides that a journalist may repudiate a contract of employment where the press outlet commits grave infringements against a journalist, including physical injury, intentional prejudice, exposure to grave danger and the like. In such cases the journalist does not need to tender his resignation and serve a notice period.
- *Trade unions:* Articles 53–54 entitle a journalist to join and hold office in a trade union.

3.2.4 High Council of Broadcasting and Communications Act 11/001 dated 10 January 2011

THE HCBC'S MAIN FUNCTIONS

In terms of sections 8 and 9 (where other sections apply these are specified), the general functions of the HCBC include:

- Guaranteeing freedom of the press, information and mass communication
- Overseeing adherence to a code of conduct in respect of information provision
- Overseeing equitable access to state providers of information and communication by all political parties and associations
- Developing a code of conduct
- Mediating in media-related disputes
- Promoting excellence in media production
- Promoting a culture of peace, democracy, human rights and fundamental freedoms
- Promoting a national culture through the media
- Protecting children

- Filing reports to Parliament
- Providing advisory opinions on draft laws to Parliament or to the government – section 10

Overall, the HCBC is responsible for the day-to-day oversight of the media.

In terms of section 17, any person wishing to operate a print, broadcast or online media service must submit a dossier to the Council of the HCBC for compliance checks. Unfortunately, no additional information is given in the statute as to what the dossier is to contain. We surmise that it requires a detailed description of the content of the service. The statute is entirely silent on licence and permit applications.

SANCTIONS

In terms of section 58, the HCBC is entitled to investigate and impose sanctions on the media for:

- Non-adherence to the content of the annexures to permits (again, we stress the statute is silent as to who is responsible for granting and drafting these permits)
- Illegally operating as a professional journalist or illegally exercising any other function in relation to the print or broadcast media
- Illegally altering share capital and means of financing
- Illegally loaning money to third parties
- Refusing to furnish information requested by the HCBC
- Unlawfully broadcasting television or radio programmes or creating interferences with third-party frequencies
- Failing to disclose tariffs to subscribers
- Fraudulently broadcasting additional radio or television channels
- Failing to observe sanctions imposed by the HCBC
- Unlawful copyright infringements of broadcast material

In terms of section 59, the HCBC has alarmingly wide powers to suspend a broadcast service for a period not exceeding three months or to seize documents, films, video cassettes and other media-related information.

No limitations on this discretion are provided for (unlike the grounds set out above) and no grounds for such action are stated in the statute. The HCBC therefore has broad power to act with impunity.

3.3 Statutes governing the making of films

There are a number of constraints on the making of films in the DRC – something that obviously impacts upon the visual media, such as television.

The main piece of legislation governing film in the DRC is Ordinance 53 of 1936 (or the Film Ordinance).

Some key aspects of it are as follows:

- In terms of article 1 of the Film Ordinance, no one may produce a film in a public place unless authorised to do so by the director-general of information services. Any person contravening this section is guilty of an offence and is liable to a period of imprisonment of one to seven days, or the payment of a fine, in terms of article 8 of the Film Ordinance.
- In terms of articles 2 and 3, applications for authorisation to make a film must be in writing and lodged with the director-general at least one month prior to the proposed commencement of filming. The applications must include a range of information such as the names, addresses and nationalities of the applicant, the travel route and the duration of the planned filming. Note that where non-‘European’ or ‘Asian’ actors are to be used, specific information regarding their roles is required to be provided. If the film is a documentary, then the documentary genre must be specified – that is, indigenous life, flora, fauna, landscape, etc.
- In terms of article 4, the director-general has the discretion to exempt the applicant from submitting a detailed film script for his/her prior approval.
- In terms of article 5, the director-general may issue his approval of the application conditional upon the presence of a state official to monitor filming, at the applicant’s expense. The state official may impose restrictions on filming and has broad discretion in this regard.

3.4 Statutes governing the broadcast media generally

3.4.1 Statutes that regulate broadcasting generally

Broadcasting in the DRC is regulated by the:

- High Council of Broadcasting and Communications (HCBC) Act, Act 11-001 dated 10 January 2011
- Press Freedom Act, Act 96-002 dated 22 June 1996
- Telecommunications Act, Act 13-2002 dated 16 October 2002
- Post and Telecommunications Act, Act 14-2002 dated 16 October 2002

3.4.2 Establishment of the HCBC and the Regulatory Authority

The DRC has more than one regulatory authority for broadcasting and signal distribution. While regulators are established in terms of a number of different statutes, it is clear that real power in respect of broadcasting resides in the executive branch of government and in particular with the Ministry of Press and Information. Despite being a constitutionally mandated body, the HCBC operates alongside a Regulatory Authority, which deals with technical matters, and is overshadowed by the very real powers exercised by the executive.

THE HCBC

As required by the Constitution, section 2 of the HCBC Act establishes the HCBC as an institution supporting democracy. Section 2 provides that the HCBC is independent, autonomous and endowed with legal personality.

THE REGULATORY AUTHORITY

Section 8 of Telecommunications Act establishes the Regulatory Authority, which is a public service with legal personality. This same body is, however, also established in terms of section 1 of the Post and Telecommunications Act as being a juristic entity, which is an independent organ of regulatory authority.

3.4.3 Main functions

THE HCBC

In terms of section 8 of the HCBC Act, the HCBC's main functions are to:

- Guarantee freedom of the press, information and mass communication

- Oversee adherence to a code of conduct in respect of information provision
- Oversee equitable access to state providers of information and communication by all political parties and associations
- Develop a code of conduct
- Mediate in media-related disputes
- Promote excellence in media production
- Promote a culture of peace, democracy, human rights and fundamental freedoms
- Promote national culture through the media
- Protect children
- File reports to Parliament
- Provide advisory opinions on draft laws to Parliament or to the government – section 10

It is clear that licensing – a key regulatory function in terms of international good practice – is not a function of the HCBC.

THE REGULATORY AUTHORITY

In terms of section 8 of the Telecommunications Act, the aims of the Regulatory Authority with regard to signal distribution include:

- Overseeing adherence to laws and regulations relating to telecommunications matters
- Processing licence applications and permits. Note that the section is extremely vague as to exactly what kinds of licences and permits are being referred to, but it appears that these are technical licences and permits appropriate to signal distribution matters
- Operating a register of licences
- Managing frequency bands

■ Enforcing compliance with the provisions of the Telecommunications Act

In terms of section 25 of the Telecommunications Act, the Regulatory Authority issues a technical permit after approval of the minister in charge of telecommunications. In terms of section 57 of the Press Freedom Act, this technical permit appears to be a pre-condition for obtaining a broadcasting permit or licence.

3.4.4 Appointment of members

THE HCBC

In terms of section 24, there are 15 members of the HCBC, namely:

- One member chosen by the president
- Two members chosen by the National Assembly
- Two members chosen by the Senate
- One member chosen by government
- One member chosen by the High Council of the Judiciary
- Three members chosen by professional media associations (print, radio and television)
- One member representing the advertising sector
- One member chosen by the National Council of Advocates
- One member chosen by the Association of Parents and Students
- Two members chosen by associations for the protection of media rights

However, in terms of section 26, the president formally appoints all members of the HCBC.

THE REGULATORY AUTHORITY

Section 9 of the Post and Telecommunications Act stipulates that the Regulatory Authority is made up of a seven-member council: a president; a deputy-president; and five councillors. Further, section 10 stipulates that all council members are officially appointed by the president of the DRC, who personally designates its president and deputy, while Parliament nominates two of the five councillors and the minister in charge of telecommunications nominates the last three.

3.4.5 Funding for the regulators

THE HCBC

Section 53 of the HCBC Act provides that the HCBC operating and financial costs

are to be provided for from monies appropriated by Parliament – in other words, specifically allocated to the HCBC in the national budget.

THE REGULATORY AUTHORITY

Section 21 of the Post and Telecommunications Act provides that the Regulatory Authority is funded through various sources of income, including service fees, administrative fees and taxes.

3.4.6 Licensing regime for broadcasters and signal distributors in the DRC

BROADCAST LICENSING

Broadcasting-related licensing in the DRC is not conducted by an independent authority. Section 56 of the Press Freedom Act provides for a system of governmental permits to provide commercial radio and television broadcasting services. An applicant needs to submit a declaration either to the Ministry of Press and Information or to the relevant regional entity responsible for press and information matters. In terms of section 57, such a declaration must include:

- The company registration number
- Channels to be broadcast
- Names, birth dates, criminal records (if any) and certificates of good conduct of both the owner and head of programming
- Statement on the nationality of the head of programming
- Addresses of the head office and any subsidiary companies
- A copy of the company's internal rules and regulations
- A copy of the schedule of programmes to be broadcast
- A copy of the licence granted by the Ministry of Post and Telecommunications. Note that this appears to be a signal distribution licence – the technical licence identifying spectrum to be used, which is obtained in terms of section 33 of the Telecommunications Act.

It appears that the Ministry of Press and Information is able to impose conditions in

respect of such broadcasting permits. Note that there are no specific references to community broadcasting services in the DRC statutes although a number of community broadcasters are operational in the country.

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.

In terms of section 33 of the Telecommunications Act, the Regulatory Authority assigns frequencies to licensed broadcasters, both radio and television, after consulting with the minister of information.

3.4.7 Responsibilities of broadcasters in the DRC

ADHERENCE TO LICENCE CONDITIONS AND OTHER REQUIREMENTS

In terms of section 87 of the Press Freedom Act, no person may provide a broadcasting service without adhering to the requirements of the Press Freedom Act.

In terms of sections 63(a), 64(b) and 65 of the Press Freedom Act, the head of programming and the producer of the particular programme in question are criminally liable for any breach of the conditions imposed by the Ministry of Press and Information when granting a permit for the commercial broadcasting service. They are to be sentenced in accordance with the provisions of the Criminal Code.

In terms of sections 63(b) and 64(a) of the Press Freedom Act, the owner, head of programming and the producer of the specific programme that breached the relevant condition are also liable for civil damages in respect of such breach of the conditions imposed by the Ministry of Press and Information when granting a permit for the commercial broadcasting service.

In terms of section 58 of the HCBC Act, the HCBC is entitled to investigate and impose sanctions on the media for:

- Non-adherence to content of the annexures to permits (again, we stress that the statute is silent as to whom is responsible for granting and drafting these permits)
- Illegally operating as a professional journalist or illegally exercising any other function in relation to the print or broadcast media

- Illegally altering share capital and means of financing
- Illegally loaning money to third parties
- Refusing to furnish information requested by the HCBC
- Unlawfully broadcasting television or radio programmes or creating interferences with third-party frequencies
- Failing to disclose tariffs to subscribers
- Fraudulently broadcasting additional radio or television channels
- Failing to observe sanctions imposed by the HCBC
- Unlawful copyright infringements of broadcast material

In terms of section 59 of the HCBC Act, the HCBC has alarmingly wide powers to suspend a broadcast service for a period not exceeding three months or to seize documents, films, video cassettes and other media-related information. No limitations on this discretion are provided for (unlike the grounds set out above) and no grounds for such action are stated in the statute. This gives the HCBC broad power to act with impunity. The HCBC, however, cannot permanently cancel a frequency allocation without a court order.

ADHERENCE TO LOCAL CONTENT REQUIREMENTS

Section 66 of the Press Freedom Act requires all broadcasters to ensure that at least 50% of all programming broadcast is locally produced programming.

RIGHT OF REPLY

In terms of sections 67–72 of the Press Freedom Act, any person is entitled to reply, free of charge, to any matter that affects his/her or its honour or reputation, which has been broadcast by any broadcasting service, within 15 days of the original broadcast. The person seeking to exercise the right of reply must specify the allegations to be addressed. The length of reply may not exceed the duration of the original allegation, unless absolutely necessary.

Any state official is automatically entitled to a right of reply provided such reply relates to factually inaccurate material broadcast. The reply in this instance may be up

to twice the duration of the original broadcast. The right of reply ought to take place in the next airing of the programme following the receipt of the request to exercise the right of reply.

Any refusal to allow a right of reply is subject to sanctions imposed in terms of section 83 of the Press Freedom Act. Section 83 empowers the minister of, or regional authority responsible for, press and information to: order the seizure of documents, suspend the broadcast of one or more offending programmes; or suspend a broadcasting service for a period not exceeding three months in the following circumstances:

- For refusing to grant a right of reply, and/or
- For broadcasting material in contravention of laws, good morals or public order

ADHERENCE TO OWNERSHIP AND CONTROL LIMITATIONS FOR PRIVATE BROADCASTING SERVICES

Section 7 of the HCBC Act imposes ownership and control restrictions on broadcasters. It provides that not more than 40% of shares of a commercial broadcaster be owned by foreigners. If a Congolese person or entity owns more than 50% of the shares in a commercial broadcaster, he/she or it cannot do so on behalf of a foreign person or entity.

ADHERENCE TO STATUTORY PROHIBITIONS ON BROADCASTING CONTENT

The only clear prohibition relates to reporting on court proceedings. These provisions are set out in detail in the section dealing with the prohibition on the publication of information relating to court proceedings, covered later in this chapter.

PROVIDING INFORMATION REGARDING A SERVICE

In terms of section 17 of the HCBC Act, any person wishing to operate a print, broadcast or online media service must submit a dossier to the HCBC Council for compliance checks. Unfortunately, no additional information is given in the statute as to what the dossier is to contain. We surmise that it requires a detailed description of the content of the service. The statute is entirely silent on licence/permit applications, which are required in terms of the Press Freedom Act.

3.4.8 Are the HCBC and the Regulatory Authority independent regulators?

The HCBC and the Regulatory Authority are not independent bodies.

THE HCBC

While section 2 of the HCBC Act provides that the HCBC is independent and autonomous, and section 53 provides that it is funded by Parliament, the HCBC's independence is compromised in the following ways:

- All its members are appointed by the president, although a number of different institutions are involved in choosing the appointees. The body as a whole is not required to act in the public interest and there is no public nominations process or other public involvement in the appointments.
- The HCBC cannot be said to act as a broadcasting regulator in the general sense because it is not involved in licensing in any way and has no regulation-making powers. The HCBC appears to be only a content-related oversight body, with extremely limited remit of powers.

This means that the HCBC does not meet international best practice standards with regard to appointment requirements for independent bodies and institutional independence.

THE REGULATORY AUTHORITY

The Regulatory Authority clearly works closely with the ministers for post and telecommunications, and press and information and does not act to grant permits or licences without the ministers' approval. The Regulatory Authority is not independent because it functions only in conjunction with the relevant ministers.

3.4.9 Weaknesses in the legislation which should be amended

There are a number of problems with the legislative framework for the regulation of broadcasting generally in the DRC. The main problem is that none of the bodies involved in the regulation of broadcasting are independent.

Executive officers and departments are intimately involved in granting licences and permits, and there is no emphasis on the need for the public interest to be served in any of the relevant statutory provisions.

There are many different laws governing licensing, authorisations and permits, but all of these involve senior officials within the executive branch of government. There cannot be said to be genuine independent institutions governing broadcasting in the DRC, particularly in respect of the licensing of new operators.

3.5 Statutes that regulate the state broadcast media

Two statutes regulate the state broadcast media:

- Ordinance 81-050 of 1981 regulates the Congolese National Radio and Television Broadcaster (*Radio Télévision Nationale Congolaise* – RTNC). Note that the name of the national broadcaster has changed (in line with the country’s general name change from Zaire to Congo), although the ordinance still refers to the old entity.
- Public Enterprises Act, Act 78-002 of 1978 regulates all public enterprises in the DRC, of which the RTNC is one.

3.5.1 Establishment of the RTNC

Article 1 of Ordinance 050 created the RTNC, which was established as a public enterprise with separate legal personality – that is, it is capable of suing and being sued. The RTNC’s aims are stated as being both educational and commercial.

The Public Enterprises Act governs many aspects of the RTNC because that entity is a public enterprise, in terms of article 1 of Ordinance 050.

Article 2 of the Public Enterprises Act provides that any public enterprise has at least one of the following characteristics. It is:

- Created and controlled by state organs in order to fulfil a public mandate
- Created to perform a specific function
- A joint venture among state entities to perform a specific function
- Created through the initiative of other public enterprises in association with state entities to perform a specific function

3.5.2 The RTNC’s mandate

Article 2 of Ordinance 050 provides that the RTNC may establish stations or bureaux anywhere in the DRC or in foreign countries.

Article 3 of Ordinance 050 sets out the RTNC’s broadcasting mandate. This is not an extensive mandate and article 3 refers only to three aspects, namely to:

- Operate national radio and television broadcasting services
- Provide information, training and education to the masses
- Create and promote cinematographic productions

3.5.3 The RTNC's governing structures and member appointment

In terms of article 7 of Ordinance 050, there are three structures within the RTNC: a board of directors; a managerial committee; and an office of chartered accountants.

BOARD OF DIRECTORS

Article 10 provides that the board of directors is the highest authority within the RTNC when it comes to administrative acts and social responsibility.

In terms of article 8 of Ordinance 050, the RTNC is controlled by a board of directors comprising nine members: a chief executive officer; two company secretaries; representatives of the departments of Information and Portfolios (this department manages cabinet functioning); and a representative of the National Parents' Association.

In terms of article 8, the RTNC board members are appointed in terms of articles 6–24 of the Public Enterprises Act. In terms of article 7 of the Public Enterprises Act, all member of the RTNC Board are appointed by the president for a renewable term of five years. Article 7 also gives the president absolute discretion to remove a board member at will during his/her term of office.

MANAGERIAL COMMITTEE

Article 11 of Ordinance 050 requires the Managerial Committee to implement all decisions taken by the board of directors and to be responsible for the day-to-day operations of the RTNC, in accordance with the RTNC's internal rules and regulations.

In terms of article 11 of the Public Enterprises Act, the members of the RTNC Managerial Committee are appointed by the RTNC Board.

OFFICE OF CHARTERED ACCOUNTANTS

Article 14 of Ordinance 050 provides that all financial transactions of the RTNC must be under the direction of the Office of Chartered Accountants, which is to have between two and four accountants. Note that members of the Office of Chartered Accountants are appointed by the president for a renewable term of two years.

3.5.4 Funding for the RTNC

Article 4 of Ordinance 050 sets out how the RTNC is funded. The four sources of funding are:

- The commercial exploitation of broadcasting, cinematographic productions, etc.
- The administration of its assets, including property
- State subsidies
- Donations

Article 31 of Ordinance 050 makes it clear that the RTNC's budget is required to be submitted to the Department of Portfolio for approval.

Articles 25–27 of Ordinance 050 provide that any net profit made by the RTNC is to be distributed as follows:

- Five per cent is to be allocated to an RTNC reserve fund, until such time as the reserve fund is equal to an amount constituting 10% of the entire capital valuation of the RTNC.
- The Department of Portfolio decides whether the remaining 95%:
 - Is to be placed in additional reserve funds if so recommended by the RTNC Board of Directors
 - Is to be carried over for the next financial year, or
 - Is to be paid over to the national treasury

Article 32 provides that the president must approve any increase or decrease in the asset pool of the RTNC, as recommended by the Department of Portfolio.

3.5.5 The RTNC: Public or state broadcaster?

The RTNC is clearly a state broadcaster. Its board members serve entirely at the discretion of the president, and its budget is approved and provided for by the minister of portfolio. The RTNC is also under close executive supervision. In terms of article 31 of Ordinance 050, the RTNC is required to report to:

- The Department of Information on the following issues:
 - Tenders
 - Organisational structure
 - Personnel
 - Salaries

- Building maintenance
 - Annual report
 - The establishment of regional offices in the DRC or foreign bureaus
- The Department of Portfolios on the following issues:
- Buying and selling of property
 - Loans
 - Financial cessions and acquisitions
 - General accounting issues
 - Budgets and financial projections
 - Year-end statements
 - Balance sheet

Furthermore, while the RTNC Board publishes an annual report, this is not presented to Parliament but instead to the Department of Information. The RTNC's accountability therefore appears to be to the executive rather than to the public's elected representatives in Parliament.

3.5.6 Weaknesses in Ordinance 050 which should be amended

It is clear that the RTNC is not a public broadcaster since it lacks basic independence. It ought to have a far more detailed public mandate that requires it to operate in the public interest and it should be accountable directly to Parliament. Furthermore, the RTNC ought to be funded directly from parliamentary disbursements specifically provided for in the national budget.

While it is appropriate for the president to formally appoint the members of the RTNC Board, this ought to happen only after a transparent and public nomination process, as well as a short-listing and recommendation process conducted by a multi-party body such as Parliament.

Lastly, RTNC board members should be removed only on objective grounds for incapacity or failure to perform.

3.6 Statutes that govern the state newsgathering agency

Two statutes govern the state newsgathering agency, the Congolese Press Agency (CPA):

- Ordinance 81-052 of 1981
- Public Enterprises Act, Act 78-002 of 1978

3.6.1 Establishment of the Congolese Press Agency

The CPA was initially established by Ordinance 67-83 of 1967 and is currently regulated in terms of Ordinance 052. Article 1 of Ordinance 052 provides that the CPA is a public institution with legal personality (that is, it is capable of suing and being sued) and that it has as its focus technical, administrative and commercial activities.

3.6.2 The CPA's main mandate

Article 3 sets out the CPA's mandate, namely to:

- Gather information that is accurate, complete and not contrary to public morals
- Make this information commercially available to users
- Undertake feasibility studies with regard to programming or means of communication (television or print based) in order to promote the international credibility of the DRC
- Create an international network to have a worldwide presence
- Promote the country's development
- Ensure the education of the public through the broadcast of its content

In order to achieve its mandate, article 4 contains a number of requirements for the CPA, including to:

- Present information in a fair and impartial manner
- Provide users with information on a regular and uninterrupted basis
- Not allow itself to be under the influence of a political or pressure group

The last requirement is interesting given that the CPA is clearly a state news agency.

3.6.3 The CPA's governing structures and member appointment

In terms of article 8 of Ordinance 052, there are three structures within the CPA: a board of directors; a managerial committee; and an office of chartered accountants. In terms of article 9 of Ordinance 052, the functioning of the CPA is governed by articles 6–24 of the Public Enterprises Act.

Article 9 of Ordinance 052 provides that the CPA Board of Directors is made up of nine members, including certain members of the Managerial Committee appointed in terms of articles 6 and 17 of the Public Enterprises Act.

Article 18 of the Public Enterprises Act provides that the Managerial Committee is responsible for the day-to-day implementation of board decisions.

Article 17 of the Public Enterprises Act provides that the Managerial Committee comprises a general manager, two administrators and a staff representative. Of these, all serve on the CPA Board of Directors, except for the staff representative.

In terms Article 9 of Ordinance of 052, the other directors are a representative of:

- The Office of the President
- The Department of Information
- The Department of Portfolio
- Press bodies (three representatives)

Article 7 of the Public Enterprises Act provides that the CPA board members are appointed by the president. They serve at his discretion as he is able to remove them from office at will.

Article 23 of Ordinance 052 provides that the CPA reports directly to the Office of the President.

3.6.4 Funding for the CPA

In terms of article 5 of Ordinance 052, the CPA is funded through a range of sources, including from contracts for services rendered to its customers, donations and state subsidies.

In terms of articles 18–23, the president determines whether the net profit of the CPA is to be:

- Carried over for the next financial year, or
- Paid over to the national treasury

Given that the CPA is both government funded and controlled through reporting directly to the Presidency, and given that the CPA Board serves at the will of the president, it is clear that the CPA operates as a government communications and information service.

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

A journalist's sources are the lifeblood of his or her profession. Without trusted sources, a journalist cannot obtain information that is not already in the public domain. However, sources will often be prepared to provide critical information only if they are confident that their identities will remain confidential and will be respected and protected by a journalist.

This is particularly true of so-called whistleblowers – inside sources that are able to provide journalists with information regarding illegal activities, whether by company or government personnel. Consequently, democratic countries often provide special protection for journalists' sources. It is recognised that without such protection, information that the public needs to know would not be given to journalists.

The only statute in the DRC that clearly deals with this issue is the Criminal Procedure Code, 1959. The Criminal Procedure Code was enacted prior to the DRC's independence, but has been amended numerous times since then. Provisions of the Criminal Procedure Code might be used to compel a journalist to reveal confidential sources.

Section 78 of the Criminal Procedure Code, for example, provides that any person who, without a valid excuse, fails to appear in court, take the required oath or give evidence as required, may be sentenced to imprisonment, or required to pay a fine, or both.

This provision might 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. 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.

3.8 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 which otherwise undermines government's authority (such as incitement)
- State secrets
- False information that alarms the nation
- Expression which insults the president
- Expression which offends against public morals
- Expression which constitutes xenophobia
- Expression which promotes hate speech or discrimination

3.8.1 Prohibition on the publication of information relating to legal proceedings

- Section 79(a) of the Press Freedom Act, 96-002 of 1996, prohibits the publication of any judicial matter prior to this being read out in a court of law.
- Section 79(b) of the Press Freedom Act prohibits the publication of any judicial deliberations or any information regarding activities of the High Council or of magistrates without their express permission.
- Section 79(c) of the Press Freedom Act prohibits the publication of photographs, drawings or pictures depicting crimes of violence or crimes against public morals, unless permission has been granted by the relevant chief judicial officer.
- Section 79(d) of the Press Freedom Act prohibits the broadcasting of court proceedings, unless permission has been granted by the relevant chief judicial officer.
- Section 79(e) of the Press Freedom Act prohibits the publication of the identity of a rape victim, unless the victim has given express permission for the revelation of his or her identity.
- Section 79(f) of the Press Freedom Act prohibits the publication of information regarding fines, costs and damages awarded against a litigant by a court of law. This provision is extraordinary in that it appears that the public is not entitled to obtain any information regarding court orders dealing with fines, costs and damages awards.

- Section 81 of the Press Freedom Act provides that any person guilty of publishing the above prohibited information can be sentenced to a period of imprisonment, the payment of a fine, or both.

3.8.2 Prohibition on the publication of state security–related information

PRESS FREEDOM ACT 96-002 OF 1996

Sections 76 and 77 of the Press Freedom Act make it an offence to incite others (whether through speeches, writings, images or any other written means) to commit punishable offences, including theft, murder, looting, arson or any act threatening the stability of the state.

It is important to note that incitement is an offence in terms of section 77 of the Press Freedom Act, even if the incitement is not acted upon. The punishment for such incitement is to be meted out in accordance with sections 22 and 23 of the Criminal Code. Section 22 essentially provides that a person who incites anyone to commit punishable offences is to be charged as an accomplice to such crimes.

Section 23 of the Criminal Code provides that an accomplice is to receive a sentence not more than half of the sentence given to the perpetrator(s) of the crime, subject to a maximum period of imprisonment of between 10 to 20 years. However, the law is unclear as to how such accomplices are to be sentenced if the incitement does not result in any criminal offences being perpetrated by anyone.

Section 78 of the Press Freedom Act provides that any person who incites active armed forces to switch allegiances to a foreign power in times of war is guilty of high treason. Section 181 of the Criminal Code, 1940, provides that the crime of high treason is punishable by death.

HIGH COUNCIL OF BROADCASTING ACT, ACT 11/001 OF 2011

Section 6 of the High Council of Broadcasting (HBC) Act prohibits the media from condoning criminal activity or inciting others to violence. Sections 69–73 provide that a media enterprise found guilty of the above can be sentenced to various fines.

CRIMINAL CODE, 1940

Section 209 of the Criminal Code prohibits the distribution of foreign publications which aim to destabilise the state. The penalty is a period of imprisonment and/or a fine.

Section 211 of the Criminal Code prohibits the publication of false information that undermines public order. The penalty is a period of imprisonment and/or a fine.

3.8.3 Prohibition on the publication of information relating to state secrets

Section 188 of the Criminal Code, 1940, makes it an offence to disclose state secrets. The penalty is a period of imprisonment.

3.8.4 Prohibition on the publication of false information that alarms the nation

Section 199B of the Criminal Code, 1940, prohibits the publication of false information that alarms the nation. The penalty is a period of imprisonment and/or a fine.

3.8.5 Prohibition on the publication of expression which insults the president

Section 77 of the Press Freedom Act 96-002 of 1996, makes it an offence to publish anything which offends the president. In terms of section 77 read with section 76 of the Press Freedom Act, the punishment for offending the president is to be meted out in accordance with sections 22 and 23 of the Criminal Code. However, as these sections deal with accomplices to crimes, it is unclear what the punishment is for offending the president.

3.8.6 Prohibition on the publication of expression which offends against public morals

Section 6 of the High Council of Broadcasting Act, Act 11/001 of 2011, prohibits the media from being used to offend against public morals. Sections 69 and 73 provide that a media enterprise found guilty of the above can be sentenced to various fines.

3.8.7 Prohibition on the publication of expression which constitutes xenophobia

Section 6 of the High Council of Broadcasting Act, Act 11/001 of 2011, prohibits the media from being used to promote xenophobia. Sections 69 and 73 provide that a media enterprise found guilty of the above can be sentenced to various fines.

3.8.8 Prohibition on the publication of expression which promotes hate speech or discrimination

Section 6 of the High Council of Broadcasting Act, Act 11/001 of 2011, prohibits the media from being used to promote tribal, racial or religious hatred or any other form of discrimination. Sections 69 and 73 provide that a media enterprise found guilty of the above can be sentenced to various fines.

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 (that is, a piece of legislation), and are made by a public functionary – usually by a minister or a regulatory body.

4.2 Key regulations governing the media

There are a number of regulations which govern both the print and broadcast media. Some of these regulations have been prescribed by the HCBC and some are ministerial decrees. These are the:

- Press, Radio, Television and Advertising Fees Decree
- Broadcast Press Freedom and Professional Practice Decree
- Radio and Television and Compliance Commission Decree
- Administrative Fees on Photographic or Filmed Reportage Decree
- Broadcasting Press Freedom and Professional Practice Implementing Measures Decree
- Code of Conduct for Congolese Journalists Regulations

4.2.1 Press, Radio, Television and Advertising Fees Decree

The Press, Radio, Television and Advertising Fees Decree, Ministerial Decree 04/MIP/018/96 dated 26 November 1996, is a short decree. It requires administrative fees to be paid by all press publications, television and radio stations, press agencies and advertising agencies, and for authorisation to film or photograph news events. Note, however, that the regulations do not specify what the fees are.

4.2.2 Broadcast Press Freedom and Professional Practice Decree

The Broadcast Press Freedom and Professional Practice Decree, Ministerial Decree

04/MIP/020/96 dated 26 November 1996, sets out a number of requirements for broadcasters operating in the DRC. It applies to all broadcasters – radio and television, public and private – in terms of Article 1.

In brief, these requirements include the following:

- In terms of article 2 of the Broadcasting Practice Decree, the content declarations required to be provided by the broadcasters in terms of Press Freedom Act, Act 96-002 dated 22 June 1996, must be in writing.
- In terms of article 3, the content of every advertisement requires approval by the Compliance Committee prior to being broadcast.
- Article 4 provides that all administrative fees payable by the broadcasters will be set by the minister of information and the press.
- Article 5 requires private broadcasters to comply with the content declaration requirement within three months of the coming into force of the decree.
- Article 7 empowers the secretary of the Ministry of Information and the Press to implement the Broadcasting Practice Decree.
- The Annexure to the Broadcasting Practice Decree sets out a list of further requirements that all broadcasters must comply with upon being granted a licence.

In brief, these include the following:

- Ministerial Approval of Broadcast Service. Before commencing operations, a broadcast service must obtain approval therefor from the minister of information and the press.
- Content
 - A content declaration required to be provided by the broadcasters in terms of the Press Freedom Act, Act 96-002 dated 22 June 1996, must be submitted to the Regulatory Authority.
 - Broadcasters will be held responsible for content broadcast.
 - Broadcasters are to be impartial and objective when broadcasting political content.
 - If a private broadcaster is carrying a programme of the RTNC, such programme must be broadcast delayed and in its entirety.
 - Fifty per cent of all programmes broadcast must be local. Note that what constitutes ‘local’ programming is not defined.
 - All political propaganda is prohibited. Note that what constitutes ‘political propaganda’ is not defined.

- When broadcasting television content that is not suitable for children, broadcasters must ensure that a white square appears on the top right-hand corner of the television screen as an audience advisory.
- Foreign content:
 - The broadcaster must ensure that all foreign content broadcast has one or more of the following characteristics: educational, scientific or religious. It is not clear how such a requirement is imposed upon commercial satellite broadcasters operating in the DRC, whose programmes clearly do not comply with this requirement.
 - Satellite broadcasters are responsible for all programmes broadcast on the satellite bouquet.
- Retention of copies of programmes broadcast: Every broadcaster must keep a copy of all broadcasts for at least 30 days.
- Fees payable: The Annexure contains a number of administrative and other fees payable by a broadcaster. These are the following:
 - A content declaration fee of US\$500.00 payable in the equivalent number of Congolese francs.
 - Non-commercial radio and television stations are to pay a licence fee of US\$5,000.00, payable in the equivalent number of Congolese francs.
 - Commercial radio and television stations are to pay a licence fee of US\$10,000.00, payable in the equivalent number of Congolese francs.
 - Press agencies are to pay a licence fee of US\$500.00, payable in the equivalent number of Congolese francs.
 - Advertising agencies are to pay a licence fee of US\$500.00, payable in the equivalent number of Congolese francs.
 - A monthly administrative fee payable to the Compliance Commission.
- Copyright
 - Broadly, this section requires broadcasters to respect and acknowledge intellectual property rights, including copyright.
 - Copyrights must be lodged with SONECA, a national intellectual property repository.
 - Should satellite broadcasts violate intellectual property rights, the broadcaster is liable.
- Advertising
 - Advertising that does not conform to the broadcaster's content declaration may not be broadcast.

- All advertising rates must be provided for in a written contract between the advertiser and the broadcaster.
- All advertising must be approved by the Compliance Commission prior to being broadcast.
- Penalties: Failure to comply with any requirements in the Annexure will be subject to penalties provided in other laws.

4.2.3 Radio and Television and Compliance Commission, Ministerial Decree

ESTABLISHMENT OF THE COMPLIANCE COMMISSION

Article 1 of the Radio and Television and Compliance Commission, Ministerial Decree 04/MIP/006/97 dated 28 February 1997, provides for the establishment of a Compliance Commission by the Ministry of Information and the Press. Article 3 of the Compliance Commission Decree provides that the Compliance Commission comprises six members, namely:

- A president, who is the secretary of the Ministry of Information and the Press
- An advisor on judicial matters
- An advisor on broadcasting matters
- An advisor on press matters
- An advisor on technical matters
- An administrator of broadcasting

Although not explicit, it is clear that the advisors and broadcasting administrator are appointed by the minister of information and the press.

MANDATE OF THE COMPLIANCE COMMISSION

In terms of article 2 of the Compliance Commission Decree, the three main objectives of the Compliance Commission are to:

- Receive and examine content declarations provided by broadcasters in terms of the Press Freedom Act
- Ensure broadcasters' compliance with statutes, regulations and other applicable legal rules governing broadcasting
- Make recommendations on sanctions in the event of a breach by a broadcaster of any applicable statutes, regulations and other applicable legal rules governing broadcasting

FUNDING OF THE COMPLIANCE COMMISSION

Article 4 of the Compliance Commission Decree provides that all broadcasters must pay 10% of their advertising revenues to the Compliance Commission, calculated on a monthly basis.

4.2.4 Administrative Fees on Photographic or Filmed Reportage Ministerial Decree

The Administrative Fees on Photographic or Filmed Reportage Ministerial Decree 04/MIP/008/97 dated 3 May 1997, is a very short decree that essentially sets administrative fees for photographic and filmed reportage.

Although the terms of the decree are extremely vague, it appears that each photographic or film assignment requires the payment of a US\$50.00 fee to the secretary-general of information – a significant reduction on the previous fees set.

4.2.5 Broadcasting Press Freedom and Professional Practice Implementing Measures – Ministerial Decree

The Broadcasting Press Freedom and Professional Practice Implementing Measures – Ministerial Decree 04/MCP/011/2002 dated 20 August 2002, contains a number of content restrictions upon or information requirements for radio and television broadcasters operating in the DRC. In brief, these are as follows:

- Article 1 prohibits the broadcasting of any content that does not comport with the declaration of content made by the broadcaster in terms of the Press Freedom Act.
- Article 2 requires the prior approval of every advertisement to be broadcast by the Compliance Commission.
- Article 3 prohibits the broadcast of any content that contradicts Congolese laws or which disturbs public order or infringes on good morals.
- Article 4 prohibits the broadcast of films, images or documentaries of a pornographic nature.
- Article 5 establishes a watershed period for television; films depicting violence and horror may be broadcast only after 22h00.
- Article 6 requires applicants for licences to submit a report to the Compliance Committee setting out their broadcasting technical capacity.

- Article 7 creates a penalties provision. Depending on the seriousness of the contravention, non-compliance with the Broadcasting Decree can result in the:
 - Seizure of documents and films or video cassettes belonging to the offender
 - Suspension of one or more programmes on the broadcasting service
 - Suspension of the broadcasting service itself for a period not exceeding three months
 - Withdrawal of the licence

4.2.6 The Code of Conduct for Congolese Journalists Regulations

The Code of Conduct for Congolese Journalists – Regulation by the High Council of Broadcasting and Communications dated 4 March 2004, regulates all journalists, whether working in the print, online or broadcast media.

The Code of Conduct is divided into two sections: Part A sets out the duties of journalists while Part B sets out the rights of journalists. These are summarised in brief:

- **Part A: Duties of journalists**
 - Section 1: To promote freedom of opinion and the public's right to access to information.
 - Section 2: To demonstrate fairness, honesty and independence when reporting on individuals and society.
 - Section 3: To be impartial when reporting on controversial issues.
 - Section 4: To be responsible for published work.
 - Section 5: Not to engage in defamation, insult, slander, unsubstantiated accusations, falsification of documents, distortions of facts, lies, incitement to hatred, as well as not to condone values that are contrary to the practice of journalism.
 - Section 6: To uphold the truth by relying on established facts and avoiding blackmail or the violation of a third party's good faith.
 - Section 7: Not to take bribes.
 - Section 8: To identify sources of information where possible, unless such sources request confidentiality.
 - Section 9: Not to engage in the distortion or embellishment of facts or information.
 - Section 10: To rectify errors promptly and grant a timely right of reply.
 - Section 11: To respect human dignity and privacy of persons, particularly with regard to personal intimacy.

- Section 12: To promote national culture, citizenship, and the virtues of the DRC, which are tolerance, pluralism of opinion, democracy and the universal values of peace, equality, human rights and social progress.
- Section 13: To exercise circumspection with regard to information that might harm vital state interests.
- Section 14: To show solidarity with fellow journalists and to abide by decisions taken by the HCBC.
- Section 15: Not to publish ostensible corrections to articles that never existed in the first place.

■ Part B: Rights of journalists

Journalists are entitled to the following:

- Section 16: Protection of sources of information.
- Section 17: Free access to sources of information, and the right to investigate all facets of public life. Secrecy can only be requested of a journalist with regard to public and private matters in exceptional circumstances.
- Section 18: To refuse to carry out instructions of a superior which are contrary to journalistic ethics. A journalist cannot be forced to express him/herself in a manner that is contrary to his/her beliefs or opinion, and if so forced, he/she may choose to resign.
- Section 19: The editorial team of any media outlet must be informed of any decision that affects the existence of such outlet and must be consulted in respect of employment-related managerial decisions.
- Section 20: Journalists have the right to engage in collective bargaining.
- Section 21: Journalists must abide by the Code of Conduct.

5 CASE LAW AND THE MEDIA

The DRC's court and jurisprudential system is a civil law system. Consequently, the case law is not as strictly based on precedent as is the case in common law systems (commonly found in former British colonies).

Case law in the DRC certainly affects the media and working journalists. For example, journalists are sometimes tried before military tribunals for crimes such as high treason. However, accessing Congolese case law is extremely difficult.

DRC case law is not published electronically or in law reports and there is no formal indexing system of previous judgments. The services of a lawyer who has access to

the registrar of the relevant court is usually essential when trying to obtain a copy of a particular judgement.

NOTES

- 1 See, generally, <http://www.state.gov/r/pa/ei/bgn/2823.htm#history>,
- 2 See, http://www.ifex.org/democratic_republic_of_congo/.

10 | Lesotho



1 INTRODUCTION

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

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

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

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

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

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

2 THE MEDIA AND THE CONSTITUTION

In this section you will learn:

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

2.1 Definition of a constitution

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

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

2.2 Definition of constitutional supremacy

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

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

2.3 Definition of a limitations clause

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

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

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

2.4 Constitutional provisions that protect the media

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

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

2.4.1 Freedom of expression

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

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

This provision needs some explanation.

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

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

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

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

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

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

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

2.4.2 Freedom from arbitrary search or entry

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

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

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

2.4.3 Freedom of conscience

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

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

2.4.4 Freedom of association

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

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

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

2.4.5 Right to a fair trial

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

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

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

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

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

2.5.1 Right to respect for private and family life

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

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

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

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

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

2.6.1 The judiciary

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

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

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

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

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

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

2.6.2 The Judicial Service Commission

The JSC is a constitutional body that is established to:

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

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

2.6.3 The Ombudsman

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

2.7 Enforcing rights under the Constitution

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

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

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

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

2.8 The three branches of government and separation of powers

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

2.8.1 Branches of government

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

THE EXECUTIVE

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

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

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

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

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

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

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

THE LEGISLATURE

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

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

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

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

THE JUDICIARY

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

2.8.2 Separation of powers

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

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

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

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

2.9.1 Remove internal constitutional qualifiers to certain rights

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

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

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

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

2.9.2 Strengthen procedural consultation provisions

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

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

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

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

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

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

3 THE MEDIA AND LEGISLATION

In this section you will learn:

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

3.1 Legislation: An introduction

3.1.1 What is legislation?

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

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

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

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

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

3.1.2 The difference between a bill and an act

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

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

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

3.2 Statutes governing the print media

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

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

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

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

3.3 Statutes governing the broadcast media generally

3.3.1 Statutes that regulate broadcasting generally

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

3.3.2 Establishment of the LCA

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

3.3.3 Main functions of the LCA

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

3.3.4 Appointment of LCA board members

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

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

3.3.5 Funding for the LCA

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

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

3.3.6 Making broadcasting regulations

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

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

3.3.7 Licensing regime for broadcasters in Lesotho

BROADCASTING LICENCE REQUIREMENT

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

CLASSES OF BROADCASTING LICENCES

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

BROADCASTING LICENSING PROCESS

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

FREQUENCY SPECTRUM LICENSING

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

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

3.3.8 Responsibilities of broadcasters under the LCA Act

ADHERENCE TO LICENCE CONDITIONS

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

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

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

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

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

REPORTING OBLIGATIONS

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

ADHERENCE TO BROADCASTING RULES AND REGULATIONS

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

3.3.9 Is the LCA an independent regulator?

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

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

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

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

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

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

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

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

3.3.10 Amending the legislation to strengthen the broadcast media generally

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

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

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

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

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

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

3.4.1 State broadcast media

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

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

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

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

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

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

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

3.4.2 State news agency

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

3.5 Statutes governing broadcasting signal distribution or transmission

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

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

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

3.6.1 Criminal Procedure and Evidence Act, 1981

PREPARATORY EXAMINATIONS

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

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

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

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

CRIMINAL TRIAL PROCEEDINGS

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

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

3.6.2 Internal Security (General) Act, 1984

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

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

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

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

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

3.7 Statutes that prohibit the publication of certain kinds of information

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

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

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

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

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

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

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

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

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

SEXUAL OFFENCES ACT, 2003

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

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

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

CRIMINAL PROCEDURE AND EVIDENCE ACT, 1981

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

- Indecent assault or
- Extortion

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

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

3.7.3 Prohibition on the publication of state security–related information

PRINTING AND PUBLISHING ACT OF 1967

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

OFFICIAL SECRETS ACT, 1967

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

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

INTERNAL SECURITY (GENERAL) ACT, 1984

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

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

POLICE SERVICE ACT, 1998

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

PRISONS PROCLAMATION OF 1957

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

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

SEDITION PROCLAMATION 44 OF 1938

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

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

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

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

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

NATIONAL SECURITY REGULATIONS, 2000

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

3.7.4 Prohibition on expression that is obscene

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

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

3.7.5 Prohibition on expression that violates fundamental rights

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

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

3.7.6 Prohibition on expression relating to financial institutions

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

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

3.8 Legislation that specifically assists the media in performing its functions

3.8.1 Introduction

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

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

3.8.2 Local Government Elections Act, 1998

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

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

Every registered party and candidate shall –

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

3.8.3 National Assembly Election Order (No. 10) 1992

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

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

3.8.4 Parliamentary Powers and Privileges Act, 1994

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

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

3.8.5 National Assembly Standing Orders, 2008

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

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

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

3.8.6 High Court Act, 1978

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

3.8.7 Subordinate Courts Order, 1988

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

4 REGULATIONS AND RULES AFFECTING THE BROADCAST MEDIA

In this section you will learn:

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

4.1 Definition of regulations and rules

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

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

4.2 Key regulations governing broadcasting

4.2.1 Broadcasting Rules 2004

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

CODE OF PRACTICE

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

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

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

■ Comment

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

■ Privacy

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

■ Payment for information obtained from criminals

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

■ Party political broadcasts and advertisements

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

ADVERTISEMENT AND SPONSORSHIP CODE

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

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

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

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

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

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

COMPLIANCE ISSUES

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

4.2.2 Broadcasting Classification Regulations, 2007

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

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

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

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

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

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

4.2.3 Licensing Fees Rules, 2008

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

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

4.2.4 Administrative, Procedural and Service Provision Rules, 2000

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

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

5 MEDIA SELF-REGULATION

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

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

6 COMMON LAW AND THE MEDIA

In this section you will learn about:

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

6.1 Definition of common law

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

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

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

6.2 Defamation

6.2.1 Definition of defamation

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

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

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

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

6.2.2 Defences to an action for defamation

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

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

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

- Consent

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

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

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

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

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

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

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

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

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

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

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

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

6.2.3 Remedies for defamation

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

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

6.3 Privacy

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

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

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

6.4 Contempt of Court

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

6.4.1 The sub-judice rule

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

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

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

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

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

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

6.4.2 Scandalising the court

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

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

NOTES

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



1 INTRODUCTION

The Republic of Namibia is a large country with a small population of just over two million. The territory, previously known as South West Africa, was administered by South Africa from the end of World War I, but gained independence in 1990. Since independence, Namibia has been a constitutional democracy. The current media environment in Namibia, particularly in respect of broadcasting, is very different compared to the pre-independence regime. There are, for example, a number of new broadcasters, and the public has access to a wider range of news, information and viewpoints than was previously the case.

In this chapter, working journalists and other media practitioners will be introduced to the legal environment governing media operations in Namibia. The chapter is divided into four sections:

- Media and the constitution
- Media-related legislation
- Media-related regulations
- 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 Namibia. Key weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Namibia, 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 Namibian 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 Namibian 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 Namibian Constitution sets out the foundational rules of the Namibian state. These are the rules upon which the entire country operates. The Constitution contains the underlying principles, values and law of the Republic of Namibia. A key constitutional provision in this regard is article 1(1), which states: ‘The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all.’

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 Namibian Constitution makes provision for constitutional supremacy. Article 1(6) specifically states: ‘This Constitution shall be the Supreme Law of Namibia.’

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 Namibian Constitution makes provision for two types of legal limitations on the exercise and protection of rights and freedoms contained in Chapter 3 of the Namibian Constitution, headed ‘Fundamental human rights and freedoms’.

2.3.1 Internal limitations

Internal limitations clauses occur within an article of the constitution. They deal specifically and only with the limitation of the particular right or freedom that is dealt with in that article. As discussed more fully later in this chapter, both the right to privacy and the right to freedom of expression contain such internal limitations clauses. In other words, the article which contains the right also sets out the parameters or limitations allowable in respect of that right.

2.3.2 General limitations

General limitations provisions apply to the provisions of a bill of rights or other statement setting out fundamental rights. These types of clauses allow a government to pass laws limiting rights, provided this is done in accordance with the constitution.

A general limitations clause applicable to rights can be found in article 22 of the Namibian Constitution, ‘Limitations upon fundamental rights and freedoms’. This allows the Namibian government to pass laws limiting fundamental rights and freedoms. Article 22 sets out the requirements for this to be done lawfully. These requirements are that such a law must:

- Be generally applicable – that is, the law may not single out particular individuals and deny them their rights
- Not negate the essential content of the right. This is a difficult legal concept. It means that the limitation cannot do away with the entire right; its essence must remain intact. For example, the death penalty negates the essential content of the right to life – there is nothing of the right left
- Specify the ascertainable extent of the limitation – that is, the law must clearly set out what the limitation is and how far it reaches

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 Namibian Constitution contains a number of important articles in Chapter 3, ‘Fundamental human rights and freedoms’. These articles directly protect the media, including publishers, broadcasters, journalists, editors and producers. There are a number of articles in other chapters of the Namibian Constitution which can be used by the media to ensure effective reporting on government activities.

2.4.1 Freedom of expression

The most important provision that protects the media is article 21(1)(a), which is part of the article headed ‘Fundamental freedoms’. It states: ‘All persons shall have the right to freedom of speech and expression, which shall include freedom of the press and other media.’ This provision warrants some discussion.

- The freedom applies to ‘all persons’. This is important as certain rights apply only to particular groups of people, such as ‘citizens’ (in respect of voting rights, for example) or ‘children’ (in respect of children’s rights). Freedom of expression is therefore a fundamental right enjoyed by everyone in Namibia, including foreigners.
- 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.
- The article 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’. The article distinguishes between the ‘press’ – with its connotations of the news media – and ‘other media’. Thus ‘other media’ could include, for example, fashion, sports, gardening or social media. Note that all technology platforms are also protected – print media, broadcasting and the internet.

2.4.2 Administrative justice

Another important provision that protects the media is article 18, ‘Administrative justice’, which states: ‘Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal’. This right also requires further explanation:

- An administrative body is not necessarily a state body; indeed, they are often private or quasi-private institutions, such as a press council operated by private newspapers or an independent broadcasting regulator. This constitutional requirement would therefore apply to these non-state bodies too.
- This provision is important for journalists and the media because it protects them (as it does all people) from administrative officials who act unfairly (for example, maliciously or in a biased manner) and unreasonably (which means there is no rational justification for the action) and who otherwise do not comply with legal requirements. The provision gives them the right to approach a court to review administrative decisions.

2.4.3 Privacy

A third protection is contained in article 13, ‘Privacy’. Article 13(1) specifies, among other things, that ‘no person shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with the law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime, or for the protection of the rights and freedoms of others’.

The provisions of article 13 are problematic and do not afford the media a great deal

of protection. This is because the supposed protections are actually rather weak. The article contains an internal limitation clause – namely, that the constitutional right to privacy can be limited by law in certain circumstances. Unfortunately, these are widely cast. In particular, it is a pity that terms such as ‘national security’, ‘public safety’, etc. are employed as they can be used to deny the media the right to report on sensitive issues. The effect of this is that the constitutional right to privacy is watered down. This article probably does not provide substantial privacy protection to the media and to journalists.

2.4.4 Emergency provisions

An important protection for the media is contained in the constitutional articles dealing with states of emergency and derogations of fundamental rights. Chapter 4 contains only one article, article 26, ‘Public emergency, state of national defence and martial law’.

Article 26 contains a number of provisions which allow the president to:

- Declare a state of emergency in all or part of Namibia, during times of national disaster, state of public defence or national emergency which threatens the life of the nation or the constitutional order
- Make regulations during a state of emergency, including the right to suspend the operation of any rule of the common law, statute or any fundamental right or freedom protected under the Constitution

However, article 26 is subject to article 24 of the Constitution, ‘Derogation’. Importantly, article 24(3) specifically prohibits the derogation of a number of rights, such as the right to freedom of speech and expression, which includes the freedom of the press and other media contained in article 21(1)(a).

The Constitution therefore specifically does not allow for the freedom of the press and the right to freedom of expression to be interfered with or limited by presidential powers during a declared state of emergency. This is a significant strength of the Namibian Constitution, but one that is rare on the continent.

2.4.5 Public access to sittings of the National Assembly

Article 61 of the Namibian Constitution requires that, as a general rule, all meetings of the National Assembly must be open to the public. The press and other media would therefore have open access to the proceedings of the National Assembly.

Disappointingly, there are exceptions – as provided in article 61(2); however, the public can only be excluded upon the adoption of a motion to this effect supported by at least 10% of the members of the National Assembly.

2.4.6 State policy principles encourage public debate

Another provision in the Namibian Constitution which may be used to support the media and the work of journalists is article 95(k). This article falls within Chapter 11 of the Constitution, ‘Principles of State Policy’, and provides that:

The state shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at ... encouragement of the mass of the population through education and other activities and through their organisations to influence Government Policy by debating its decisions.

The media undoubtedly plays a crucial role in educating the population to participate meaningfully in a democracy. This article could therefore be used to encourage the growth of a culture of openness and transparency on the part of government, and could be interpreted as requiring media-friendly policies on the part of the state in order to meet the informational needs of the population.

It is important to note, however, that in terms of article 101 of the Constitution, the principles of state policy, including the one set out above, are not legally enforceable by themselves. They are only there to guide government action and can be used by the courts when interpreting laws based on them. Thus, while one cannot directly sue the state for failure to comply with article 95(k), it is useful in interpreting other laws.

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 Namibian Constitution can be used against the media. There are a number of these.

2.5.1 Internal limitations on freedom of expression

Perhaps the most important and troubling constitutional provision which could be used against the media is the internal limitation provision (see discussion on limitations clauses above) contained in article 21(2). This limitation unfortunately deprives the fundamental freedoms contained in article 21(1) (including freedom of

speech and expression, which extends to freedom of the press and other media) of much of their force.

Article 21(2) provides that the freedoms contained in article 21(1) must be exercised subject to the law of Namibia. This is a troubling provision because it essentially provides that an ordinary law, such as a statute, can limit the fundamental freedoms. This goes against the notion of constitutional supremacy (discussed above) and undermines the whole point of enshrining rights in a constitution.

Article 21(2) does, however, require that such a limiting law must impose ‘reasonable restrictions’, which are ‘necessary in a democratic society’ and which are ‘required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence’.

The reference to defamation is particularly noteworthy: the Namibian Constitution clearly envisages laws limiting freedom of expression to protect against defamation (see case law on defamation below).

2.5.2 Dignity

The requirement of respect for human dignity set out in articles 8 and 8(1) specifically provides that the ‘dignity of all persons shall be inviolable’. Dignity is a right that is often raised in defamation cases because defamation usually undermines the dignity of the person being defamed. This right is frequently set up against the right to freedom of the press, requiring a balancing of constitutional rights.

2.5.3 Privacy

Similarly, the right to privacy (discussed in some detail above) is often raised in litigation involving the media. People who find themselves the object of media attention sometimes assert their privacy rights when arguing that they should not be photographed, written about or followed in public.

The media does have to be careful in this regard and should be aware that there are boundaries that need to be respected. It is impossible to state with certainty what these boundaries are as they are context specific and depend on the circumstances of each case. However, a public figure clearly has less of a right to personal privacy in relation to matters relevant to his or her public life. For example, a church minister will have less of a right to privacy concerning his/her private life if it is led in a manner that is inconsistent with his/her church teachings.

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

Three important institutions in relation to the media are established under the Constitution of Namibia: the judiciary, the Ombudsman and the Judicial Services Commission (JSC).

2.6.1 The judiciary

In terms of article 78(1), the judiciary is the Namibian courts – that is, the Supreme Court, High Court and lower courts of Namibia.

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.

Article 78(2) specifically provides that the courts are independent and subject only to the Constitution and to the law. Judges are appointed and removed by the president, acting on the recommendation of the JSC.

2.6.2 The Ombudsman

In terms of article 89 of the Namibian Constitution, the Ombudsman is a constitutional office with the same level of independence as the members of the judiciary. The Ombudsman's functions are set out in article 91, and include investigating complaints regarding violations of fundamental rights. The Ombudsman can therefore play an important role in, for example, protecting the media from unlawful action by the state.

The Ombudsman is appointed and removed by the president, acting on the recommendation of the JSC. Specific legislation has been passed governing the office and functions of the Ombudsman in the Ombudsman Act, Act 7 of 1009.

2.6.3 The Judicial Services Commission

The JSC is a constitutional body established to participate in the appointment and removal of judges and of the Ombudsman. Many would query why the JSC is

relevant to the media. The answer is because of the JSC's critical role in the judiciary and the Ombudsman, the proper functioning and independence of which are essential for democracy.

In terms of article 85, the JSC is made up of the chief justice, a judge appointed by the president, the attorney-general and two members of the legal profession nominated by professional bodies. The provisions regarding the JSC are adequate as it is clear that legal practitioners as opposed to politicians serve on the JSC. This is important to protect the independence of the JSC, which in turn is necessary to protect the independence of the judiciary.

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 properly. There are a number of ways in which the Namibian Constitution addresses the issue and tries to ensure that rights are effective.

Article 5, 'Protection of fundamental rights and freedoms' requires all of the fundamental rights and freedoms enshrined in Chapter 3 to be 'respected and upheld by the Executive, the Legislature and the Judiciary' as well as by 'all natural and legal persons in Namibia', where the rights are applicable to them and 'shall be enforceable by the Courts.' This means that:

- All three branches of government (see below) must uphold these fundamental rights and freedoms
- Individuals and companies also have a duty to uphold rights and freedoms where applicable
- A person whose rights or freedoms have been violated can approach the courts for relief

Clearly, however, the Constitution itself also envisages the right of people, including the media, to approach a body, such as the Ombudsman or the courts, 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 the chapter on fundamental human rights and freedoms. If it were easy for the National Assembly

to do away with the constitutional protection of rights and freedoms then, in an overall sense, the enforcement of the rights would be weak. The rights and freedoms would be subject to the constant potential threat of the rights simply being done away with. Article 131 of the Constitution, ‘Entrenchment of fundamental rights and freedoms’, clearly addresses this concern.

This article flatly disallows the amendment or repeal of any of the provisions of Chapter 3 (which contains the fundamental human rights and freedoms) if the repeal of amendment ‘diminishes or detracts from the fundamental human rights and freedoms’ contained and defined in that chapter. Importantly, the article also provides that any purported amendment or repeal which violates this rule will be invalid and have no effect.

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 Namibia, executive power vests in the president and the Cabinet, in terms of article 27(2). In terms of article 35, the Cabinet is made up of the president, the prime minister and the ministers appointed by the president.

Article 40 sets out a number of functions of the Cabinet, including the following:

- In terms of article 40(a): ‘to direct, co-ordinate and supervise the activities of Ministries and Government departments, including para-statal enterprises’.
- In terms of article 40(b): ‘to initiate Bills for submission to the National Assembly’.

Clearly, the executive is responsible for developing government policy, which is to inform the development of such bills. The role of the executive is to administer or enforce laws, make governmental policy and propose new laws.

THE LEGISLATURE

The principal legislative authority in Namibia is the National Assembly, in terms of article 44. The vast majority of members of the National Assembly are elected by general, direct and secret ballot, in terms of article 46(1)(a). In terms of article 63(1), this legislative authority has the power to make and repeal laws. Note that in terms of article 75 of the Namibian Constitution, the National Council plays a role in reviewing legislation passed by the National Assembly.

The legislature also fulfils other important functions, including, in terms of article 63(2)(f), holding the executive accountable for its operations – that is, playing an oversight role in terms of the workings of the executive branch of government.

Under article 146(2), which deals with constitutional definitions, Parliament is defined as being the National Assembly acting subject to review by the National Council when this is required by the Constitution.

THE JUDICIARY

Judicial power, as discussed above, vests in the courts. The main role of the judiciary is to interpret the law and to adjudicate legal disputes in accordance with the law. The judiciary has no powers of enforcement.

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 Namibian Constitution 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 weaknesses in the Namibian Constitution. If these provisions were strengthened, there would be specific benefits for the Namibian media.

2.9.1 Remove internal limitations on fundamental rights and freedoms

The internal limitations applicable to fundamental rights, such as the rights to freedom of expression and privacy, ought to be repealed because they weaken the rights. In any event, the general limitations clause renders the internal limitations unnecessary as government has all the power it needs to limit fundamental rights reasonably under the general limitations clause.

2.9.2 Recognise the right to information

It is disappointing that the Namibian Constitution does not explicitly recognise the right to receive information and ideas, and does not guarantee the public a right of access to information held by the state.

We live in an ‘information age’, and access to information is probably the single biggest factor in empowering people to make appropriate decisions about their lives, including political decisions. The media is the way that most people obtain access to news and information, and having a right of access to information would enable the media to play its public information role.

2.9.3 Provide for an independent broadcasting regulator and public broadcaster

It is disappointing that the Constitution does not provide specific protection for the independence of the broadcasting regulator or of the public broadcaster. These institutions are critical to the functioning of broadcasting as a whole in Namibia.

The Constitution should specifically protect their independence and ensure that they operate in the public interest in order to guarantee impartiality and to ensure that the Namibian public is exposed to a variety of views.

3 THE MEDIA AND LEGISLATION

In this section you will learn:

- What legislation is and how it comes into being
- The kinds of legislation that deal with the different roles government plays in relation to state media, including in respect of state newsgathering, state newspapers and state broadcasting
- What legislation governs the press more generally, both print and broadcast media (state or commercial), including legislation that threatens the protection of sources, licensing requirements and content regulation or prohibitions

3.1 Legislation: An introduction

3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed by the legislative authority. Legislative authority in Namibia vests primarily in the National Assembly, with legislation also being referred to the National Council on certain occasions, in terms of the Constitution. Legislation or statutes are therefore acts of the National Assembly made into law.

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 (that is, by the National Assembly and the National Council), it becomes an act once it is signed by the president (signifying his assent to the bill) and published in the Government Gazette, in terms of article 56 of the Namibia Constitution.

It is important to note that, in terms of article 56, the president may refer a bill back to Parliament for reconsideration only if the bill was not initially passed by a two-thirds majority of members of the National Assembly. Upon reconsideration, if the National Assembly passes the legislation by at least a two-thirds majority, then the president cannot withhold consent and the bill will become an act. However, if the majority is less than two-thirds, the president can refuse to sign a bill into law and it will simply lapse.

3.1.3 Why do some pieces of old South African legislation continue to be law in Namibia?

Article 140(1) of the Constitution specifically provides that, subject to the Constitution, all laws which were in force in Namibia immediately before the date of independence shall remain in force until repealed or amended by an act of Parliament or until declared unconstitutional by a competent court. This provision maintains a peaceful transition to a constitutional legal regime by ensuring the existing laws continue to apply until properly dealt with in terms of the Constitution, whether by Parliament or by a court.

3.2 Statutes governing state media – Newsgathering

3.2.1 Establishment of the Namibian Press Agency

The Namibia Press Agency (NAMPA) is established in terms of section 2(1) of the Namibia Press Agency Act, Act 3 of 1992.

3.2.2 NAMPA's main mandate

Following the passage of the Namibia Press Agency Amendment Act (2004), NAMPA's mandate is two-fold: to operate a news agency service; and to operate an information technology service for the production, collection and dissemination of media, information and information technology products and services. In order to achieve its mandate, NAMPA is given a wide range of powers, listed in section 5 of the act. These include establishing facilities for collecting and distributing news and information, publishing any literary matter, and entering into any agreement to supply news and information to NAMPA.

3.2.3 Appointment of the NAMPA Board

NAMPA is controlled and governed by a board, comprising three to five members, all of whom are appointed by the minister of information and broadcasting. If the minister is responsible for appointing the board, the board cannot be said to be independent of the executive.

3.2.4 Funding for NAMPA

NAMPA is funded through a range of sources, including donations and from contracts for services rendered by it. In terms of section 12 of the Namibia Press Agency Act, NAMPA is funded primarily through money appropriated by Parliament – that is, specifically allocated to it in the national budget.

Given that NAMPA is essentially government funded and controlled, it appears that NAMPA actually operates as a government communications and information service.

3.3 Statutes that govern state media – state newspaper

3.3.1 Establishment of the state-sponsored newspaper

The New Era Publication Corporation is established as a 'publication corporation' in terms of section 2 of the New Era Publication Corporation Act, Act 1 of 1992.

3.3.2 Main functions

In terms of section 3 of the New Era Publication Corporation Act, New Era's main function is to provide an objective and factual information service by compiling, publishing and distributing the *New Era* newspaper in English as well as in different indigenous languages. Section 3(b) sets out reporting objectives of the newspaper.

These are community-related issues (particularly in rural areas), issues of national interest and government-related matters.

3.3.3 Board appointments

The affairs of New Era are managed by a board of directors of between seven and 12 members, all of whom are appointed by the minister of information and broadcasting.

3.3.4 Funding

While New Era is entitled to be funded from, among other sources, money received from the sales of *New Era* and from the sale of advertising in *New Era*, it is clear from section 11(1)(a) that the New Era Publication Corporation Act envisages that the major source of funding is from the national budget, paid over to it by Parliament. Importantly, the newspaper is exempt from paying income tax and transfer duty, in terms of section 15 of the act.

3.3.5 Is the newspaper independent?

New Era was never intended to be an independent newspaper. It was established overtly as a government newspaper, with a mandate which includes reporting on government. Its board is entirely appointed by the minister, and while its main aim is to provide an objective and factual information service, there is no reference in the legislation to operating in the public interest.

3.3.6 Weaknesses in the statute that should be amended to strengthen the media generally

There is undoubtedly a need to communicate with the public, and having an effective communications strategy is a key priority for all governments. But should a government be establishing and funding its own newspaper?

The problem with state-sponsored newspapers is that it is difficult to ensure genuinely objective news reporting on government if the medium is really an extension of government. Furthermore, given that it has special benefits, including government funding and tax exemptions, a government newspaper such as *New Era* does not compete on a level playing field with other print media. An imbalance or unfair advantage for government media is therefore created, to the detriment of other media.

If government wanted to ensure the development of community-focused media it

could encourage this through, for example, funding community media initiatives or establishing a genuine public broadcasting service.

3.4 Statutes governing state media: The Namibian Broadcasting Corporation

3.4.1 Establishment of the NBC

The Namibian Broadcasting Corporation (NBC) is established as a corporation under section 2 of the Namibian Broadcasting Act, Act 9 of 1991.

3.4.2 The NBC's mandate

The NBC's mandate is set out in section 3 of the Namibian Broadcasting Act. Its mandate is to:

- Provide a broadcasting service to inform and entertain the public
- Contribute to the education and unity of the nation and to peace in Namibia
- Provide and disseminate information relevant to the socio-economic development of Namibia
- Promote the use and understanding of English

3.4.3 Appointment of the NBC Board

The NBC is controlled by a board comprising between six and eleven members, who are appointed by the minister responsible for broadcasting services, in terms of section 6(1) of the Namibian Broadcasting Act.

While it is often the case that there is a minister for communications, sometimes the interior, home affairs or information minister is tasked with regulating broadcasting.

The wording of the section makes it clear that whoever is responsible for regulating broadcasting appoints the NBC Board. Clearly, if the minister is responsible for appointing the board, the board cannot be said to be independent of the executive.

3.4.4 Funding for the NBC

The Namibian Broadcasting Act is vague about how the NBC is funded. There appear to be three different sources of funding:

- In terms of section 16(3), the NBC is entitled to collect and keep television licence fees, which are paid by the public. Note that it is the minister responsible for broadcasting services, not the NBC, who determines what the actual television licence fee is to be.
- Section 20(1)(a) refers to ‘monies appropriated by law for the benefit of the Corporation’. Therefore it seems that Parliament would set aside an amount of money for the NBC in the national budget.
- However, section 20(1)(a) also refers to ‘all other moneys received by the Corporation’, and this is a reference to advertising revenue.

The NBC therefore seems to have a mixed model of funding, including television licence fees, government funding and commercial revenue through advertising.

3.4.5 NBC: Public or state broadcaster?

Unfortunately, it does appear that the NBC does not meet certain basic standards for public broadcasting. It is clear that the NBC is not sufficiently independent from government and in particular is not sufficiently independent from the minister responsible for broadcasting. This can be seen in a number of key areas:

- The minister appoints the entire board. While section 6(2) of the act specifies some objective (and good) criteria for the board as a whole – including knowledge or experience in the administration or management of public affairs and the political, socio-economic and communication field – the minister has sole discretion over board appointments.
- The minister also plays a role in a number of the NBC’s functions, as is clear from the provisions of section 4 of the act, some of which require the minister’s permission to be obtained before the NBC can engage in certain activities, including erecting foreign broadcasting installations and entering into programming supply agreements.
- Nowhere does the act specify that the NBC is editorially independent and free to express its views.
- Nowhere does the act specify to whom the board is accountable. Such accountability statements are common in a public broadcaster, and the governing legislation of many public broadcasters will state that the corporation is accountable to the public and acts in the public interest.

3.4.6 Weaknesses in the NBC statute that should be amended to strengthen the media generally

Two important weaknesses ought to be addressed: the concept of broadcasting ‘in the public interest’ needs to be strengthened in the act; and the direct involvement of the executive in the NBC diminished. In line with international best practice standards:

- The public ought to be involved in making board nominations
- There ought to be a public interview process for short-listed candidates
- Parliament (which is a multi-party body) ought to make recommendations on board appointments to the president and not to a minister
- The NBC’s mandate ought to be expanded to develop measurable goals for broadcasting in the public interest

3.5 Statutes governing media more generally: Registration of newspapers

3.5.1 Introduction

In terms of section 2 of the Newspaper and Imprint Registration Act, Act 63 of 1971, no person is entitled to publish a newspaper intended for public dissemination unless the newspaper has been registered.

3.5.2 Requirements associated with registration

The key provisions of the Newspaper and Imprint Registration Act, Act 63 of 1971, are as follows:

- In terms of section 4 of the Newspaper Act, registration certificates are issued by the minister of the interior: however, the application for registration must be made, in accordance with the prescribed form and upon payment of the prescribed fee, to the secretary for the interior, in terms of section 3. The only basis for refusing to register a newspaper is set out in section 4, and this is if the name of the newspaper too closely resembles the name of another registered newspaper so as to be deceiving.
- Section 5 of the Newspaper Act requires changes to the registration information to be notified to the secretary.
- Section 6 of the Newspaper Act provides that a copy of the first edition of the

newspaper must be forwarded to the secretary. Also, if the minister makes a written request for any issue, this must be sent to the minister.

- The name and address of where the newspaper is published and the name and addresses of the proprietor, printer and publisher must be published in every issue of a registered newspaper, in terms of section 7.
- The editor of a registered newspaper must be a resident, in terms of section 8.

3.5.3 Penalties for non-compliance with the registration and associated requirements

Section 11 of the Newspaper Act makes it an offence not to comply with a provision of this act, and the penalty is a fine or imprisonment for up to six months, or both.

3.5.4 Amending the legislation to strengthen the media generally

As this is such an old statute, many of its provisions are out of date. The registration provisions ought to be updated to refer to existing functionaries. While ordinarily registration requirements are not seen as being in accordance with the right to freedom of expression, these are not terribly problematic because there are very limited grounds for refusal to register a newspaper other than similarity of name/title.

3.6 Statutes governing media more generally: Broadcasting

3.6.1 Statutes that regulate broadcasting

Broadcasting in Namibia is regulated primarily in terms of the Namibian Communications Commission (NCC) Act, Act 4 of 1992. However, frequency-related issues are governed by the Radio Act, Act 3 of 1952.

3.6.2 Establishment of the NCC

The NCC Act provides that the Namibian Communications Commission/Communications Regulatory Authority of Namibia is established in terms of section 2.

3.6.3 Main functions of the NCC

- In terms of section 11 of the NCC Act, the NCC's main functions are to exercise control over broadcasting activities – both radio (also called sound) and television. This means being responsible for content regulation – in other words, regulating what is actually broadcast by licensees, imposing licence conditions, ensuring that

technical requirements are adhered to, among other things. The NCC is responsible for issuing broadcasting licences as well as licences for both postal and telecommunications services. Furthermore, the NCC is responsible for radio frequency spectrum planning and management.

- In terms of section 19 of the NCC Act, the NCC is also responsible for supervising compliance with licence conditions and with the duties of broadcasters laid down in section 18 of the act (dealt with below). Such supervision can include ordering programme changes, imposing a fine, or suspending, or even withdrawing, a broadcasting licence. As part of this function, section 22 grants the NCC certain inspection powers.
- It is important to note, however, that the provisions of the NCC Act do not apply to the NBC or to broadcasting activities carried out by the NBC, in terms of section 29 of the NCC Act. The broadcasting activities of the NBC therefore fall outside of the area of responsibility of the NCC, leaving it essentially unregulated by any outside body.

3.6.4 Appointment of NCC commissioners

There are between six and nine members of the NCC, all of whom are appointed by the minister of information and broadcasting, in terms of section 3(1) of the NCC Act. Clearly, if the minister is responsible for appointing the members of the NCC, the NCC cannot be said to be independent of the executive.

3.6.5 Funding for the NCC

The NCC Act is silent as to the funding of the NCC, but it is important to note that the NCC Act clearly seems to envisage that the members of the NCC are to operate on an intermittent/part-time basis as the NCC Act, at section 8(2), makes provision for a minimum of only four NCC meetings annually.

The minister is responsible for determining the remuneration, travelling expenses and subsistence allowances for NCC members, in terms of section 5(3)(a) of the NCC Act. NCC staff are appointed as part of the public service, in terms of section 8(1) of the NCC Act.

3.6.6 Making broadcasting regulations

Broadcasting regulations (like all regulations made in terms of the NCC Act) are made by the minister acting on the recommendations of the NCC. This means that

while the minister cannot simply make regulations without the involvement of the NCC, the NCC is likewise not free to make its own regulations. Thus, broadcasting is effectively co-regulated by both the NCC and the minister, even in respect of straightforward regulatory matters such as applications for licences, application fees, process regulations for issuing, renewal or transfer of licences, and annual licence fees.

3.6.7 Licensing regime for broadcasters in Namibia

The NCC can issue broadcasting licences, including for radio and television, in terms of section 11(b) of the NCC Act. Radio (sound) broadcasting licences are valid for not more than five years and television licences for not more than eight years, and both of these can be renewed for a five-year period, in terms of section 13 of the NCC Act.

It is important to note that the radio frequency spectrum is licensed by the NCC in terms of the Radio Act, Act 3 of 1958, which licences are required in addition to a broadcasting licence if spectrum is used to provide broadcasting services. Anyone using spectrum without the necessary licence is guilty of an offence, and the penalty is a fine or a period of imprisonment or both, in terms of section 19 of the Radio Act.

3.6.8 Responsibilities of broadcasters in Namibia

ADHERENCE TO LICENCE CONDITIONS

Licence conditions are set in regulations, which are made by the minister on the recommendation of the NCC. Many of these licence condition regulations will doubtless relate to technical specifications, such as frequencies to be used. However, certain content requirements can be imposed in licence conditions, such as the broadcasting of news or other information required to be broadcast in the public interest (see generally section 12 of the NCC Act).

GENERAL CONTENT REQUIREMENTS

Besides its licence conditions, a licence holder has to comply with the duties set out in section 18 of the NCC Act. These include:

- Presenting news accurately and impartially
- Presenting current affairs in a fair, clear, factual, accurate and impartial manner
- Providing a range of Namibian content and using Namibian creative resources

- Limiting advertisements to a maximum of 20% of daily broadcasting time
- Complying with generally accepted standards of journalistic ethics
- Keeping copies of material broadcast

POLITICAL BROADCASTING OBLIGATIONS

Interestingly, section 18 of the NCC Act also contains a number of duties relating to political broadcasting, including not broadcasting any programme aimed at furthering the advancement of any political party except during election time, not broadcasting party political advertising, and providing the NCC with the name of the relevant political party, and the date and time of the broadcast, if the broadcaster broadcasts a political speech of longer than three minutes.

RIGHT OF REPLY

Section 20 of the NCC Act makes specific provision for a ‘right of reply’ – an obligation upon licensees to broadcast a counter version by any person or organisation affected by the broadcast of a ‘fact’, which turns out to have been false.

SUBMISSION OF FINANCIAL STATEMENTS

All licensees have to submit audited financial statements to the NCC annually, in terms of section 21 of the NCC Act.

OBLIGATION TO BROADCAST MATERIAL IN THE INTEREST OF NATIONAL SECURITY

There is an obligation upon licensees to comply with a ministerial order to broadcast material in the interest of national security or in the public interest, in terms of section 26 of the NCC Act.

3.6.9 Is the NCC an independent regulator?

The NCC does not meet certain basic standards for an independent broadcasting regulator. The NCC is not sufficiently independent from government.

This can be seen in a number of key areas:

- The minister appoints the entire board. Worse, there are no criteria to act as a guide in making such appointments.

- The minister also plays a role in a number of the NCC's functions; for example, the minister makes broadcasting regulations, albeit on the recommendation of the NCC.
- Nowhere does the NCC Act specify to whom the NCC is accountable. With respect to an independent broadcasting regulator, such accountability statements are common and the governing legislation of many regulators will state that the regulator is accountable to the public and acts in the public interest.
- Nowhere does the NCC Act specify that the NCC is independent from commercial and/or political interests.

3.6.10 Amending the legislation to strengthen the media generally

There are a number of weaknesses in the NCC Act which ought to be strengthened in the interests of a free and independent media, and of the public more generally.

- The concept of regulating 'in the public interest' needs to be strengthened in the act, and the direct involvement of the executive branch of government – namely, the minister – in the affairs of the NCC needs to be diminished. This is in line with international best practice standards for appointment procedures.
- The NCC ought to be free to regulate broadcasting on its own and to make broadcasting regulations, for example, without any role being played by the minister.
 - There ought to be objective appointment criteria for NCC members, emphasising the required skills and experience.
 - The public ought to be involved in making NCC member nominations.
 - There ought to be a public interview process for short-listed candidates.
 - Parliament (as a multi-party body) ought to make binding recommendations on NCC appointments to the minister.
- The NCC and not the minister ought to be empowered to instruct broadcasters to broadcast programming in the public interest (which could include during times of national emergency or where there is a threat to national security).
- The act should distinguish specifically between public, commercial and community broadcasting services.
- The activities of the NBC should fall under the jurisdiction of the NCC, to ensure that the NBC is regulated in the public interest.

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

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

3.7.1 Criminal Procedure Act, Act 51 of 1977

The Criminal Procedure Act (CPA), Act 51 of 1977, which was an old South African statute, is still applicable in Namibia, although it has been revised and amended many times by the Namibian Parliament.

Section 205 of the CPA essentially 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 a public prosecutor. 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.

3.7.2 Security Commission Act, Act 18 of 2001

The Security Commission Act, Act 18 of 2001, is an act to regulate the affairs of the National Security Commission, established in terms of article 114 of the Namibian Constitution. According to the Constitution, the role of the National Security Commission is, primarily, to advise the president on the appointment of the chief of the defence force, the inspector-general of police and the commissioner of prisons. However, the Security Commission Act, at section 5, sets out a number of other functions, including advising the president on states of emergency and defence and internal security issues, and advising the minister on whether or not a person constitutes a threat to Namibia and ought to be labelled a prohibited immigrant.

Section 5(6) of the Security Commission Act empowers the commission to conduct an enquiry into any matter relating to its functions, and at such enquiry the Commission is empowered, in terms of section 5(6)(a), to require any person who, in

its opinion, is able to provide information relevant to the enquiry to appear before the Commission and to give evidence.

Thus, if the Commission suspects that a journalist knows something of relevance to an enquiry being held by it, such journalist might be ordered in terms of section 5(6)(a) of the Security Commission Act to reveal his/her sources of information.

It is important to note, however, that whether 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. 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.

3.8 Statutes that prohibit the publication of certain kinds of information

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

- Identities of litigants in court proceedings
- Advertising restrictions
- Bank information
- Obscenity laws
- National security laws

It is often 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 such laws are therefore set out below.

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

GENERAL LAW AMENDMENT ORDINANCE, 22 OF 1958

The General Law Amendment Ordinance is an old South West African ordinance enacted by the Legislative Assembly for the Territory of South West Africa (as it was then), which is still in force in Namibia.

Section 1(1) of the ordinance prohibits the publication of the name, address, school, place of employment or any other information likely to reveal the identity of any person who is under 18 years and who is a party to any civil proceedings or is a

witness in any legal proceedings, unless the judge or magistrate in question has agreed in writing after consultation with the person's parent or guardian. A violation of section 1(1) is an offence, and the penalty is a fine, imprisonment or both.

CRIMINAL PROCEDURE ACT, ACT 51 OF 1977

The Criminal Procedure Act (CPA) is a piece of South African legislation that is still in force in Namibia, although it has been amended by the Namibian Parliament several times.

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, 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, imprisonment or both.

3.8.2 Prohibition on the publication of certain information relating to criminal proceedings

The Criminal Procedure Act, Act 51 of 1977, 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
- In extortion proceedings
- Where the identity of the complainant in a sexual offences case might be revealed, unless the judge authorises such publication as being just and equitable, or where the complainant is 18 or older and consents to the publication
- The publication of the identity of a complainant in relation to a charge involving extortion or sexual offences from the commission of the offence until such time as the accused has pleaded to the charge

In terms of section 154(5) of the CPA, any such publication is an offence with a penalty of a fine, imprisonment or both.

Importantly, section 154(6) of the CPA specifically states that to the extent that such prohibitions upon publication authorise interference with a person's freedom to publish, this is done in terms of article 21(2) of the Namibian Constitution. This

clause was dealt with in greater detail at the beginning of the chapter – it is the so-called internal limitation to, among others, the right to freedom of expression.

3.8.3 Prohibition on the publication of identities involved in protection order proceedings

Section 30 of the Combating Domestic Violence Act, Act 4 of 2003, makes it an offence to publish any information concerning protection order proceedings that might reveal the identity of an applicant, complainant, or any child, or any other person involved in such protection order proceedings unless the court has authorised publication in the public interest. The penalty is a fine, imprisonment or both.

3.8.4 Prohibition on the publication of information relating to defence, security and prisons

DEFENCE ACT, ACT 1 OF 2002

Section 54(1) of the Defence Act prohibits any person from publishing (including in a newspaper or on radio or television) any information likely to endanger national security or the safety of any member of the defence force, except where the minister responsible for national defence has authorised the publication thereof or furnished the information.

Furthermore, section 54(2) of the Defence Act makes the owner, printer, publisher or editor of the publication in which the prohibited information was published guilty of an offence too.

Section 55 of the Defence Act also makes it an offence to take photographs or make a sketch of any military camp, installation or other premises which are under military control, or to have any means for taking photographs while on military property.

Section 63 sets out the penalties in respect of all of the offences set out above. The penalties are a fine, imprisonment or both.

PROTECTION OF INFORMATION ACT, ACT 84 OF 1982

The Protection of Information Act is a piece of old South African legislation that has been amended by the Namibian Parliament. Section 4 of the act 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, imprisonment or both.

PRISONS ACT, ACT 17 OF 1998

The Prisons Act is a Namibian statute regulating prison matters. Section 71 of the Prisons Act makes it an offence for anyone to, without the written permission of the Commission of Prisons:

- Take a photograph or make a film, video, sketch or drawing of a prison
- Publish a photograph, film, video, sketch or drawing of a prison
- Take a photograph or make a film, video, sketch or drawing of a prisoner or group of prisoners, whether inside or outside of a prison
- Publish a photograph, film, video, sketch or drawing of a prisoner or group of prisoners, whether inside or outside of a prison

It is also an offence to publish false information concerning a prisoner's behaviour or experience in prison, or prison administration, if reasonable steps were not taken to verify such information.

The penalty for conviction for any of the above offences is a fine, imprisonment or both.

3.8.5 Prohibition on the publication of obscene photographic matter

The Indecent or Obscene Photographic Matter Act, Act 37 of 1967, is an old South African statute that makes it an offence to possess indecent or obscene photographic matter. The penalty is a fine, imprisonment or both.

It is important to note that this act might not survive a constitutional challenge as many of its definitions are outdated and too broad. The act has been repealed in South Africa.

3.8.6 Prohibition on the publication of advertising on roadsides

The Advertising on Roads and Ribbon Development Ordinance, 30 of 1960, is an ordinance that was passed by the Legislative Assembly for the Territory of South West Africa and which remains in force. Its provisions are probably of more interest to media owners than to 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.

3.8.7 Prohibition on the disclosure of Bank of Namibia information

The Financial Intelligence Act, Act 3 of 2007, is designed to prevent money laundering activities. Section 35 deals with the protection of confidential information and prohibits any person from disclosing ‘confidential information’ obtained from the Bank of Namibia, with very few exceptions.

Note that the term ‘confidential information’ is undefined, making it difficult to know what falls within the ambit of that term. The penalty for such disclosure is a fine, imprisonment or both.

3.8.8 Prohibition on the publication of racist publications

The Racial Discrimination Prohibition Act, Act 2 of 1991, as amended, is a post-independence piece of legislation clearly aimed at overcoming the legacy of apartheid in Namibia through outlawing a raft of racist practices. Certain of its provisions directly affect the media:

- In terms of section 10 of the act, no one can publish an advertisement that indicates an intention to discriminate in relation to: public amenities; provisioning of goods and services; selling or letting immovable property (houses, flats, etc.); educational institutions; medical institutions; employment; and the formation of associations and religious services.
- In terms of section 11 of the act, no one can publish an article which intends to:
 - Threaten or insult any person or group on racial grounds
 - Incite hatred between different racial groups
 - Disseminate ideas based on racial superiority

It is important to note that the original wording of section 11 was much broader, but this was held to be an unconstitutional violation of the freedom of expression provisions in the Namibian Constitution in *S v Smith NO and Others* 1996 NR 367 (HC). The section was consequently amended to its current wording. The penalty for violating sections 10 or 11 is a fine, imprisonment or both.

- Section 15, in the parts relevant to the media, provides that where the person convicted of an offence under the act also holds a licence, such as a broadcasting licence, the court may enforce additional penalties, including a declaration that imposes conditions upon, suspends or even cancels such a licence.
- In terms of section 16, in making a determination in respect of an offence, a court may make a compensatory damages award in favour of the person who originally

complained about the conduct. Thus, a media outlet might find itself liable for these damages.

4 REGULATIONS AFFECTING THE MEDIA

In this section you will learn:

- What regulations or rules are
- The different types of broadcasting licences available and whether media diversity is provided for
- The restrictions on broadcasters in respect of news, political broadcasts, advertising and sponsored programmes

4.1 Definition of rules

Regulations are subordinate legislation. They are legal rules that are made in terms of a statute, in this case, the Namibian Communications Commission (NCC) Act (discussed earlier in this chapter). Rules are a way for ministers or organisations, such as the NCC, to make regulations governing an industry or sector, without having to proceed to Parliament.

The empowering statute will entitle the minister or a body such as the NCC to make regulations on particular matters within the scope of the functions and powers of that minister or organisation.

4.2 The different types of broadcasting licences and media diversity

The minister of information and broadcasting, acting on the recommendation of the NCC, has passed broadcasting regulations (Government Gazette 802 dated 25 February 1994), which have been subsequently amended.

The Broadcasting Regulations distinguish between:

- Urban community-based radio stations
- Rural community-based radio stations
- Community-based television stations
- Commercial radio stations
- Commercial television stations

This is important because it is clear that the legal environment does indeed allow for a variety of types of broadcasters, which is necessary to provide media diversity for the public.

4.3 Restrictions on broadcasters

The Broadcasting Regulations contain a number of content requirements or restrictions that apply to commercial and community broadcasting licensees. Some of these are outlined below.

4.3.1 News commentary

Section 6 of the Regulations provides that commentary on news events must be broadcast separately from the news and must be identified as commentary.

4.3.2 Party election broadcasting

Section 7 contains requirements on party election broadcasting during election periods, and essentially allows broadcasters to choose whether or not to grant broadcasting time for electioneering. If broadcasters choose to grant broadcasting time for electioneering then there are specific rules for how this is to be done. Broadcasters must:

- Grant each political party equal broadcasting time in respect of 40% of the total broadcasting time available for party election broadcasts
- Grant each political party broadcasting time equal to the percentage of votes that party obtained in the last election in respect of 60% of the total broadcasting time available for party election broadcasts
- In respect of presidential elections, grant presidential candidates equal time

This complicated process is best illustrated by examples:

- *In respect of 40% of the total broadcasting time available for general electioneering:*
 - Each party must get equal broadcasting time.
 - Example: If 100 minutes of broadcasting time are available for electioneering on a broadcasting service, then 40 minutes (40%) must be divided equally between the competing parties. If there are four parties competing in an election, then the time must be divided as follows:

Name of party	Minutes to be allocated to each party out of a total of 40 minutes
Party A – ruling party	10 minutes
Party B	10 minutes
Party C	10 minutes
Party D – new party	10 minutes

■ *In respect of 60% of the total broadcasting time available for general electioneering:*

- Each political party must be given the percentage of broadcast time equal to the percentage of votes that party obtained in the previous election.
- Example: If 100 minutes of broadcasting time are available for electioneering on a broadcasting service and there are four parties competing in the election, then 60 minutes must be divided as follows:

Name of party	Percentage of votes obtained in previous election	Minutes to be allocated to each party out of a total of 60 minutes
Party A – ruling party	80%	48 minutes
Party B	10%	6 minutes
Party C	10%	6 minutes
Party D – new party	0%	0 minutes

■ *In respect of presidential elections:*

- 100% of the total broadcasting time must be divided equally between the presidential candidates as follows:

Presidential candidate	Minutes to be allocated to the candidate out of a total of 100 minutes
Mr A – sitting president	25 minutes
Mr B – candidate	25 minutes
Mr C – candidate	25 minutes
Mr D – candidate	25 minutes

4.3.3 Advertising

Section 8 of the Broadcasting Regulations requires advertising material to be clearly identified as such. There is a prohibition on advertisements for alcohol or tobacco products in programming intended for persons under the age of 18.

4.3.4 Sponsored programming

Section 9 of the Broadcasting Regulations requires that sponsored programming must be clearly identified with the name and logo of the sponsor appearing at the beginning and end of sponsored programming. The broadcaster must be responsible to the NCC for content and scheduling of sponsored programming.

5 COMMON LAW AND THE MEDIA

In this section you will learn about:

- Common law
- Defamation, the defences to an action for defamation, and remedies for defamation
- Contempt of court

5.1 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 or government departments). In common law legal systems such as Namibia'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.

In this section we focus on two areas of common law of particular relevance to the media, namely, defamation and contempt of court.

5.2 Defamation

5.2.1 Definition of defamation

Defamation is part of the common law of Namibia and reliance is placed on a number of leading South African cases. 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. It is important to note that the media can be liable for defamation even if it is merely reporting on a defamatory statement made by someone (see *Smit v Windhoek Observer (Pty) Ltd and Another* 1991 NR 327 (HC)).

The Namibian courts have held that the common law of defamation is not per se inconsistent with the Constitution. This is because of the importance of upholding the right to dignity, which includes the right of a person not to be unlawfully defamed (see *Afshani and Another v Vaatz* 2006 (1) NR 35 (HC)).

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.

5.2.2 Defences to an action for defamation

There are several defences to a claim based on defamation. We shall focus on two of the most common of these: truth in the public interest; and that the defamation occurred at a privileged occasion. See, for example, *Marais v Hauliyondjaba* 1993 NR 171 (HC) and *Afshani and Another v Vaatz* 2006 (1) NR 35 (HC).

- *Truth in the public interest*: This is where an action for damages is defended by asserting that the defamatory statement was true and, further, 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. It is therefore often the case that it will be in the public interest to publish true, albeit defamatory, material about public representatives. This is because of the importance of the public having accurate information to be able to engage in democratic practices such as voting.
- *Privileged occasions*: These are when the law recognises that certain situations require statements to be made freely, even if the statements are defamatory. For example:
 - In the discharge of a legal, social or moral duty to a person having a

reciprocal duty or interest to receive the statement. For example, when a teacher reports suspected child abuse to a social worker

- In the protection or furtherance of an interest to a person who has a common or corresponding duty or interest to receive such information, and the statement was relevant to the matter under discussion on that occasion. For example, a manager giving an assessment of the work performance of an employee to a management committee

5.2.3 Remedies for defamation

There are two main remedies in respect of defamation in the absence of a defence: an action for damages; or a prior restraint.

- *Action for damages:* This is where a person who has been defamed sues for monetary compensation. This 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 (in other words, 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 of the person being defamed in society (see, *Smit v Windhoek Observer (Pty) Ltd and Another* 1991 NR 327 (HC)).

It is important to note that the Namibian courts have ordered that exemplary damages (this is where a high amount is ordered to be paid to make an example of the defamer) be awarded in circumstances where defamatory material was published and continued to be published about a person after the institution of legal proceedings and without an apology, and also without defending the defamation action (see, *Afrika v Metzler and Another* 1994 NR 323 (HC)).

- *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 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 (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 a last resort mechanism, and the legal systems of countries which 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. The Namibian High Court has refused to grant

an interdict preventing the broadcast of material in circumstances where the producer has taken reasonable steps to ascertain the truth of the allegations to be broadcast (see, *Muheto and Others v Namibian Broadcasting Corporation* 2000 NR 178 (HC)).

5.3 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.

5.3.1 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 therefore illegal to report on judicial proceedings in such a way as to pre-empt the outcome of the proceedings.

5.3.2 Scandalising the court

The rule against scandalising the court is there to protect the institution of the judiciary. It acts to prevent the public undermining of the dignity of the courts. This issue has been addressed by the Namibian courts and by the judiciary in *S v Heita and Another* 1992 NR 403 (HC). The court discussed contempt of court as follows: ‘Contempt of Court is a common law crime. This crime is necessary to protect the independence of the court and the independence, dignity and effectiveness of the courts and their judicial officers.’

The court also quoted extensively from a public statement by the minister of justice on contempt of court in which the minister contrasted criticism with contempt, quoting former Judge President Strydom: ‘An honest and temperate expression of a dissenting opinion regarding, for example, the perennial topic of inequality of sentences will not constitute contempt of Court ... However it is one thing to exercise one’s right to make fair comment, it is quite another to scandalise or intimidate a Judge by calling him or her names ... We ... say yes to fair comment but definitely no to undue political and other pressures on members of the judiciary.’

12 | Tanzania



1 INTRODUCTION

The United Republic of Tanzania was created from the union of two former colonial territories, Tanganyika and Zanzibar, in 1964. It consists of mainland Tanzania, which is predominantly Christian, and the island of Zanzibar, which is predominantly Muslim.

Tanzania has a population of approximately 42 million people. The country has had multiparty elections since 1992, and has been ruled by the Chama Cha Mapinduzi (CCM) party since 1977. Lately, violence has marred election campaigning.

Tanzania has a federal system of government, and Zanzibar is given a great deal of autonomy to determine its own laws and legal institutions. Consequently, the media in Tanzania is governed by different laws depending on whether the media operates in mainland Tanzania or on the island of Zanzibar.

It is important to note that for the purposes of this chapter we deal with the laws and institutions applicable to mainland Tanzania only, and a reference to Tanzania is a reference to mainland Tanzania.

Freedom House ranks the media environment in Tanzania as only ‘partly free’.¹

In this chapter, working journalists and other media practitioners will be introduced to the legal environment governing media operations in Tanzania. The chapter is divided into four sections:

- Media and the constitution
- Media-related legislation
- Media-related regulations
- Media self-regulation

The aim of this chapter is to equip the reader with an understanding of the main laws governing the media in Tanzania. Key weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Tanzania, 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 Tanzania
- 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 Tanzania 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 Tanzania (CAP.2) of 1977, as amended, sets out the country’s

founding values and principles in its preamble and in other provisions. For the purposes of the media, the following values and principles on which Tanzania is said to be founded are particularly important and are summarised below:

- *From the Preamble:* ‘... freedom, justice ... [and] a democratic society in which the Executive is accountable to the Legislature composed of elected members and representatives of the people, and also a Judiciary which is independent and which dispenses justice without fear or favour, thereby ensuring that all human rights are preserved and protected’
- *Article 8, The Government and the People:* Article 8(1) – ‘The United Republic of Tanzania is a state which adheres to the principles of democracy and social justice and accordingly’ –
 - Sovereignty resides in the people
 - The primary objective of the government shall be the welfare of the people
 - Government shall be accountable to the people
 - The people shall participate in the affairs of government in accordance with the Constitution
- *Article 9, Object of the Constitution:* ‘The object of this Constitution is to facilitate the building of the United Republic as a nation of equal and free individuals enjoying freedom, justice, fraternity and accord, through the pursuit of the policy of Socialism and Self-Reliance ... Therefore, the state authority and all its agencies are obliged to direct their policies and programmes towards ensuring ...’. What follows is a list of 11 laudable objectives, including respecting dignity, human rights, the rule of law and equality, and eradicating injustice, corruption, and discrimination, and avoiding wealth concentration.
- However, it is important to note that both articles 8 and 9 are in Part II of Chapter One, headed ‘Fundamental objectives and directive principles of state policy’. Article 7(2) of the Constitution specifically provides that the provisions of this Part are not enforceable by a court, and no court may determine whether any act or omission by any person complied with the provisions of this Part. The effect of this is that no one can be held to account for failure to comply with the founding principles enunciated in Part II of Chapter One.

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 in a particular

country. 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 Tanzania Constitution makes provision for constitutional supremacy rather obliquely. Article 4 deals with the exercise of state authority by various organs. It is important to note that article 4(4) provides that each organ specified in article 4 ‘shall be established and shall discharge its functions in accordance with the other provisions of this Constitution’. The effect of this is that legislative, executive and judicial organs of state are bound by 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. 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 Tanzania makes provision for three types of legal limitations on the exercise and protection of rights contained in Part III of Chapter One, ‘Basic rights and duties’, namely, state of emergency limitations, general limitations and internal limitations.

2.3.1 State of emergency limitations

Article 32 of the Tanzania Constitution, read with article 31, makes it clear that the basic rights set out in Part III of Chapter One of the Constitution may be limited by a presidential proclamation of a state of emergency. Note that these even include the right to life (article 14), although this is limited to deaths resulting from acts of war – article 31(3). Note in terms of article 32(2) of the Constitution, a state of emergency can be declared only in the following cases:

- War
- Danger of invasion or state of war
- Breakdown of public order
- Imminent occurrence of danger, disaster or environmental calamity

- Danger which clearly constitutes a threat to the state

Note further that in terms of article 32(5), a proclamation of a state of emergency ceases to have effect:

- If revoked by the president
- Within 14 days, if Parliament has not resolved to support the presidential proclamation, which resolution requires a two-thirds majority vote
- After six months, if Parliament has not extended the operation of the proclamation for further periods of six months by a resolution with a two-thirds majority vote
- If revoked by Parliament by a resolution with a two-thirds majority vote

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 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 Part III of Chapter One, 'Basic rights and duties', in article 30 of the Tanzania Constitution, headed 'Limitations upon, and enforcement and preservation of basic rights, freedoms and duties'.

Article 30(2) is drafted in a very legalistic fashion, but essentially it provides that rights can be limited by legislation that has one or more of the following extremely broad purposes:

- To ensure that the rights of others are not prejudiced.
- To ensure the defence, public safety, public peace, public morality, public health, rural and urban development planning, the exploitation and utilisation of minerals, property development or any other interests for enhancing the public benefit.
- To ensure the execution of a court order.
- To protect the reputation, rights and freedom of others, privacy of persons in

court proceedings, prohibiting the disclosure of confidential information or safeguarding the dignity, authority and independence of the courts.

- To impose restrictions on or supervise or control the formation, management and activities of private societies and organisations.
- To enable any other thing to be done which promotes or preserves the national interest.

Further, article 30(1) specifically states that human rights ‘shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest’.

These provisions need some detailed explanation.

The general limitations clause is extremely problematic because of the very wide grounds upon which rights can be limited and, more problematically, because there are no requirements such as proportionality, justifiability, reasonableness or least restrictive means. This means that once a ground of justification has been provided – and these are extremely wide and include grounds such as furthering the national interest or supervising the activities of private organisations – basic rights can be limited.

The effect of this is that, in many instances, rights will be able to be limited very easily. All too often legislation will, in effect, trump basic rights, despite the provisions of the supremacy clause of the Constitution.

2.3.3 Internal limitations

The Tanzania Constitution also has a number of so-called ‘internal limitations’; these are limitations to specific rights. These are dealt with below in relation to the specific rights to which they apply.

2.4 Constitutional provisions that protect the media

The Tanzania Constitution contains a number of important provisions in Part III of Chapter One, ‘Basic rights and freedoms’, which directly protect the media, including publishers, broadcasters, journalists, editors and producers.

There are also 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 section that protects the media is article 18, which sets out a number of detailed and important provisions protecting freedom of expression.

Article 18 provides that:

Every person –

- (a) has a freedom of opinion and expression of his ideas;
- (b) has the right to seek, receive and/or disseminate information regardless of national boundaries;
- (c) has the freedom to communicate and a freedom with protection from interference from his communication;
- (d) has a right to be informed at all times of various important events of life and activities of the people and also of issues of importance to society.

These provisions need some explanation.

- The rights and freedoms apply to ‘every person’ and not just to certain people, such as citizens. Hence, all persons, everybody, enjoys these rights and freedoms.
- The basic 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.
- The right in article 18 specifically enshrines the freedom ‘to seek, receive and, or disseminate information regardless of national boundaries’. This right of everyone’s to receive information is a fundamental aspect of freedom of expression, and this article enshrines the right to the free flow of information. Thus, the information rights of media audiences, for example, are protected. This right is important because it also protects organisations which 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.

Note, however, that nowhere in this article is freedom of the media and/or the press specifically mentioned, although it is implied in the right to freedom of expression.

PRIVACY AND PERSONAL SECURITY

A second protection is contained in article 16, headed ‘Right to privacy and personal

security’. Article 16 specifies that every person ‘is entitled to respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect and protection of his residence and private communications’.

Note that this protection of private communications (which would include emails, SMSes, mail and telephone conversations) is an important right for working journalists.

Note further, however, that this right is subject to an internal limitation. This is dealt with in the section 2.5 of this chapter, ‘Constitutional provisions that might require caution from the media or might conflict with media interests’.

FREEDOM OF ASSOCIATION

A third protection is provided for in article 20(1), which grants every person the

freedom to freely and peaceably assemble, associate and cooperate with other persons, and for that purpose, express views publicly and to form and join with associations or organisations formed for purposes of preserving or furthering his beliefs or interests or any other interests.

Clearly, the right provides protection for journalists to form organisations, including trade unions. It also provides protection of people to form media houses and for media houses to form self-regulatory bodies, press associations and the like.

It is important to note that article 20 is a right which is subject to an internal limitation. However, the internal limitation in article 20(2) pertains to grounds upon which political parties can be refused registration and does not have direct implications for journalists or the media.

FREEDOM TO PARTICIPATE IN PUBLIC AFFAIRS

A fairly uncommon right is provided for in article 21(2) of the Tanzania Constitution. This article provides that every citizen has the right and the freedom to participate fully in the process leading to the decision on matters affecting him/her, his/her well-being and the nation. This requires some discussion.

First, this is a right that is available only to citizens. Second, the right is a right to participation. This is important because it provides for a right to be heard on key matters. Furthermore, it can be argued that participation is meaningful when it is informed. Taken together, these indicate that citizens have a right to be informed

about key issues and to be heard thereon. Such rights are meaningless without a free press, which is essential for providing information to the citizenry. Consequently, this right is one which, we submit, is premised on a free press.

2.4.2 Provisions regarding the functioning of Parliament

There are provisions of the Tanzania Constitution, apart from the rights discussed above, which are important and which assist the media in performing its functions. Article 100 of the Tanzania Constitution is headed 'Freedom and immunity from proceedings'. In brief, article 100(1) provides for freedom of opinion and debate in the National Assembly. Article 100(2) essentially provides that a member of Parliament (MP) shall not be prosecuted and no civil proceedings may be instituted against him or her in a court in relation to anything which he or she has said or done in the National Assembly.

These provisions assist the media by protecting parliamentarians; they allow MPs to speak freely without facing arrest or charges for what they say.

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 of Tanzania can be used against the media. A number of these exist.

2.5.1 Right to dignity

The right to dignity is provided for in article 12(2), which states that: 'Every person is entitled to recognition and respect for his dignity.' Note that in the Tanzania Constitution the right to dignity falls under the general right to equality (article 12). 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 in article 16 (discussed above) is often raised in litigation involving the media, with the subjects of press attention asserting their rights not to be photographed, written about, followed in public, etc. The media has

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 or not the person is a public figure or holds public office, and the nature of the issue being dealt with by the media.

It is also critical to note that article 16 is subject to a limitation clause. This may well be used against journalists by denying them their rights to privacy, particularly in respect of the privacy of their communications. Article 16(2) entitles the state to:

lay down legal procedures regarding the circumstances, manner and extent to which the right to privacy, security of his person, his property and residence may be encroached upon without prejudice to the provisions of this Article.

Ostensibly, this is to ‘preserve the person’s right in accordance with this Article’; in reality, however, the wording gives the state a limitless discretion when encroaching upon the right to privacy and personal security. The effect of this provision is that the constitutional right becomes subordinate to legislation and other legal mechanisms limiting the right.

2.5.3 States of emergency provisions

These have already been noted above in the discussion on limitations clauses.

2.5.4 Fundamental duties

The Tanzania Constitution contains a number of ‘duties’, which are not commonly found in constitutional provisions and which could arguably be used against journalists and media houses when reporting. For example, article 29(5) provides that ‘every person has the duty to conduct himself and his affairs in a manner that does not infringe upon the rights and freedoms of others or the public interest’.

This provision is echoed in article 30(1), which provides that ‘human rights and freedoms ... shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest’.

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

There are a number of important institutions in relation to the media that are established under the Tanzania Constitution, namely, the judiciary, the Judicial Service Commission, and the Commission for Human Rights and Good Governance.

2.6.1 The judiciary

In terms of article 107A(1) of the Tanzania Constitution, the judiciary is the ‘authority with final decision in dispensation of justice in the United Republic of Tanzania’. Judicial authority of the Republic vests in the courts, which are required to observe the following principles, in terms of article 107A(2):

- (a) impartiality to all without due regard to one’s social or economic status;
- (b) not to delay dispensation of justice without reasonable grounds;
- (c) to award reasonable compensation to victims of wrong doings committed by other persons, in accordance with laws enacted by Parliament;
- (d) to promote and enhance dispute resolution among persons involved in the disputes;
- (e) to dispense justice without being tied up with technicalities which may obstruct the dispensation of justice.

The general apex court in Tanzania is the Court of Appeal of the United Republic – article 117(3). Note that article 125 establishes a Special Constitutional Court of the United Republic, whose sole function, in terms of article 126(1), is:

to hear and give a conciliatory opinion on the interpretation or application of the Constitution where such interpretation or application is in dispute between the Government of the United Republic and the Revolutionary Government of Zanzibar.

Other courts include the High Court and such other courts as are established by legislation.

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

Key judicial appointment procedures are as follows:

- In terms of article 112(1) of the Tanzania Constitution, the Judicial Service Commission (JSC) is an appointments advisory commission for High Court judges and magistrates.

- Half of the judges of the Special Constitutional Court are appointed by the Government of the United Republic and the other half by the Revolutionary Government of Zanzibar – article. 127(1). Note that decisions of this court must be taken by two-thirds of the members appointed by the Government of the United Republic and by two-thirds of the members appointed by the Revolutionary Government of Zanzibar – article 128(3).
- Judges of the Court of Appeal are appointed by the president after consultation with the chief justice, in terms of article 118(3). Note that the JSC is not involved.
- Judges of the High Court are appointed by the president after consultation with the JSC, in terms of article 109(1).
- Note that judges are removed by the president acting on the advice of a tribunal appointed by the president – article 110A and see article 120A(2). Grounds for removal are inability to perform the functions of the office, behaviour inconsistent with the ethics of office of a judge or with the law concerning the ethics of office of public leaders – articles 110A(2) and 120A(2).
- In terms of article 113(4), magistrates are appointed, disciplined and removed by the JSC.

It is critical to note that the Tanzania Constitution recognises the right of Zanzibar to establish its own court structures with their own jurisdictions under the 1984 Constitution of Zanzibar – See Part IV ‘High Court of Zanzibar’ of Chapter Five of the Tanzania Constitution.

2.6.2 The Judicial Service Commission

The JSC is a constitutional body established in terms of article 112 of the Tanzania Constitution. Article 113(1) sets out the functions of the JSC. These include:

- Advising the president on appointments of judges of the High Court
- Advising the president on matters relating to discipline of judges
- Advising the president in respect of the appointment and discipline of registrars of the High Court and Court of Appeal
- Appointing and disciplining magistrates
- Establishing committees to implement its functions

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 article 112(1), the JSC is made up of the chief justice of the Court of Appeal (chairman of the JSC), the attorney general, a justice of appeal appointed by the president after consultation with the chief justice, the principal judge of the High Court and two members appointed by the president.

2.6.3 Commission for Human Rights and Good Governance

The Commission for Human Rights and Good Governance (HRGG Commission) is an important organisation in respect of the media. In terms of article 130(1) of the Tanzania Constitution, its brief is extremely wide and includes:

- Sensitising the public about the preservation of human rights and duties
- Receiving complaints in relation to violations of human rights in general
- Conducting enquiries on matters relating to the infringement of human rights and violations of principles of good governance
- Conducting research and disseminating the results thereof on the infringement of human rights and violations of principles of good governance
- Enquiring into the conduct of any person or institution in relation to the ordinary performance of functions or abuses of office
- Advising government, other public institutions and the private sector on human rights and good governance
- Taking the necessary action in order to promote and enhance conciliation, reconciliation among persons and various institutions appearing before the HRGG Commission

It is important to note, however, that in terms of article 130(6), the HRGG Commission may not undertake activity in relation to the president or leader of the Revolutionary Government of Zanzibar. Further, the HRGG Commission may not enquire into:

- Matters before a court or tribunal
- Matters concerning the relationship between the government and a foreign government or international organisation
- Matters concerning the presidential power to award remissions
- Any other matter mentioned in law

This last provision is troubling as it completely undermines the ability of the HRGG Commission to act in the face of countermanding legislation.

Unfortunately there are contradictory statements regarding the independence of the HRGG Commission. In Article 130(2) of the Constitution, the HRGG Commission is said to be:

an autonomous department ... in exercising its powers ... the Commission shall not be bound to comply with directives or orders of any person or department of government, or any opinion of any political party or of any public or private sector institution.

However, the very next sub-article (article 130(3)) provides that the above provisions:

shall not be construed as restricting the President from giving directives or orders to the Commission, nor are they conferring a right to the Commission of not complying with directives or orders, if the President is satisfied that in respect of any matter or any state of affairs, public interest so requires.

The effect of this is that the president can give directives or orders to the HRGG Commission, which it is bound to comply with. This obviously undermines the independence of the HRGG Commission.

Article 129(2) provides that the HRGG Commission comprises:

- A chairman, who must possess qualifications for appointment as a judge
- A vice-chairman, who is appointed on the basis that if the chairman is from the mainland, the vice-chairman is to be from Zanzibar, and vice versa
- Up to five other commissioners, who are appointed from among persons who possess skills, experience and wide knowledge in matters relating to human rights, law, administration, political or social affairs
- Assistant commissioners

In terms of article 129(3), commissioners and assistant commissioners are appointed by the president after consultation with the Nominations Committee, which consists of the chief justice of the Court of Appeal, the speaker of the National Assembly, the chief justice of Zanzibar, the speaker of the House of Representatives and the deputy-attorney general, who is the secretary of the Nominations Committee.

In terms of article 129(7), a member of the HRGG Commission or a deputy commissioner can be removed only on the grounds of inability to perform the functions of his or her office, or misconduct.

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 30(3) of the Tanzania Constitution provides that:

any person claiming that any provision of this Part of this Chapter (that is, Part III dealing with Basic Rights and Duties) ... concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic, may institute proceedings for redress in the High Court.

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

It is important to bear in mind that the Constitution of Tanzania makes provision for two executives: the Executive of the United Republic (Chapter 2) and the Executive of the Revolutionary Government of Zanzibar (Chapter Four). For the purposes of this chapter, only the Executive of the United Republic of Tanzania is discussed as focus here is on mainland Tanzania.

Article 35(1) specifies that all executive functions of the government of the United Republic discharged by officers of the government are done on behalf of the president. Also, article 34(3) provides that subject to the Constitution:

[a]ll the authority of the Government of the United Republic over all Union Matters [a list of 22 of these is set out in the First Schedule to the Constitution

and they include constitutional matters, foreign affairs, defence and security] in the United Republic and also over all other matters concerning mainland Tanzania shall vest in the President.

Clearly then, executive authority vests in the president.

It is important to note, however, that Tanzania also has a prime minister who, in terms of article 52(1), has authority over the control, supervision and execution over the day to day functions and affairs of the government of the United Republic; but he does so under the direction of the president, in terms of article 52(3).

The Cabinet of Tanzania is made up of the president, the vice-president, the prime minister and ministers appointed by the president – see article 54. Note that article 54(3) provides that Cabinet is the principal organ for advising the president regarding all matters concerning the exercise of his powers.

Essentially, the role of the executive is to administer or enforce laws, to make governmental policy and to propose new laws.

THE LEGISLATURE

Legislative power in relation to all Union Matters (a list of 22 of these is set out in the First Schedule to the Constitution and they include: constitutional matters, foreign affairs, defence and security) and also in relation to all other matters concerning mainland Tanzania vests in Parliament, in terms of article 64(1) of the Tanzania Constitution.

In terms of article 62(1), the Parliament of the United Republic consists of the president and the National Assembly. Importantly, key functions of the National Assembly include:

- Asking ‘any question to any Minister concerning public affairs in the United Republic which are within his responsibility’ – article 63(3)(a)
- Debating ‘the performance of each Ministry during the annual budget session of the National Assembly’ – article 63(3)(b)
- Enacting law ‘where implementation requires legislation’ – article 63(3)(d).

In terms of article 66(1), the National Assembly shall consist of the following categories of members:

- Members elected to represent constituencies, which constituencies are determined by the Electoral Commission.
- Women members proposed by political parties on the basis of proportional representation, making up at least 30% of the members of the National Assembly.
- Five members elected by the House of Representatives of Zanzibar from among its members.
- The attorney-general.
- Up to ten members appointed by the president, at least five of whom shall be women.
- The speaker, if not elected from among the members.

THE JUDICIARY

Judicial power, as already discussed in this chapter, 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 significant weaknesses in the Tanzania Constitution, which, if improved, would create a more conducive environment for, among other things, media freedom.

2.9.1 Remove internal constitutional limitation on the right to privacy

Concern has already been expressed about the fact that article 16, the right to privacy, is subject to a limitation clause. This may well be used against journalists by denying them their rights to privacy, particularly in respect of the privacy of their communications. Article 16(2) entitles the state to:

lay down legal procedures regarding the circumstances, manner and extent to which the right to privacy, security of his person, his property and residence may be encroached upon without prejudice to the provisions of this Article.

Ostensibly, this is to ‘preserve the person’s right in accordance with this Article’; but in reality the wording gives the state limitless discretion when encroaching upon the right to privacy and personal security. The effect of this provision is that the constitutional right becomes subordinate to legislation and other legal mechanisms limiting the right.

2.9.2 Improve the general limitations clause

As already set out above, the general limitations clause is extremely problematic owing to the very wide grounds upon which rights can be limited, and, more problematically, because there are no requirements such as proportionality, justifiability, reasonableness, or least restrictive means.

This means that once a ground of justification has been provided (and these are extremely wide and include grounds such as furthering the national interest or supervising the activities of private organisations) basic rights can be limited. The effect of this is that, in many instances, rights could be easily limited. All too often then, legislation will trump basic rights, despite the provisions of the Constitution’s supremacy clause.

2.9.3 Improve independence of the HRGG Commission

As already pointed out, there are contradictory constitutional provisions regarding the independence of the HRGG Commission. In article 130(2) of the Constitution, the HRGG Commission is said to be:

an autonomous department ... in exercising its powers ... the Commission shall not be bound to comply with directives or orders of any person or department of government, or any opinion of any political party or of any public or private sector institution.

However, the very next sub-article, article 130(3), provides that the above provisions:

shall not be construed as restricting the President from giving directives or orders to the Commission, nor are they conferring a right to the Commission of not complying with directives or orders, if the President is satisfied that in respect of any matter or any state of affairs, public interest so requires.

The effect of this is that the president can give directives or orders to the HRGG Commission, which it is bound to comply with. This obviously undermines the independence and, potentially, the effectiveness of the HRGG Commission.

2.9.4 Provide constitutional protection for the broadcasting regulator

The broadcasting environment in Tanzania would be greatly improved if an independent authority to regulate broadcasting in the public interest was required to be established by law in the Tanzania Constitution itself.

2.9.5 Provide constitutional protection for the public broadcaster

The broadcasting environment in Tanzania would be greatly improved if constitutional provisions required the establishment of a public broadcaster with a public interest mandate and an independent board to provide public broadcasting services.

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 films
- 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 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, that is, the president and National Assembly. It is important to note that legislation passed by Parliament does not, as a general rule, apply to Zanzibar.

Chapter Three of the Tanzania Constitution deals with the legislature of the United Republic, and Part III thereof deals with its procedure, powers and privileges. In respect of legislation, articles 97–99 are particularly important.

There are detailed rules in articles 98–99 of the Tanzania Constitution which set out the different law-making processes that apply to different types of legislation. It is important for journalists and others in the media to be aware that the Constitution requires different types of legislation to be passed in accordance with particular procedures. The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the Constitution of Tanzania, 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 article 98 of the Tanzania Constitution
- Ordinary legislation – the procedures and/or applicable rules are set out in article 94 of the Constitution. Essentially, decisions (including the decision to pass legislation) are to be taken by majority vote, with the presiding officer having a casting vote
- Legislation that deals with taxation or national debt issues – the procedures and/or applicable rules are set out in article 99 of the Tanzania 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 the National Assembly during the law-making process. If a bill is passed by the Parliament in accordance with the various applicable procedures required for different types of bills, it becomes an act (and therefore law) once it has been assented to by the president, in terms of article 97(1) of the Tanzania Constitution.

If the president withholds his consent he may refer a bill back to the National Assembly, together with a statement of his reasons for withholding consent, for

reconsideration, in terms of article 97(2) of the Constitution. The bill cannot be presented to the president again by the National Assembly until six months have elapsed, unless the bill has been passed by at least two-thirds of all the members of the National Assembly, in which case the president must assent to it within 21 days – article 97(4).

3.2 Statutes governing print media

The law governing the print media in Tanzania is archaic and is not in accordance with international norms and standards. Besides requiring the registration of newspapers, newspapers are also required to post bonds or sureties in certain circumstances. The Newspapers Act, 1976, governs newspapers on mainland Tanzania. There are several key provisions of the Newspapers Act which impact upon the media and the practise of journalism in Tanzania.

3.2.1 Registration of newspapers

- Section 6 prohibits the printing or publishing of a newspaper (which is defined extremely broadly in section 2 as ‘any paper containing news, or intelligence, or reports of occurrences of interest to the public or any section thereof, or any views, comments or observations thereon, printed for sale or distribution and published in Tanzania periodically or in parts or numbers’) unless each of the proprietor, printer and publisher has registered an affidavit (sworn to before a magistrate) with the registrar of newspapers, which affidavit must contain the following information:
 - Correct title of the newspaper.
 - A true description of the house or building wherein such newspaper is intended to be printed.
 - The real and true names and places of residence of the persons intended to be proprietor, printer and publisher of the newspaper.
- In terms of section 7, new affidavits must be registered with the registrar in the event of any change in details.
- The registrar is appointed by the minister responsible for newspapers, in terms of section 3 of the Newspapers Act.
- In terms of section 9 of the Newspapers Act, the printer and publisher of every newspaper published in Tanzania shall deliver or send by registered post (at his or her own expense) to the registrar, a copy of every newspaper published and every supplement thereto.

- Failure to comply with, among others, sections 6, 7 or 9 is an offence, and upon conviction a person would be liable to a fine, imprisonment or both – section 12.

3.2.2 Bonds to be paid by newspapers

- In terms of section 13(1) of the Newspapers Act, the minister may, by written notice, require any newspaper publisher to execute and register a bond with the registrar in the amount specified in the notice with one or more sureties as may be required by the minister.
- In terms of section 13(2), such a bond may be used for the payment of:
 - Any monetary penalty imposed upon the publisher upon his or her conviction for an offence relating to the publication of the newspaper
 - Damages and costs awarded in any proceeding in respect of matter published in the newspaper
- Failure to comply with section 13 is an offence, and upon conviction a person would be liable to a fine, imprisonment or both – section 17.

3.2.3 Information to be published in every newspaper and copies to be kept and produced

- In terms of section 20(1), each copy of every newspaper published in Tanzania shall have printed legibly on the first or last printed page the name and address of its printer and publisher, and the description of the place of printing and publication.
- Failure to comply with section 20(1) is an offence, and upon conviction a person would be liable to a fine, imprisonment or both – section 20(2).
- In terms of section 21(2), every person who prints a newspaper must keep a copy thereof for a period of six months and produce it on written demand to do so by the registrar or by a court, judge or magistrate.
- Failure to comply with section 20(1) is an offence, and upon conviction a person would be liable to a fine, imprisonment or both – section 21(2).

3.2.4 Seizures of newspapers, searches of premises and destruction of newspaper

- In terms of section 22(1) of the Newspapers Act, any police officer may seize any newspaper he or she reasonably suspects has been printed or published in contravention of this act.

- Further, in terms of section 22(2), a magistrate may, by warrant, authorise any police officer above the rank of inspector to enter and search any place where it is reasonably suspected that any newspaper published in contravention of the act is being kept and to seize such newspaper. Note that this can be done without a warrant, where the police officer has cause to think that the delay would defeat the purposes of the act – section 22(3).
- In terms of section 22(4), a magistrate may order the forfeiture or destruction of any newspaper or thing seized in terms of section 22 if he or she is satisfied that the newspaper was published in contravention of the act or that the thing was used in the commission of an offence under the act.

3.3 Statutes governing films

The Films and Stage Plays Act, 1976, governs, among other things, the making of films in Tanzania. This clearly has an impact on the film and video media in Tanzania.

- In terms of section 3 of the Films Act, no person may direct, take part in or assist in the making of a film (except for a film by an amateur for private exhibition to family or friends) except under and in accordance with a permit granted by the minister responsible for censorship of films and stage plays, unless the minister has exempted such film from the provisions of this part of the Films Act, in terms of section 8 of the Films Act.
- Failure to comply with section 3 is an offence, and upon conviction a person would be liable to a fine, imprisonment or both. Further, the film in question could be subject to court confiscation and destruction order – sections 7 and 34.
- Section 4 of the Films Act requires an application for a film permit to be made in writing to the minister. 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 (and if these are to be amended from time to time then fresh notifications are required).
- Section 5 of the Films Act empowers the minister to issue a film permit subject to conditions as he may impose, 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 minister may even order a public officer to be present at the making of the film. Section 5(3) of the Films Act provides that any public officer required 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.

3.4 Statutes governing the broadcast media generally

3.4.1 Statutes that regulate broadcasting generally

Broadcasting in Tanzania, that is mainland Tanzania, is regulated in terms of a number of different pieces of legislation, namely the:

- Tanzania Communications Regulatory Authority (TCRA) Act, 2003
- Electronic and Postal Communications Act (EPCA), 2010
- Universal Communications Service Access Act (UCSAA), 2006

3.4.2 Establishment of the TCRA, the Content Committee and the Council

The TCRA Act establishes a number of bodies which are relevant to the regulation of broadcasting.

THE TANZANIA COMMUNICATIONS REGULATORY AUTHORITY

The TCRA Act provides, in section 4, that the Tanzania Communications Regulatory Authority (TCRA) is established and that it is a body corporate with perpetual succession. It is important to note that the TCRA is an amalgamated body, bringing together the former Tanzania Communications Commission and the former Tanzania Broadcasting Commission – section 6(1)(e) of the TCRA Act.

THE CONTENT COMMITTEE

The TCRA Act provides, in sections 25 and 26, that a Content Committee is established, which is responsible for the regulation of broadcast content transmitted by any broadcasting station or any electronic communication media as a broadcasting service.

THE TCRA CONSUMER CONSULTATIVE COUNCIL

The TCRA Consumer Consultative Council is a body established by section 37 of the TCRA Act and whose primary function is to represent the interests of consumers.

3.4.3 Main functions of the TCRA, the Content Committee and the Council

THE TCRA

The TCRA Act distinguishes between ‘duties’ and ‘functions’ of the TCRA. In terms of section 5 of the TCRA Act, the duty of the TCRA is to strive to enhance the welfare of Tanzanian society in carrying out its functions by:

- Promoting effective competition and economic efficiency
- Protecting the interests of consumers
- Protecting the financial viability of efficient suppliers
- Promoting the availability of regulated services to all consumers, including low income, rural and disadvantaged consumers
- Enhancing public knowledge, awareness and understanding of regulated sectors including:
 - Rights and obligations of consumers and regulated suppliers
 - Ways in which complaints and disputes may be initiated and resolved
 - The duties, functions and activities of the TCRA
- Taking into account the need to protect and preserve the environment

Section 6 of the TCRA Act sets out the TCRA’s functions. These include:

- Performing the functions conferred on it by sector legislation – that is, legislation related to the ‘regulated sector’, which in turn is defined in section 3 as telecommunications, broadcasting, postal services, allocation and management of radio spectrum and converging electronic technologies, including the internet and other information and communication technology applications
- Issuing, renewing and cancelling licences
- Regulating rates and charges
- Making rules for carrying out the purposes and provisions of the TCRA Act and sector legislation
- Monitoring the performance of the regulated sectors, including:
 - Levels of investment

- Availability, quality and standards of service
 - Cost of services
 - Efficiency of production and distribution of services
 - Other matters relevant to the TCRA
-
- Establishing standards for regulated goods and services. These are defined as equipment produced, supplied or offered for use, or services supplied or offered for use, in a regulated sector
 - Facilitating the resolution of complaints and disputes
 - Taking over and continuing to carrying out the functions formerly of the Tanzania Communications Commission and the Tanzania Broadcasting Commission
 - Disseminating information about matters relevant to the functions of the TCRA
 - Consulting with other regulatory authorities or institutions discharging functions similar to those of the TCRA in Tanzania and elsewhere
 - Administering the TCRA Act
 - Performing such other functions as may be conferred by law

It is also important to note that, in terms of section 34 of the TCRA Act, the TCRA has specific functions with regard to the Tanzania Broadcasting Service, which are dealt with elsewhere in this chapter.

THE CONTENT COMMITTEE

In terms of section 27(1) of the TCRA Act, the Content Committee shall have such powers and functions as the TCRA may determine, and in particular shall:

- Advise the sector minister on broadcasting policy
- Monitor and regulate broadcast content
- Handle complaints from operators and consumers
- Monitor broadcasting ethics compliance

However, section 27(4) provides that in determining the Content Committee's powers, the TCRA must have regard to the desirability of ensuring that the Committee has at least a significant influence on decisions which relate, among other

things, to matters concerning the content of anything broadcast or otherwise transmitted by means of electronic communication networks.

THE TCRA CONSUMER CONSULTATIVE COUNCIL

The TCRA has the power to:

- Represent the interests of consumers by making submissions to and consulting with the TCRA, the minister responsible for communications and the sector ministers (that is, telecommunications, broadcasting and postal services, etc.)
- Disseminate information and views on matters of interest to consumers of regulated equipment and services
- Establish local, regional and sector consumer committees and to consult with them
- Consult with industry, government and other consumer groups on matters of interest to consumers of regulated equipment and services

3.4.4 Appointment of TCRA Board, Content Committee and Council members

THE TCRA BOARD

In terms of section 7 of the TCRA Act, the TCRA Board, which is the governing body of the TCRA, consists of seven members. A member must meet the sole criterion that he or she not hold an office which he or she could use to exert influence on the TCRA:

- A non-executive chairman and a non-executive vice-chairman. These are appointed by the president on the basis that if one hails from one part of the Union (for example, mainland Tanzania), the other shall hail from the other part of the Union (for example, Zanzibar).
- Four non-executive members. These are appointed:
 - By the minister responsible for communications, after consultation with sector ministers, that is the ministers responsible for the different sectors – telecommunications, broadcasting, postal services, etc.
 - From lists of short-listed candidates who apply for positions in response to public advertisements, which lists are submitted by the Nominations Committee, which itself comprises:

- The permanent secretary for the ministry responsible for communications, who shall be the chairman of the committee
 - the permanent secretary responsible for public broadcasting and content matters
 - two other persons representing the private sector: one nominated from a legally recognised body representative of the private sector and the other nominated by the Council
- A person representing the public sector nominated by the minister responsible for communications.
 - The director general of the TCRA, who is appointed by the minister responsible for communications from a list of names submitted by the Nominations Committee.

THE CONTENT COMMITTEE

In terms of section 26(2) of the TCRA Act, the Content Committee consists of not more than five members, namely:

- The vice-chairman of the TCRA Board, who shall be the Content Committee chairman
- Four members appointed by the minister for communications, upon consultation with the chairperson of the TCRA Board
- Other members co-opted by the Content Committee as an expert or as necessary

Note that it is not clear how many co-opted members can be appointed given the limit of five members provided for above.

THE TCRA CONSUMER CONSULTATIVE COUNCIL

In terms of section 37(2) of the TCRA Act, the Council consists of between seven and ten members appointed by the minister responsible for communications from a list of names provided by members of the business community or by organisation(s) legally recognised as being representative of private sector interests. The chairperson of the Council is appointed by the minister and the vice-chairman is elected by the Council members.

Importantly, the minister is required, in terms of section 37(4), to call for nominations and to publish the names of proposed members (after public

nominations) in the Gazette and in newspapers, and to invite written comments thereon. Further, in terms of section 37(5) of the TCRA Act, the minister has to have regard to the desirability of the Council, having knowledge and understanding of consumers and of the regulated industries, including:

- Low-income, rural and disadvantaged persons
- Industrial and business users
- Government and community organisations

3.4.5 Funding for the TCRA, the Content Committee and the Council

THE TCRA

In terms of section 49(1) of the TCRA Act, the TCRA's funds consist of:

- Fees collected by the TCRA, including for the granting and renewal of licences
- Levies collected from regulated suppliers (that is in the telecommunications, broadcasting and postal sectors)
- All payments or property due the TCRA in respect of its functions
- Any grants, donations, bequests or other contributions made to the TCRA

THE CONTENT COMMITTEE

Note that no specific funding mechanisms for the Content Committee are provided for in the TCRA Act, although section 29(3) provides that its members are to be paid such allowances and fees as the minister of communications shall determine, on the advice of the TCRA.

THE TCRA CONSUMER CONSULTATIVE COUNCIL

In terms of section 39(1) of the TCRA Act, the Council funds consist of:

- Such sums as may be appropriated by Parliament, that is, provided for in the national budget, for the purposes of the Council during the first three years of its existence
- Such sums as may be appropriated from the funds of the TCRA for the purposes of the Council

- Grants, donations, bequests or other contributions

3.4.6 Making broadcasting regulations

In terms of section 47(1), the minister responsible for communications is empowered to make regulations and/or rules which are not inconsistent with the TCRA Act or with sector legislation as he or she considers necessary or desirable to give effect to the provisions of this act.

However, it is important to note that, in terms of section 47(2) of the TCRA Act, the TCRA also has rule-making powers (provided these are made in consultation with the minister responsible for communications) with respect to:

- Code of conduct
- Records to be kept, including the form and content of accounting records, and information and documents to be supplied to the TCRA by regulated suppliers
- Standards of regulated equipment and services
- Terms and conditions of supply of regulated goods and services
- Conduct in connection with the production, distribution and supply of regulated goods and services
- Complaint handling procedures
- Rates and charges for regulated goods and services
- Levies and fees payable to the TCRA
- Circumstances in which, and the terms and conditions upon which, a supplier of regulated goods and services shall be able to gain access to facilities owned or controlled by another person
- Such other matters as the TCRA considers desirable or necessary to give effect to the TCRA Act.

Note that in terms of section 47(4), any person who contravenes a rule made under section 47 is guilty of an offence and is liable upon conviction to a fine.

Note further that section 103 of the EPCA provides that the minister may make content-related regulations and that the TCRA may make content-related rules upon the recommendation of the Content Committee.

3.4.7 Licensing regime for broadcasters in Tanzania

CATEGORIES OF BROADCASTING SERVICES

Section 13(3) of the Electronic and Postal Communications Act (EPCA) provides that there are seven categories of so-called ‘content services’, which are defined in section 3 of the EPCA as a ‘service offered for speech or other sound, test or images whether still or moving except where transmitted in private communications’. Although the EPCA does make reference to broadcasting services, it is clear that a content service includes a broadcasting service. The seven categories of content services are listed (without being defined in the EPCA) as follows:

- Public service
- Commercial service
- Community service
- Non-commercial service
- Subscription broadcasting service
- Support service for subscription content service
- Any other licence as may be determined by the TCRA

In terms of section 6(1) of the EPCA, a person wishing to operate a content service shall apply to the TCRA for a licence. Section 13(1) of the EPCA prohibits a person from providing a content service without a licence. The EPCA makes reference to content services being provided under an individual or a class licence, but is entirely unclear as to when a content service would require an individual as opposed to a class licence. Subsections 6(2) and (3) of the EPCA set out the application requirements for an individual licence and these include:

- Business plans
- Technical proposals
- Shareholder information
- Proof of financial capacity
- Previous experience
- Technical specifications where the licensee intends to use frequency bands that are competitive

Section 116(3)(b) makes it an offence to provide a content service without having

first obtained the necessary licence. The penalty upon conviction is a fine, imprisonment or both.

FREQUENCY SPECTRUM LICENSING

Section 71(1) of the EPCA provides that the TCRA has the powers to manage and control all radio communication frequencies spectrum or frequency channels, and to provide mechanisms governing the allocation and assignment to persons by issuing licences under conditions determined by the TCRA. Clearly, a broadcaster intending to make use of the radio frequency spectrum must have a spectrum licence in addition to a content service licence.

Indeed, section 117(1) makes it an offence to use radio frequency spectrum without obtaining an individual assignment. The penalty upon conviction is a fine, imprisonment or both.

3.4.8 Responsibilities of broadcasters in Tanzania

ADHERENCE TO LICENCE CONDITIONS

Section 152(3) of the EPCA provides that any person who contravenes or fails to comply with any licence condition ‘without lawful excuse’ is guilty of an offence and is liable upon conviction to a fine.

Furthermore, section 117(2) of the EPCA provides that if a person wilfully fails to adhere to the conditions of a spectrum licence, the licence will be cancelled.

ADHERENCE TO CONTENT REQUIREMENTS OR RESTRICTIONS

Although all broadcasters enjoy the constitutional right to freedom of expression, this right is not absolute. In fact, broadcasters are subject to a range of content regulations in relation to what they may or may not broadcast. These include:

Prohibitions against transmitting certain types of information communication

In terms of section 118(a) of the ECPA, a person who uses a content service to transmit any communication which is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person is guilty of an offence. The penalty upon conviction is a fine, imprisonment or both.

Adherence to a code of conduct

Section 104 of the EPCA makes reference to a code of conduct which is to be binding

on all content service licensees and which is to prohibit the provision of content which is indecent, obscene, false, menacing or otherwise offensive in character. The code of conduct has to achieve a number of objectives. Briefly, these include:

- Protecting children
- Excluding material likely to incite the commission of a crime
- Comprehensive, accurate and impartial news
- Presenting religious material in a balanced and responsible manner
- Protecting the public against offensive and harmful content
- Regulating advertising and sponsorships appropriately
- Preventing subliminal messaging

Requirements regarding events of national interest

Section 105(1) of the EPCA requires that regulations on the provision of content relating to events of national interest (note that section 105(2) provides that events of national interest include, but are not restricted to, ‘significant sporting events that are of interest or importance to a substantial proportion of mainland Tanzanian society’) shall:

- Be designed to ensure that the content is reasonably accessible to members of the public simultaneously and without undue delay
- Clearly identify the nature of events that fall within the category of events of national interest. The effect of this is that the regulations must define what an event of national interest is
- Not interfere unduly with the commercial affairs of content service licensees

It is also important to note that subscription content service providers are prohibited from acquiring exclusive rights that prevent or hinder the public broadcaster from broadcasting sporting events that are of national interest.

Requirements regarding news and current affairs

Section 106(1) of the EPCA requires that regulations relating to news and current affairs shall be made to ensure that the content service licensee provides news and information on current affairs:

- Regularly
- That it is accurate, balanced, impartial and fair
- That it deals with international, regional, national and, where appropriate, local matters

Adherence to local content quotas

Section 107(1) of the EPCA deals with the original and independent production of local content, and requires that regulations dealing with local content and independent and original productions be made to:

- Stimulate the production of content in mainland Tanzania
- Prevent the excessive provision by content service licensees of:
 - Content that is not relevant or conducive to the development of mainland Tanzanian society
 - Content that has previously been made available to the public
- Specify:
 - The extent to which content service licensees shall include content produced in mainland Tanzania, and content produced by independent producers and original content
 - The times of the day or week when such content is to be provided

Official languages

Section 108 of the EPCA empowers the minister responsible for content and broadcasting services to make regulations on the use and promotion of official languages in content provided by a content service licensee.

Advertising and sponsorship

Although the TCRA is empowered to make rules regarding advertising and sponsorships, section 109 specifies that such rules may include:

- Prohibiting, restricting or regulating advertisements of specified goods, products, services and activities
- Prohibiting, restricting or regulating specified forms and methods of advertising or sponsorship
- Prohibiting, restricting or regulating political advertisements
- Restricting or otherwise regulating the extent of advertising and sponsorship a content licensee may have, including:
 - Maximum amount of time to be allocated to advertisements in any hour
 - Minimum interval which can elapse between any two periods allocated to advertising

- Number of such periods to be allowed in any hour or day
- Prominence that may be given to advertisements or sponsorships
- Exclusion of advertisements or sponsorships from a specified part of a licensed service

Educational content

Section 110 empowers the TCRA to make rules in relation to educational content that impose obligations on all or some content service licensees to ensure that a specified proportion of content provided by each one of them constitutes content of an educational nature and shall include:

- A definition of educational content
- The extent to which a content service licensee:
 - Shall be obliged to finance the production of educational content
 - May acquire and provide educational content produced by other persons
- Provisions to ensure that educational content is provided by a content service licensee
- Provisions to ensure that educational content provided is:
 - Of high quality
 - Suitable to meet the requirements of mainland Tanzanian society
- Different categories of educational content, and impose differential obligations of content service licensees, in relation to such categories

Content for the visually- and hearing-impaired

Section 111 of the EPCA empowers the minister, when making content regulations, or the TCRA, when making rules, to cater for the needs and interests of the visually- or hearing-impaired, including:

- The extent to which all or any content service licensees shall promote the understanding and enjoyment of content by persons who are hearing and/or visually impaired
- The means by which such understanding and enjoyment should be promoted, such as subtitling, audio-description for the blind, or the use of sign language
- Different classes of content to which such regulations apply

Political content

Section 112 of the EPCA requires the minister, when making content regulations in regard to the provision of political content (other than political advertising):

- Not to prohibit content service licensees from providing political content
- To regulate political content in a manner that is consistent with the Constitution

Counter-versions or right of reply

Section 113 of the EPCA requires a content services licensee to broadcast a counter-version presented by any person affected by an assertion of fact in any programme broadcast, if the person concerned claims that the assertion of fact is false. Note that the various subsections set out this requirement in some detail, including the circumstances in which a broadcaster is not required to broadcast a counter-version.

ADHERENCE TO OWNERSHIP AND CONTROL REQUIREMENTS

Section 26 of the EPCA was amended shortly after the promulgation of the EPCA by the Written Laws (Miscellaneous Amendments Act) No. 3, Act 17 of 2010. Section 26 now provides that the minister, in consultation with the TCRA, shall make regulations prescribing the minimum local shareholding requirement and procedure for the approval and transfer of shares in a company holding, among others, a content service licence.

ADHERENCE TO PRICING AND BILLING REQUIREMENTS

Section 31 of the EPCA provides that licensees may set and revise prices charged for content services provided to the public. This is clearly applicable only to subscription broadcasting and would not apply to free-to-air services. However, section 31(2) requires that in determining such prices, licensees must respect the following principles, namely:

- Be transparent, based on objective criteria, and non-discriminatory
- Not contain discounts that unreasonably prejudice competitive opportunities of other licensees
- Take account of regulations and recommendations of international organisations of which Tanzania is a member.

Section 31(3) requires licensees to:

- File price determinations with the TCRA two weeks prior to their introduction
- Publish its prices in the public media at its own expense at least one week prior to their introduction

Section 31(6) requires licensees to provide sufficiently detailed billing information to enable customers to determine if they are being billed correctly.

ADHERENCE TO DUTY OF CUSTOMER CONFIDENTIALITY

Section 97 of the EPCA prohibits the disclosure of any information of a customer, except where authorised by law.

PAYMENT OF UNIVERSAL SERVICE LEVY

Section 18(7) of the Universal Service Access Act makes it an offence for the holder of a communications licence to fail to pay the applicable universal service levy. The penalty, upon conviction, is a fine.

3.4.9 Is the TCRA an independent regulator?

It is clear that the TCRA does not meet international standards as an independent regulator. The TCRA Act does not even claim that the TCRA is an independent regulator. The minister has significant powers in respect of the process of appointing board members and also in terms of regulatory functions, including the power to make broadcasting-related content regulations.

3.4.10 Amending the legislation to strengthen the broadcast media generally

The single most significant problem is that the legislation ought to provide for the independence of the broadcasting regulator, that is the TCRA. In our view, the legislation ought to be amended such that the National Assembly is responsible for calling for public nominations of candidates to serve on the TCRA Board and for developing the short-list of suitably qualified candidates. In this regard, the TCRA Act ought to set out detailed provisions regarding the qualities, expertise and qualifications required of a TCRA board member. Thereafter, the president ought to formally appoint all TCRA board members.

Furthermore, the TCRA ought to have full powers in respect of regulating the broadcasting sector – that is, making rules and regulations, etc. – and the minister ought not to have regulation-making powers in respect of broadcasting matters.

In addition, the EPCA does not sufficiently clarify the differences between various categories of content – that is, broadcasting services. The legislation ought to set out in some detail what the differences are between the various categories and the requirements, for example, for community broadcasting services as opposed to commercial services.

3.5 Statutes that regulate the public broadcast media

3.5.1 Introduction

The Tanzania Broadcasting Corporation (TBC) is Tanzania's national broadcaster. It includes a national radio station, a national television station and an international radio station with a reach beyond the borders of Tanzania. It is important to note that the African Commission on Human and People's Rights has called upon Tanzania to transform the TBC into a public broadcaster.²

The main statutes governing the affairs of the TBC are the Public Corporations Act, 1992, the Public Corporation (The Tanzania Broadcasting Corporation – TBC) (Establishment) Order, 2007, and the Tanzania Communications Regulatory Authority Act, 2003.

3.5.2 Establishment of the TBC

The TBC was established under section 4 of the Public Corporations Act. Section 4 provides that the president may by order published in the Gazette establish a public corporation. The TBC was established in terms of the TBC Order.

3.5.3 The TBC's mandate

Section 4 of the TBC Order provides that the TBC's mandate is to encourage Tanzanian expression by offering a wide range of programmes that:

- Reflect Tanzanian attitudes, opinions, ideas, values and artistic creativity
- Display Tanzanian talent in educational and entertaining programmes
- Offer a plurality of views and a variety of news, information and analysis from a Tanzanian point of view
- Advance the national and public interest

Section 5 of the TBC Order sets out a list of functions of the TBC, and these include providing public service broadcasting through radio and television, and responding to audience needs.

Note that both section 7 of the TBC Order and section 32 of the TCRA Act require the TCRA to ensure that a charter is developed by the TBC and the minister responsible for broadcasting services, and that the charter ‘empowers the [TBC] to become a public service broadcaster’. It appears that such a charter has not in fact been developed yet.

In terms of section 32(2) of the TCRA Act, the TBC charter is to prescribe categories of services to be provided by the TBC. These can include public, commercial and community broadcasting services, as well as any other broadcasting service which the minister may determine. Presumably, these are not, strictly speaking, community or commercial services but public services provided to a localised community or on a commercial basis.

3.5.4 Appointment of the TBC Board

In terms of section 9 of the TBC Order, the TBC Board consists of nine members. The chairperson is appointed by the president and the minister responsible for broadcasting appoints the other eight board members.

Section 11 of the Public Corporations Act sets out the criteria for TBC Board appointments; board members must be of sound integrity, properly qualified and appropriately experienced in relation to the public corporation in question, or in public affairs.

Importantly, the TBC Board does not appoint the director-general of the TBC. In terms of section 8(1), the president appoints the director-general of the TBC. The director-general is the chief executive and the coordinating officer of the TBC. He or she is responsible to the TBC Board for the day to day functioning of the TBC, in terms of section 8(2) of the TBC Order.

3.5.5 Funding for the TBC

In terms of section 16(1) of the TBC Order, the funds of the TBC consist of:

- Sums appropriated by Parliament – that is, provided for in the national budget
- Fees and charges levied for goods and services provided
- Monies borrowed by or grants made available to the TBC
- Monies received for commercial activities, such as consulting, or leasing property or equipment
- Monies received from government levies
- Monies from government funds established for the functioning of the TBC

3.5.6 The TBC: Public or state broadcaster?

There is little doubt that the TBC remains a state broadcaster. From a legal perspective, the TBC remains an extension of the ministry responsible for broadcasting and content services. This is largely based on the role of the minister in appointing the TBC board members.

3.5.7 Weaknesses in the broadcasting legislation which should be addressed to strengthen the TBC

The government has clearly recognised the concept of public broadcasting and the need to transform the TBC into a genuine public broadcaster; however, it has failed to enact laws that would set the legal foundation for such transformation.

There are a number of weaknesses:

- The legislation ought to set out what the charter of the TBC is to be, rather than leaving this up to the TBC and the minister to develop.
- Legislation ought to be developed to provide for the independence of the TBC Board. The legislation ought to be amended such that the National Assembly is responsible for calling for public nominations of candidates to serve on the TBC Board and for developing the short-list of suitably qualified candidates.
- In this regard the legislation ought to set out detailed provisions regarding the qualities, expertise and qualifications required of a TBC board member. Thereafter, the president ought to formally appoint all TBC board members. The TBC Board ought to appoint the chief executive of the TBC and the Board ought to be solely responsible for regulating the activities of the TBC with no role for the minister. Lastly, the TBC ought to be accountable directly to the National Assembly and not through the minister.

3.6 Statutes governing broadcasting signal distribution

The key statute in respect of broadcasting signal distribution (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) is the Electronic and Postal Communications Act (EPCA).

The EPCA makes it clear that broadcasting signal distribution is a form of network service, which is defined in section 3 as:

a service for the carrying of information in the form of speech or other sound, data, text or images, by means of guided or unguided electronic energy but does not include services provided solely on the customer side of the network boundary.

Consequently, all broadcasting signal distributors must have a network service licence to provide network service.

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

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

3.7.1 Criminal Procedure Act [CAP 20 R.E. 2002]

Sections 142 and 195 of the Criminal Procedure Act (CPA) empower a court to issue a summons to compel any person who is likely to give material evidence to come before the court and to bring and produce all documents and writings in his possession, which are specified in the summons. Thus, if a court believes that a journalist knows something about a crime that could constitute material evidence, such a journalist might be ordered, in terms of sections 142 or 195 of the CPA, to reveal sources of information relating to that crime.

Note that failure to comply with a summons can result in the issuing of an arrest warrant and, in terms of section 199, in being detained until the person consents to do what is required of him or her.

3.7.2 Public Leadership Code of Ethics Act, Act 13 of 1995

Section 25 empowers the Ethics Tribunal established under the Public Leadership Code of Ethics Act to require any person who, in its opinion, is able to give any information relating to any enquiry being conducted by the Tribunal to attend before it to answer questions or to produce any document.

3.7.3 Penal Code [Cap 16]

Section 114(1)(b) of the Penal Code makes it an offence to refuse to answer a question in a judicial proceeding without lawful excuse. The penalty, upon conviction, is a fine or a period of imprisonment. In the absence of a recognised qualified privilege for journalists, this subsection might be used to force a journalist to reveal his/her sources of information.

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 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.

3.8 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 prejudicial to a child
- Certain kinds of information regarding legal proceedings
- Information regarding defence, security, prisons, breaches of the peace, and public order
- Publications which the president considers contrary to the public interest
- Publications which promote ill-will or hostility between classes of the population
- Obscene publications
- Incitement to violence
- Children and extreme violence
- Prohibition of false news

- Prohibition of misleading information regarding HIV and AIDS
- Information regarding the civil service
- Election-related information
- Criminal defamation

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

3.8.1 Prohibition on the publication of information prejudicial to a child

Section 158 of the Law of the Child Act, Act 21 of 2009, makes it an offence to publish any information which is prejudicial to the best interests of a child. The penalty upon conviction is a fine, imprisonment or both.

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

LAW OF THE CHILD ACT, ACT 21 OF 2009

Section 33 of the Law of the Child Act makes it an offence to publish, without the permission of the court, any information or a photograph that may lead to the identification of a child in any matter before the court. The penalty is a fine, imprisonment or both.

CRIMINAL PROCEDURE ACT [CAP 20 R.E. 2002]

- Section 186(3) of the CPA prohibits the publication in any newspaper or other media of the evidence of any person in a trial involving sexual offences. Note that the prohibition does not apply to law reports or to periodicals of a technical nature intended for circulation to lawyers or member of the medical profession.
- Section 188 of the CPA empowers a court to prohibit the publication of the names or identities of parties or of witnesses in the interests of the administration of justice.

PENAL CODE [CAP 16]

- Section 114(1)(d) of the Penal Code makes it an offence to publish writing capable

of prejudicing any person in favour of or against any party to the proceeding, or which lowers the authority of the court, that is, the presiding officer. This provision clearly includes both aspects of contempt of court – that is, the *sub-judice* rule and the rule against ‘scandalising’ the court.

- Further, section 55 of the Penal Code deals with ‘seditious intentions’. Section 55(1)(c) states that a seditious intention is an intention to, among other things, ‘bring into hatred or contempt or to excite disaffection against the administration of justice in the United Republic’. Note, however, that in terms of section 55(2)(b), an act, speech or publication is not seditious by reason only that it intends to point out errors or defects in the administration of justice with a view to the remedying of such errors or defects.

Note that in determining whether or not the intention with which any act was done, any words spoken or document published is seditious, every person is deemed to intend the consequences that would naturally follow from his or her conduct at the time and in the circumstances in which he or she so conducted him or herself – section 55(3).

NEWSPAPERS ACT, ACT 3 OF 1976

The Newspapers Act contains the same definition of seditious intention as is contained in the Penal Code, set out immediately above. It further provides in section 32 that any person who publishes or imports a seditious publication is guilty of an offence and liable, upon conviction, to a fine, imprisonment or both.

3.8.3 Prohibition on the publication of state security–related information

NATIONAL SECURITY ACT, 1970

Section 4 of the National Security Act contains a number of provisions relating to the disclosure of security-related information. The act makes it an offence to publish a range of security-related information, such as official codes or passwords, sketches, notes or other documents which relate to protected places (as determined by the president or in terms of the Protected Places and Areas Act, 1969), or munitions information, or confidential information that has been entrusted to a person by a public official. The penalty for such publication is imprisonment.

Section 5 of the National Security Act makes it an offence to communicate any classified matter to any unauthorised person who is guilty of an offence. The penalty is imprisonment.

TANZANIA INTELLIGENCE AND SECURITY SERVICE ACT, 1996

Section 16 of the Tanzania Intelligence and Security Service Act makes it an offence to publish in a newspaper or other document or to broadcast the fact that a person is a member of the Tanzania Intelligence Service (other than the director-general thereof) or is in any way connected with the Tanzania Intelligence Service, without the written consent of the minister for intelligence and security. The penalty upon conviction is a fine.

POLICE FORCE AND PRISONS COMMISSION ACT, ACT 8 OF 1990

Section 15(1) of the Police Force and Prisons (PFP) Commission Act makes it an offence for any person to publish the contents of any document, communication or information of any other kind which has come to his knowledge in the course of performing duties under the PFP Act. The penalty upon conviction is a fine, imprisonment or both.

Furthermore, section 15(2) makes it an offence to publish information which a person knows has been disclosed in contravention of the provisions of the PFP Act. The penalty upon conviction is a fine, imprisonment or both. These subsections severely hamper whistle-blowers and the media from reporting on information provided by whistle-blowers.

FILMS AND STAGE PLAYS ACT, 1976

Section 15 of the Films and Stage Plays Act makes it an offence to exhibit a film unless a certificate of approval from the Censorship Board has first been obtained.

Section 18(4) prohibits the Censorship Board from approving a film which, in its opinion, ‘tends to prejudice the maintenance of public order ... or the public exhibition ... of which would ... be undesirable in the public interest’.

PENAL CODE [CAP 16]

Section 55 of the Penal Code deals with ‘seditious intentions’. Section 55(1) sets out that a seditious intention is an intention to, among other things:

- Bring into hatred or contempt or to excite disaffection against the lawful authority of the Republic or its government
- Excite any of the inhabitants of the United Republic to attempt to procure the

alteration, other than by lawful means, of any other matter in the United Republic as by law established

- Raise discontent or disaffection among any of the inhabitants of the United Republic

Note, however, that in terms of section 55(2) an act, speech or publication is not seditious by reason only that it intends to:

- Show that the government has been misled or mistaken in any of its measures
- Point out errors or defects in the government or Constitution as established, or in legislation, or in the administration of justice with a view to the remedying of such errors or defects
- Persuade any inhabitants of the United Republic to attempt to procure by lawful means the alternation of any matter in the United Republic

Note that in determining whether or not the intention with which any act was done, any words spoken or document published is seditious, every person is deemed to intend the consequences that would naturally follow from his/her conduct at the time and in the circumstances in which he or she so conducted him or herself – section 55(3).

Section 89(1) of the Penal Code makes it an offence to use obscene, abusive or insulting language to any other person, in such a manner as is likely to cause a breach of the peace. The penalty is a period of imprisonment.

NEWSPAPERS ACT, ACT 3 OF 1976

The Newspapers Act contains the same definition of seditious intention as is contained in the Penal Code set out above. It further provides in section 32 that any person who publishes or imports a seditious publication is guilty of an offence and liable, upon conviction, to a fine, imprisonment or both.

3.8.4 Prohibition on publications which the president considers to be contrary to the public interest

Section 27 read with section 28 of the Newspapers Act, Act 3 of 1976, makes it an offence to publish a publication which the president has prohibited the importation of, on the basis that he is of the opinion that its importation would be contrary to the public interest. The penalty upon conviction is a fine, imprisonment or both.

3.8.5 Prohibition on publications which promote ill-will or hostility between classes of the population

Section 55 of the Penal Code [Cap.16] deals with ‘seditious intentions’. Section 55(1) states that a seditious intention is an intention to, among other things, promote feelings of ill-will and hostility between different classes of the population. Note, however, that, in terms of section 55(2), an act, speech or publication is not seditious by reason only that it intends to point out, with a view to their removal, any matters that are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of the Republic.

In determining whether or not the intention with which any act was done, any words spoken or document published is seditious, every person is deemed to intend the consequences that would naturally follow from his or her conduct at the time and in the circumstances in which he or she so conducted him or herself – section 55(3).

3.8.6 Prohibition on obscene publications

LAW OF THE CHILD ACT, ACT 21 OF 2009

Section 58(1)(b) of the Law of the Child Act makes it an offence to publish a photograph of a child or a dead child in a pornographic manner. The penalty is a fine, imprisonment or both.

PENAL CODE [CAP 16]

Section 175 of the Penal Code makes it an offence to distribute or even possess any obscene writing, drawing, photograph or cinematograph film. The penalty upon conviction is a fine or imprisonment.

FILMS AND STAGE PLAYS ACT, 1976

Section 15 of the Films and Stage Plays Act makes it an offence to exhibit a film unless a certificate of approval has first been obtained from the Censorship Board. Section 18(4) prohibits the Censorship Board from approving a film which, in its opinion, ‘tends to ... offend decency, or the public exhibition ... of which would ... be undesirable in the public interest’.

3.8.7 Prohibition on the publication of incitement to violence

Section 37 of the Newspapers Act, Act 3 of 1976, makes it an offence, without lawful

excuse, to publish a statement indicating or implying that it would be incumbent or desirable to, without lawful authority, do any act calculated to:

- Bring death or physical injury to any person or category or community of persons
- Lead to destruction or damage to property

The penalty, upon conviction, is a fine, imprisonment or both.

3.8.8 Prohibition on the publication of children and extreme violence

Section 58(1)(b) of the Law of the Child Act, Act 21 of 2009, makes it an offence to publish a photograph of a child or a dead child containing brutal violence. The penalty is a fine, imprisonment or both.

3.8.9 Prohibition on the publication of false news

Section 36(1) of the Newspapers Act, Act 3 of 1976, makes it an offence to publish any false statement, rumour or report that is likely to cause fear and alarm to the public or to disturb the public peace. The penalty, upon conviction, is a fine, imprisonment or both.

Note, however, that in terms of section 36(2), it is a defence if the accused proves that prior to publication he or she took reasonable steps to verify the accuracy of the statement, rumour or report as to lead him or her reasonably to believe that it was true.

3.8.10 Prohibition on the publication of misleading information regarding HIV and AIDS

Section 27(1) of the HIV and AIDS (Prevention and Control) Act, Act 28 of 2008, requires all information regarding the cure for HIV and AIDS to be subjected to scientific verification before being announced. Section 27(3) makes it an offence to publish misleading information regarding curing, preventing or controlling HIV and AIDS. The penalty is a fine, imprisonment or both.

3.8.11 Prohibition on the publication of information regarding the civil service

Section 16 of the Civil Service Act, Act 16 of 1989, makes it an offence for a person to publish information which, to his or her knowledge, has been disclosed in contravention of the requirement that no person may, without the written permission of the president, disclose information which has come to his or her knowledge in the course of the performance of his or her duties under the act, to an authorised person. The penalty is imprisonment.

These provisions are extremely draconian and run entirely counter to notion of a civil service that is transparent, accountable and responsive to public needs.

3.8.12 Prohibition on the publication of election-related information

Section 91A of the National Elections Act [CAP 343 R.E. 2010] makes it an offence knowingly to broadcast, print or publish a statement on the withdrawal of any candidate for the purposes of promoting the election of another candidate. The penalty upon conviction is imprisonment.

Note that this section is extremely poorly drafted and it is unclear whether the statement has to be false before such publication is an offence. It would seem ludicrous to have an effective blanket prohibition of the publication of news of the withdrawal of a candidate where this has indeed happened.

3.8.13 Prohibition on the publication of criminal defamation

Criminal defamation creates a criminal offence of defamation, which is normally a civil wrong in which damages are paid to repair the reputational damage suffered by the defamed person.

OFFENCE OF LIBEL

Section 38 of the Newspapers Act, Act 3 of 1976, provides for the offence of ‘libel’ – that is, where a person by means including print or writing, unlawfully publishes any defamatory matter concerning another person with the intent to defame that other person.

Section 40 provides that a person ‘publishes a libel’ if he causes the print, writing, painting, effigy, or other means by which the defamatory matter is conveyed, to be dealt with, either by exhibition, reading, recitation, description, delivery or otherwise, so that the defamatory meaning thereof becomes known or is likely to become known to either the person defamed or any other person.

Section 41 provides that any publication of defamatory matter concerning a person will be unlawful unless:

- The matter is true and publication is in the public interest, or
- It is privileged

There are two types of privilege – absolute and conditional privilege.

In terms of section 42, the publication of defamatory material is absolutely privileged in certain cases. This means that it is immaterial whether or not the material was true or false, or whether or not it was published in good faith. In general, the grounds of absolute privilege are:

- The defamatory matter is published by or on the order of the president, the government, the National Assembly or the speaker of the National Assembly
- The defamatory matter is published in the course of a court martial
- The defamatory matter is published in a judicial proceeding by a person taking part therein, that is, as judge, assessor, magistrate, lawyer, witness or party
- The defamatory matter is a fair report of anything said, done or published in the National Assembly
- The defamatory matter is published by a person legally bound to publish it

In terms of section 43 of the Newspapers Act, the publication of defamatory material is privileged on condition that it was published in good faith, and if the relationship between the parties was such that the person publishing the matter is under some legal or moral duty to publish it to whom the publication was made or has a legitimate personal interest in publishing it, provided that the publication does not go further than what is reasonably sufficient for the occasion, and in any of the following cases:

- A fair report of court proceedings.
- A copy or fair abstract of any matter that has been previously published and which was absolutely privileged when first published.
- An expression of opinion in good faith as to the conduct or personal character of any person in a judicial, official or other public capacity.
- An expression of opinion in good faith as to the conduct of a person in relation to any public question.
- An expression of opinion in good faith as to the conduct of a person disclosed by evidence given in a public legal proceeding.
- An expression of opinion in good faith as to the merits of any book, art, speech, performance and the like.

- A censure passed in good faith on the conduct or character of another person in respect of whom he or she has authority by contract or otherwise.
- A complaint or accusation made by a person in good faith against another person in respect of his or her conduct or character to a person in authority.
- If the matter is published in good faith for the protection of the rights or interests of the publisher or of the person to whom it is published.

Note that while section 45 provides that good faith will be presumed in conditional privilege cases, section 44 sets out when the publication of defamatory matter will not be deemed to have been made in good faith, namely:

- If the matter was untrue and the publisher did not believe it to be true
- If the matter was untrue and the publisher did not take reasonable care to ascertain whether or not it was true or false
- If the publisher acted with intent to injure the person defamed in a substantially greater degree than was necessary for the public interest.

The penalty for the offence of libel is a fine, imprisonment or both, in terms of section 47.

DEFAMATION OF A FOREIGN DIGNITARY

Section 46 makes it an offence to publish anything intended to degrade, revile, expose to hatred or contempt, any foreign sovereign ruler, ambassador or other foreign dignitary with intent to disturb the peace and friendship between Tanzania and the country to which the ruler or dignitary belongs. The penalty for the offence is a fine, imprisonment or both, in terms of section 47.

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 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.

Sadly, Tanzania has yet to pass this kind of legislation. In 2002 Tanzania did enact the Records and Archives Management Act, the aim of which was ‘to provide for the

proper administration and better management of public records and archives’. However, section 16, headed ‘Access to public records’, contains the rather astounding provision that public records shall be available for public inspection ‘after the expiration of a period of thirty years from their creation’. Exceptions to this – that is, longer or shorter periods – may be prescribed by the minister responsible for records and archives management. Clearly, allowing access to public records only after the expiry of 30 years does nothing for the media’s ability to report on public life and government activities.

4 REGULATIONS AFFECTING THE BROADCAST MEDIA

In this section you will learn:

- What regulations are
- Key regulatory provisions governing broadcasting content
- Other key broadcasting regulations

4.1 Definition of regulations

Regulations are a type of subordinate legislation. They are legal rules that are made in terms of a statute. Regulations are a legal mechanism for allowing ministers, or even organisations such as the TCRA, to make legally binding rules governing an industry or sector, without having Parliament having to pass a specific statute thereon. The empowering statute will empower the minister or a body such as the TCRA to make regulations and/or rules on particular matters within the scope of the functions and powers of that minister or body.

4.2 Key regulations governing broadcasting content

Although the Broadcasting Services (Content) Regulations, 2005, were made in terms of the now-repealed Broadcasting Services Act, 1993, they are still in force in terms of the EPCA. The Content Regulations apply to all broadcasters, and regulate both the technical aspects of content services as well as programme content. Part II of the Content Regulations, which deals with content services, requires:

- All broadcasting equipment to meet minimum technical standards set by the regulator, the TCRA
- Every transmitter to operate on the assigned frequency
- Every signal carrier (now called network service licensees) to ensure that every

broadcasting transmission is identified by transmitting signal or announcements periodically

Part III of the Content Regulations, which deals with programme content, contains the following provisions:

- *Programme presentation* – Section 5 requires every licensee to ensure that a programme:
 - Upholds national sovereignty, national unity, national interest, national security and Tanzania’s economic interests
 - Projects Tanzanian national values and national points of view
 - Observes good taste and decency
 - Upholds public morality
 - Avoids intrusive conduct into private lives
 - Does not injure the reputation of individuals
 - Protects children from negative influences
 - Does not incite or perpetuate hatred against or vilify any group or persons on the basis of ethnicity, race, gender, religion or disability.

- *News and current affairs* – Section 6 requires the licensee to:
 - Ensure that at least 1.30 hours of the daily programme output shall be for news
 - Provide news of local, regional, national and international nature
 - Report accurately and fairly
 - Report news in an objective and balanced manner, without intentional or negligent departure from the facts, whether by distortion, exaggeration, misrepresentation or material omission
 - Not accept sponsorship on news bulletins
 - Ensure that during the presentation of current affairs programmes, factual programmes and documentaries, where issues of public importance are discussed, reasonable effort is made and reasonable opportunity is given to present a fair, accurate, balanced and impartial view
 - Where the licensee allows the expression of personal views during the programmes, to inform the audience in advance and give them an opportunity to respond to such views
 - Advise the audience in advance of news items containing accounts of extraordinary violence, sexual conduct or gruesome accounts of death
 - Ensure that court and parliamentary proceedings are reported accurately and that the reporting does not contain premature

conclusions which may prejudice the outcome of the case or parliamentary proceedings

- *Political party broadcasts* – Section 7 requires the broadcaster to:
 - During election campaigns, give reasonable and equal opportunities for the broadcasting of election campaigns to all political parties contesting the election
 - Be guided by the code on political party election broadcasts issued by the authority

- *Investigation reporting* – Section 8 requires investigate reports to be balanced, accurate, fair and complete.

- *Privacy* – Section 9:
 - A licensee shall not use material relating to a person's personal or private affairs or which invades an individual's privacy other than where there is a compelling public interest for the material to be broadcast.
 - The identity of rape victims and victims of other sexual offences shall not be divulged on programme broadcasts without the prior written consent of the victim.
 - The identity of minors who are victims of rape or any other crime shall not be divulged.

- *Live programmes* – Section 10 requires licensees to:
 - Be technically equipped in handling live programmes so as to avoid broadcasting obscene and undesirable comments from participants, callers and audiences
 - Ensure that contributors and participants to a programme are treated fairly without discrimination or denigration
 - Ensure that they abide by the provisions of the Copyright and Neighbouring Rights Act, 1997

- *Sponsorship* – Section 11 requires every licensee to:
 - Develop a sponsorship policy which ensures that:
 - Any advertising material from the sponsor must be clearly distinct and separated from the programme
 - The content and format of the individual programmes are not influenced by the sponsors of the programme
 - The sponsorship of news and current affairs programmes shall not be allowed

- The provisions of the code on advertising and sponsorship are adhered to
- *Programme hook ups* – Section 12 provides that a licensee shall be free to undertake programme hook-ups subject to business agreements between them and to the Copyright and Neighbouring Rights Act, 1997.
- *Broadcasting of parliamentary sessions* – Section 13 entitles a licensee to cover parliamentary sessions subject to laid down parliamentary rules, regulations, procedures and on parliamentary broadcasting. However, a licensee shall not insert advertisements during a live parliamentary session or display sponsorship logos.
- *Unsuitable programmes* – Section 14 requires:
 - All licensees to have particular regard to the need to protect children from unsuitable programme material
 - That subscription broadcasting service programmes dealing with extreme violence, sexual conduct and disturbing social and domestic friction shall not be broadcast before the watershed period (05h30 to 21h00).
- *Language* – Section 15 requires every free-to-air licensee to:
 - Ensure that only official languages, namely Kiswahili and English, are used for all broadcasts, except where specific authorisation has been given to use non-official languages
 - Refrain from using language meant to mislead or unnecessarily cause alarm and despondency
 - Take particular care to avoid blasphemy and take into account cultural and religious sensitivities
- *Explicitness* – Section 16 requires:
 - Every licensee to ensure that sexual activity shall:
 - Only be suggested in discreet visual or verbal reference and never in graphic detail
 - Not be frequent and without any good reason
 - Broadcasters to take into account community values on exposure to unsolicited sexual material when broadcasting programmes that contain sexual aspects or conduct
 - That no licensee broadcasts any programme which depicts actual sexual activity
 - Nude scenes which show the genitals not to be broadcast, except for educational purposes

- News stories involving a sexual aspect to be presented as such without undue exploitation
- *Programme clarification labels or warnings* – Section 17 requires:
 - That during early hours of the adult listening and viewing period, the licensee shall provide audience advisories before the commencement of each programme
 - That, in addition to verbal warnings about the content, a visual warning shall be displayed on the screen at the start of the programme and on all promotional material
 - The following warning symbols to be displayed on television:
 - C – Content may offend
 - L – Language may offend
 - V – Contains violence
 - VL – Contains violence and strong language
 - S – Sexual content may offend
 - The following classifications on age restrictions:
 - FAM – General/family viewing
 - PGA – Parental guidance advised
 - 13+ – Approved for viewing by persons over 13 years
 - 16+ – Approved for viewing by persons over 16 years
 - 18+ – Approved for viewing by persons over 18 years
- *Violence* – Section 18 requires every free-to-air licensee to:
 - Have particular regard to protect children from any violent material
 - Have a responsibility to ensure that generally programmes broadcast do not:
 - Incite, encourage or glamorise violence and brutality
 - Contain gratuitous violence in any form – that is, violence which does not play a leading role in developing the plot or theme of the material as a whole
 - Epitomise violence as the only legitimate ingredient and main theme without clearly showing the negative consequences of violence to its victims and perpetrators
 - Show methods or devices of inflicting injury which are capable of easy imitation
 - Not portray conduct that encourages antisocial behaviour, abuse of alcohol or drugs
 - Not air programmes containing frightening and excessive special effects featuring violence not relevant to the story line

- Not air programmes containing a combination of violence and sexual conduct meant to titillate the viewers or listeners
 - Not air programmes that portray violence against women in drama so as to encourage the idea that women are to be exploited or degraded through violence or are willing victims of violence
 - Not air programmes that portray violence against women as an erotic experience
 - Justify any depiction where, in rare cases, there is a link between violence and sexual gratification that is explored as a serious theme in drama
- *Advertising content* – Section 19 requires every licensee to:
- Ensure that there is a clear separation of advertising content and programme, and shall:
 - Broadcast a maximum of five minutes of advertising material in any 30 minutes of broadcasting
 - Insert a maximum of two advertising breaks in a 30-minute programme
 - Ensure that every advertisement does not exceed a duration of 60 seconds
 - Be guided by the code of advertising and sponsorship issued by the authority
- *Portrayal* – Section 20 requires:
- Every free-to-air licensee to:
 - Avoid broadcasting material which promotes or glamorises discrimination based on race, national ethnic origin, colour, religion, gender, age, mental or physical disability
 - Portray women and men as having equal capabilities in performing societal functions
 - Every licensee to avoid:
 - Identifying people by their ethnic origin or colour
 - Using derogatory terms in speaking of men or women of a particular ethnic groups or race
 - The presentation of a group of people as an undifferentiated similar mass, rather than a collection of individuals with different interests and beliefs
 - Programmes which depict women as sexual objects
 - Licensees to:
 - Be sensitive to the rights and dignity of people who are mentally or physically challenged

- Ensure that programmes which patronise and promote myths about people with disabilities are avoided
 - Ensure that in portraying acts of violence, they are not always associated with people who are mentally challenged
- *Programme classification* – Section 21 requires subscription content licensees to:
- Visually display classification warning symbols throughout the viewing period
 - Not only display the symbols but to give reasons for the classifications as follows:
 - *FAM – Family viewing*
 - Violence – shall be discreetly implied but have very low scenes of threat or menace and is infrequent
 - Sexual activity – shall be only suggestive in visual or verbal reference
 - Coarse language – shall be mild
 - *PGA – Parent guidance advised*
 - Violence – shall be discreetly implied or styled
 - Sexual activity – shall be suggested, but discreet and infrequent
 - Language – coarse languages shall be very infrequent
 - *16+ – Recommended for over 16 years*
 - Violence – shall not contain a lot of detail and should not be prolonged
 - Sexual activity – verbal reference to sex may be slightly more detailed, but sexual activity not depicted
 - Coarse language – shall be used infrequently
 - Drug use – shall be shown only briefly if it enhances the story line
 - Nudity – shall be shown, but should not be detailed
 - *18+ – This category is legally restricted* (material classified under this category deals with issues or contains depictions which require mature perspective)
 - Violence – depiction of violence shall not have a high impact
 - Sexual activity – sexual activity may be implied but actual sexual activity shall not be shown. Verbal reference to sexual activity may be detailed. Depiction of nudity must not be detailed.
 - Drug use – may be shown but not promoted or encouraged

- *Programme schedules* – Section 22 requires a licensee to:
 - Publish programme schedules in a daily newspaper circulating widely in Tanzania at least one month in advance
 - Adhere to the programme schedules which have been provided in advance to the subscribers, unless it is obliged to broadcast spontaneous events of national or international significance live or through special news programmes.
 - Submit to the TCRA:
 - Advance quarterly programme schedules 14 days before each quarter
 - Transmission reports detailing programmes actually broadcast within seven days after the end of each calendar month
 - Music play-lists detailing all the music broadcast within seven days after the end of each calendar month
 - Maintain copies of all off-air transmission recordings for 90 days
- *Code on Community Broadcasting* – Section 23 requires a licensee holding a community broadcasting licence to comply with the Code on Community Broadcasting issued by the TCRA.
- *Subtitling for the deaf* – Section 24 requires a licensee to ensure that its content output is subtitled for the deaf and hard of hearing.
- *Children's programmes* – Section 25 requires licensees:
 - To provide high-quality programmes for children of:
 - Not less than 30 minutes of its daily programme on weekdays
 - Not less than one hour of its daily programme on weekends and public holidays
 - Not to provide content unsuitable for children at times when large numbers of children may be expected to be part of the audience
 - To exercise particular caution in, and as far as possible avoid, the depiction of violence in content directed at children
 - Not to use offensive language, including profanity, blasphemy and other religiously insensitive material in content specially designed for children
- *Watershed period* – Section 26 provides that:
 - Content which depicts or contains scenes of violence, sexually explicit conduct or offensive language intended for adult audiences shall not be transmitted between 05h30 to 21h00
 - No excessive and gross offensive language should be used in content

transmitted between 05h30 and 21h00, or at times when substantial numbers of children are likely to be part of the audience

- *Local content* – Section 27 specifies that:
 - A minimum of 60% of all content provided by the licensee, measured as a weekly average over the period of a year, must be content produced by:
 - A natural person who is a citizen of, and permanently resident in, the United Republic
 - A legal person, the majority of whose directors or shareholders are citizens and permanently residing in the United Republic, or
 - The licensee
 - The licensee shall ensure that 10% of local content aired by the licensee shall be produced and supplied to the licensee by independent local producers

Section 28 of Part IV of the Content Regulations provides that the penalty for non-compliance with the regulations is a fine.

Section 29 of Part IV of the Content Regulations contains detailed provisions regarding the process for an application to change a station's name.

Finally, section 30 of Part IV requires that a licensee must clearly identify itself by its station identification regularly every hour during the daily period when it provides content to the public.

4.3 Other key broadcasting-related regulations

The TCRA has passed regulations governing different non-content aspects of broadcasting, signal distribution and radio frequency spectrum management. For the purposes of this chapter it is not necessary to set out the rather technical details, but it is important to note the passage of the Tanzania Communications (Radio-communication and Frequency Spectrum) Regulations of 2005, which deal with licensing processes, types of licences and interference issues.

5 MEDIA SELF-REGULATION

A self-regulatory body, the Media Council of Tanzania, was established in 1995 and developed a Code of Ethics for Media Professionals and a Professional Code for Journalists, which it enforces.

5.1 Code of practice for media owners/publishers

The Code of Ethics provides that media owner and publishers should:

- Employ managers on professional merit only
- State the purpose for which the organ was established
- As a rule, not interfere with the decisions of managers in recruitment, management and disciplinary matters
- Spell out clearly professional and non-professional interests and ambitions in relation to the investment and the media organ
- Allow for the establishment of mechanisms that monitor and respond to public opinion and concern as regards the media output and service
- Avoid sell-out attitudes, such as summoning the manager before a disgruntled party for redress
- Consider with care gifts and offers that may compromise the policy, objectives and integrity of the enterprise
- Suggest without coercion or intimidation any feelings regarding certain issues to the manager

5.2 Code of ethical practice for media managers/editors:

The Code of Ethics provides that media managers and editors should:

- Ensure that all workers know clearly the organisation's objectives and how best to achieve them
- Motivate personnel and work out incentives for job satisfaction
- Remunerate fairly all work done by employees
- Ensure that all employees are given an opportunity to enhance their professional competence through further training
- Ensure that libel is avoided, and that the honour of a person is respected

- Ensure that media output is distinguishable between fact and commentary; that only proven and accurate stories are published and that rumours are discouraged
- Ensure that information published does not incite discrimination, sexism, racism or violence
- Ensure that all points of view are exposed by seeking out the main parties to a story. When a party refuses to cooperate, the organ should say so
- Inform all editorial staff of important decisions that may influence the life of the enterprise
- Ensure that the organ reports fairly and accurately the outcome of an action for defamation to which it has been a party
- Ensure that in times of grief or shock, enquiries are made with sympathy; and editing is carried out with discretion so that the concerned parties are not made to relive their agony
- Ensure that children and minors are not identified with any sexual or any other criminal offence
- Ensure that material that would identify victims of sexual assault is not published
- Ensure that derogative references to a person's creed or racial origin are not published
- Ensure that neither him or her, nor an employee takes gifts or bribes in cash or kind
- Examine offers, sponsorships and attractive contracts and agreements to ensure that they have no attachments that would compromise the organisation
- Not suppress useful information for any reason other than the public interest
- Not entertain favouritism and greed
- Ensure that the public is provided with unbiased, accurate, balanced and comprehensive information/news
- Avoid violations of individual privacy and human dignity unless necessitated by the public interest

- Not use plagiarised material without giving due credit to the source
- Not open to ridicule any underprivileged persons or communities
- Not, as a rule, disclose sources of information given in confidence

5.3 The Professional Code of Ethics for Journalists

The provisions of this Code include:

■ Truth and accuracy

- Seek to keep the good faith of readers by assuring them that the news is accurate, free from bias, and that all sides are presented fairly.
- Always provide a truthful and comprehensive account of events in a fair and honest manner.
- Seek subjects of news stories and allegations, and give them the opportunity to respond as a matter of right.
- Distinguish clearly comment, conjecture and fact.
- Where a significant inaccuracy, misleading or distorted statement is published, it must be corrected promptly with due prominence and, where appropriate, an apology.

■ Right of reply

Give a fair opportunity to reply to any individual or organisation which the newspaper or broadcasting organisation itself attacks editorially.

■ Privacy

- Publication or broadcasting of information, including pictures, about the private lives or concerns of individuals without consent is acceptable only if a serious legitimate public interest outweighs their normal human right of privacy, or where the material concerned ought to be published in the public interest, outweighing the normal human right of privacy.
- Entry into public life does not disqualify individuals from the right to privacy about their private affairs, except where the circumstances of these are likely to affect their performance of, or fitness for, the public roles they hold or seek.
- The overriding public interest relied upon in this and other clauses of the Code include:
 - Detection and expose of crime
 - Protection of public health and safety

- Preventing the public from being seriously misled on an important matter by a public statement or action of an individual or institution

■ Harassment and pursuit

- Avoid undercover and surreptitious methods to get information from sources, except where conventional means have failed, and the information is of a high public interest. When used, it has to be explained as part of the story.
- Avoid seeking interviews, information or pictures by intimidation, harassment or persistent pursuit. Do not invade individuals' privacy by deception, eavesdropping or covert technological means unless the material sought to be published is in the public interest and could not be obtained in any other way.

■ Discrimination

- Avoid discriminatory and derogatory stereotyping information or depiction by race, creed, gender, ethnicity, age, disability, geography, physical endowment or social status.
- Avoid comics and jokes about physical or mental disability and real life tragedy, which might be painful.
- Be extra careful when making jokes based on race, religion, sex or age.
- As a rule, use gender-sensitive language.
- Avoid identifying people by ethnicity or colour.
- Be sensitive to the rights and dignities of the disabled.
- Avoid bringing into the open someone's sexuality.

■ Children

- Avoid interviewing or photographing a child under the age of 16 in the absence of, or without the consent of, a parent or other adult responsible for the child, such as a teacher.
- Publication without consent of material about a child's private life cannot be justified solely by the fame, notoriety or position of his or her parents.
- Reports of proceedings in youth courts should leave out the names and addresses of children.
- Explicit sexual conduct between adults and children should not be depicted.

■ Victims in sexual cases

- Avoid identifying victims of sexual assaults.

-
- Avoid identifying children under the age of 16 as victims or witnesses in sexual assault cases.
 - Reports of cases alleging sexual offences against a child may identify an adult concerned but must avoid identifying the child.
- **Sexual relations and conduct**
- Avoid depictions of nudity and explicit sex.
- **Crime**
- Avoid glamorising crime and antisocial behaviour involving violence.
 - Issue warnings whenever a factual scene is to include violence.
- **Innocent relations**
- Avoid implicating families of criminals in wrongdoing or guilt by association.
 - Avoid identifying relations of criminals unless the connection is directly relevant to the matter being reported.
- **Religion**
- Avoid casual use of words considered holy by believers.
 - Journalists and broadcasters should approach and refer to religious bodies in a balanced, fair and seemly manner.
- **Grief and bereavement**
- Respect personal grief, taking care to make any necessary approaches and inquiries with sensitivity and discretion.
 - When covering disasters and tragic events, care must be taken not to add to the distress of people who are already at a loss, including pressurising them for interviews.
 - Treat the dead with respects; close-ups should be avoided.
- **Advertising**
- Advertisements should not promote social disharmony.
 - Advertisements and sponsored material must be clearly distinguishable from general editorial and programming matter, where necessary by being clearly labelled in print or on air as ‘advertisement’ or ‘advertising feature’.
- **Personal interest and influence**
- Resist undue influence from outside sources, including owners, advertisers, story subjects, powerful individuals and interest groups.

- Journalists should not allow personal or family interests to influence their professional duties.
 - Journalists must not be influenced by any consideration, gift or advantage offered to them, or by advertising or other commercial considerations.
 - Journalists should not belong to any organisation whose activities they cover.
- **Confidential sources**
- Never, as a rule, disclose sources of information given in confidence unless required to do so by a legal process.
 - Journalists of all media have a moral obligation to protect confidential sources of information, and to respect confidences knowingly and willingly accepted in the course of their occupation.
- **Withholding information**
- Never suppress useful information unless this is in the public interest.
 - Government may ask you to withhold publication of a story until it has investigated and acted upon it.
 - Exercise caution but do not hold back stories that protect the government as opposed to the country.
- **Deceitful identification**
- A journalist should never falsely identify him or herself to gain access to persons or places and then write stories on the experience.
- **Freedom of the press**
- Defend at all costs the freedom of the media.
 - Freedom belongs to all, and journalists must make sure that public business is conducted in public.
 - Journalists must be vigilant against those who exploit the press for their purposes.

NOTES

- 1 See, <http://www.freedomhouse.org/report/freedom-press/2012/tanzania> [accessed 16 June 2013].
- 2 Concluding Observations on the Consolidated 2nd to 10th Periodic Report of the United Republic of Tanzania, p. 6, para. 34. Available online: http://www.achpr.org/files/sessions/43rd/conc-obs/2to10-1992-2008/achpr43_conc_staterep2to10_tanzania_2008_eng.pdf [accessed 14 June 2013].

13 Zimbabwe



1 INTRODUCTION

Zimbabwe became the then British colony of Southern Rhodesia in 1923. In 1965, the leader, Ian Smith, made a unilateral declaration of independence as Rhodesia, which was immediately declared illegal by Great Britain. In the late 1960s and during the 1970s, armed liberation movements launched an internal guerrilla war of liberation. In 1979, Ian Smith's government was forced to the negotiating table at Lancaster House, where agreement was reached on a democratic constitution.

Robert Mugabe was the first democratically elected leader of Zimbabwe, which has a population of approximately 12 million people. Some 30 years down the line, however, the United States State Department's 2010 Human Rights Report on Zimbabwe believes that the past four elections – in 2002, 2005, 2008 and the presidential run-off elections also in 2008 – were 'not free and fair'. Zimbabwe's declining gross domestic product, inflation woes, declining life expectancy rates, political violence and generally low levels of political freedom, including freedom of the press and other media, are well documented.

In 2008, the so-called Global Political Agreement – a power-sharing agreement – was entered into between the ruling party, the Zimbabwe African National Union – Patriot Front (ZANU-PF), and both factions of the Movement for Democratic Change (MDC). This power-sharing arrangement resulted in a new Constitution being negotiated and endorsed in a national referendum in March 2013. At the time of writing, the date for the proposed elections remains to be finalised. In addition,

there are still worrying examples of political violence and widespread doubts as to whether there is a genuine commitment to free and fair elections on the part of Zimbabwe's ruling party.

This chapter introduces working journalists and other media practitioners to the legal environment governing media operations in Zimbabwe. 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 Zimbabwe. Key weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Zimbabwe, 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 Zimbabwe
- 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 Zimbabwe 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.

This chapter is unique in the handbook because it focuses on the new Constitution of Zimbabwe, which was passed on 1 February 2013 but is yet to come into effect. The new Constitution was approved by over 95% of participants in a national referendum that took place in March 2013.

Although not yet in effect, it is clear that the new Constitution will replace the existing Zimbabwe Constitution, which is contained in a schedule to the Zimbabwe Constitution Order of 1979 (S.I. 1979/1600 of the United Kingdom), after having been agreed to by the United Kingdom, the Zimbabwean liberation movements and the former Rhodesian government, following a protracted war. Throughout this chapter, reference to the 'Constitution' thus means reference to the new Constitution of 2013.

The Zimbabwe Constitution sets out the country's founding values and principles in section 3(1). For the purposes of the media, the following values and principles that Zimbabwe is said to be founded on are particularly important. These are the rule of law, fundamental human rights and freedoms, 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 Zimbabwe Constitution does make provision for constitutional supremacy. 'Supremacy of the Constitution' is listed in section 3(1)(a) as the first founding value or principle on which Zimbabwe is founded. In addition, section 2(1) specifically states that: 'This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency'. Section 2(2) goes on to specify who is bound by the Constitution. Section 2(2) states:

The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.

The effect of this wording is that constitutional obligations are binding on every person and not just organs of state.

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 Zimbabwe makes provision for two types of legal limitations on the exercise and protection of rights contained in Chapter 4, the Declaration of Rights – namely, public emergency limitations and general limitations as contained in Part 5 of Chapter 4, which part is headed ‘Limitation of fundamental rights and freedoms’.

2.3.1 Public emergency limitations

Section 87 of the Zimbabwe Constitution, read with the Second Schedule to the Constitution, makes it clear that the fundamental rights and freedoms set out in Chapter 4 of the Constitution may be limited by a written law providing for measures to deal with situations arising during a period of public emergency. This is, however, subject to certain requirements:

- Such a law must be published in the Government Gazette.
- Any limitation which the law imposes on a fundamental right or freedom must not be greater than is strictly required by the emergency.
- No such law (or any other law) may indemnify the state for any unlawful act or limit the following rights: life, human dignity, the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment; the right not to be placed in slavery or servitude, the right to a fair trial or the right to obtain a habeas corpus order.
- If a public emergency is declared in relation to only a part of Zimbabwe, emergency law may not limit fundamental rights or freedoms in any other part.

- As set out in the Second Schedule, there are a number of specific protections given to people detained under a declaration of a public emergency, including the establishment of a tribunal to review the cases of detainees and which must be given notice of every detention within ten days.

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 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 constitutional chapter which sets out the Declaration of Rights can be found in section 86 of the Zimbabwe Constitution, headed 'Limitations of rights and freedoms'. Section 86(1) provides that the fundamental rights and freedoms set out in Chapter 4 must be exercised reasonably and with due regard for the rights and freedoms of other persons. Section 86(2) provides that the fundamental rights and freedoms 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 fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors including:
 - The nature of the right or freedom
 - The purpose of the limitation, in particular whether it is necessary in the interest of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest
 - The nature and extent of the limitation
 - The need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others
 - 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 also important to note that at least one of the rights contained in the Declaration of Rights is subject to what is known as an 'internal limitation'. This is where the

Constitution sets out, in the text of the right itself, what the limits of such a right are. This is done, for example, in the right to freedom of expression and freedom of the media. The details of such an internal limitation are dealt with in section 2.5 below.

2.4 Constitutional provisions that protect the media

The Zimbabwe Constitution contains a number of important provisions in Chapter 4, Declaration of Rights, that directly protect the media, including publishers, broadcasters, journalists, editors and producers. There are provisions elsewhere in the Constitution that also assist the media as it goes about its work of reporting on issues in the public interest, and those are included in this section too.

2.4.1 Rights that protect the media

FREEDOM OF EXPRESSION AND FREEDOM OF THE MEDIA

The most important section that protects the media is section 61, which sets out a number of detailed and important provisions protecting freedom of expression and freedom of the media, including the broadcast media. Section 61(1) provides that:

- Everyone has the right to freedom of expression, which includes –
- (a) freedom to seek, receive and communicate ideas and other information
 - (b) freedom of artistic expression and scientific research and creativity; and
 - (c) academic freedom.

Importantly, section 61(2) specifically enshrines the right of every person to freedom of the media, which includes ‘protection of the confidentiality of journalists’ sources of information’.

The next two subsections of section 61 relate to the electronic and state-owned media. The specificity and detail of the protections enshrined are testimony to the abuses that have been evident in the broadcasting sector in Zimbabwe’s recent past.

Section 61(3) governs broadcasting generally. It provides that:

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

Section 61(4) is noteworthy because it focuses on state-owned media. It provides that:

All state-owned media of communication must –

- (a) be free to determine independently the editorial content of their broadcasts or other communications;
- (b) be impartial; and
- (c) afford fair opportunity for the presentation of divergent views and dissenting opinions.

These provisions need some explanation.

- These rights and freedoms apply to ‘everyone’ or ‘every person’ and not just to certain people, such as citizens. Hence, everybody enjoys these rights and freedoms.
- The basic 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.
- The right in section 61(1) specifically enshrines the freedom ‘to seek, receive and communicate ideas and other information’. 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 which traditionally have little access to the media.
- Section 61(2) specifies that every person enjoys ‘freedom of the media’, which freedom includes ‘protection of the confidentiality of journalists’ sources of information’. This is very important because it:
 - Makes it clear that this right can apply to corporate entities, such as a media house, a newspaper or a broadcaster, as well as to individuals
 - Makes it clear that the right encompasses the media as a whole, meaning that it extends beyond the press, with its connotations of the news media. Media generally includes, for example, fashion, sport, gardening or business publications or television channels, thereby protecting all media, including the press

- Clearly protects journalists’ sources – a critical protection if proper investigative journalism (often based on whistleblowing) is to flourish. This kind of provision is extremely uncommon and will undoubtedly have a major impact on journalism in Zimbabwe
- Section 61(3) makes it clear that broadcasters have the right to ‘freedom of establishment’. While this is subject to licensing procedures, it is clear that the state will no longer have the right simply to refuse to grant licences.
- Section 61(4) makes it clear that the state-owned media (including institutions such as the Zimbabwe Broadcasting Corporation) are to have editorial independence and are expected to be impartial and to air dissenting opinions.
- Section 61(5) lists expression which is excluded from the protections of the freedoms set out above. These are detailed in section 2.5 below.

RIGHT OF ACCESS TO INFORMATION

Another critically important provision that protects the media is section 62, which enshrines the right of access to information.

Section 62(1) provides that:

every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the State or by any institution or agency of government at every level in so far as the information is required in the interests of public accountability.

Section 62(2) provides that:

every person, including the Zimbabwean media, has the right of access to any information held by any person, including the State, in so far as the information is required for the exercise or protection of a right.

Section 62(3) provides that:

every person has a right to correction of information, or the deletion of untrue, erroneous or misleading information, which is held by the State or any institution or agency of government at any level, and which relates to that person.

Section 62(4) provides that:

Legislation must be enacted to give effect to this right, but may restrict access to information in the interest of defence, public security or professional confidentiality, to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

This right requires some explanation.

- Sections 62(1) and (2) essentially provide for the right to access two types of information:
 - The first is a right to information which is required in the interests of public accountability. This right is available only to citizens or those with permanent residence. Note that Zimbabwean juristic persons and the media are specifically included. Further, only a state or government institution is required to provide such information. In other words, private companies or persons cannot be required to provide information on this ground.
 - The second is a right to information which is required for the exercise and protection of such a right. There are no pre-requirements for this right – everyone has the right to such information; that is, there is no citizenship or permanent residency requirement in respect of the exercise of this right. In addition, this right applies in respect of information held by ‘any person’. This formulation is broad and includes natural persons, private juristic persons and, specifically, the state.
- It is important to note the constitutional right to correct information or to delete untrue, erroneous or misleading information held by the state, provided by section 62(3). Note that this right is not applicable in respect of information held by non-state persons or institutions.
- The provisions of section 62(4) require legislation to be passed to give effect to this right. This is significant because it means that Zimbabweans can look forward to the passage of access to information legislation. This is critical in the practical implementation of access to information rights.
- It is important to note, however, that section 62(4) does implicitly contain an internal limitation clause, which is dealt with more fully in section 2.5 below.

The right of access to information is vital in the ‘information age’. 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 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.

RIGHT TO ADMINISTRATIVE JUSTICE

A third important provision that protects the media is section 68, headed ‘Right to administrative justice’. Section 68(1) provides that every person ‘has the right to administrative action that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair’. Section 68(2) provides that any person ‘whose right, freedom, interest or legitimate expectation, has been adversely affected by administrative action has the right to be given promptly and in writing the reasons for the conduct’. Section 68(3) requires that an act of Parliament be passed to give effect to the rights provided for in sections 68(1) and (2), and which must provide for a court or independent tribunal to review administrative action and promote an efficient administration.

This right requires some explanation.

- This provision is important for journalists and the media because 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 results in them being adversely affected.
- An administrative body is not necessarily a state body; indeed, these bodies are often private or quasi-private institutions. So these constitutional requirements would apply to non-state bodies too.
- Many decisions taken by bodies are ‘administrative’ in nature. This requirement of administrative justice is important as it 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. It also aids in ensuring transparency, and, ultimately, accountability.

Importantly, section 68(3) provides that national legislation must be enacted to give effect to the right to administrative justice. This is significant because it means that Zimbabweans can look forward to the passage of administrative justice legislation. This is critical in the practical implementation of administrative justice rights.

PRIVACY

A fourth protection is contained in section 57, headed ‘Right to privacy’. Section 57 specifies that every person has the right to privacy, which includes the right not to have their:

- Home, premises or property entered or searched
- Person searched
- Possessions seized
- Privacy of their communications infringed upon
- Health condition disclosed

Note that this protection of privacy of communications (which would include emails, SMSes and telephone conversations) is an important right for working journalists.

FREEDOM OF ASSEMBLY AND ASSOCIATION

A fifth protection is provided for in section 58, which grants every person the right to freedom of assembly and association, thereby guaranteeing the rights of the press to form press associations, as well as media houses and operations. An interesting feature of the drafting of this right is that section 58 stresses the right *not* to assemble or associate, including the right not to be compelled to belong to an association or to attend a gathering. This is doubtless due to Zimbabwe’s recent experience of coerced attendance at political meetings and of forced party membership.

FREEDOM OF CONSCIENCE

A sixth protection is contained in section 60, which guarantees every person the right to freedom of conscience. This includes not only ‘freedom of thought, opinion religion or belief’ – s60(1) – but also ‘freedom to practise and propagate and give expression to their thought, opinion, religion or belief, whether in public or in private and whether alone or together with others’ – s60(2). The freedom of opinion is important for the media as it protects commentary on public issues of importance. It is noteworthy that the Zimbabwe Constitution expressly protects the right to propagate and give expression to such opinion. This bolsters the general right to freedom of expression and freedom of the media.

FREEDOM OF PROFESSION, TRADE OR OCCUPATION

Section 64 guarantees everyone the right to choose and carry on any profession, trade or occupation, but the practise of a profession, trade or occupation may be regulated by law. Note that in and of itself 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, for example, 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 of the Zimbabwe Constitution, apart from the provisions of Chapter 4, Declaration of Rights, which are important and which assist the media in performing its functions.

PROVISIONS REGARDING GOOD GOVERNANCE

One of the provisions of the preamble to the Zimbabwe Constitution provides for ‘recognising the need to entrench democracy, good, transparent and accountable governance and the rule of law’.

Section 3 of the Constitution is headed ‘Founding values and principles’, and one of these is a commitment to good governance. Section 3(2) sets out in more detail what the principles of good governance are. For the purposes of the media, two principles of good governance that are particularly important are:

- A multi-party democratic political system
- Transparency, justice, accountability and responsiveness

Section 9 of the Constitution is headed ‘Good governance’. Section 9(1) provides that the state must adopt and implement policies and legislation to develop efficiency, competence, accountability, transparency, personal integrity, and financial probity in all institutions of government. In particular:

- Appointments are to be made primarily on merit
- Measures must be taken to expose, combat and eradicate corruption and abuse of power

The Zimbabwe Constitution is interesting because it has an entire chapter (Chapter 9) devoted to principles of public administration and leadership.

Section 194 of the Constitution is headed ‘Basic values and principles governing public administration’. Some of these are important for the work of the media. For example:

- Efficient and economical use of resources must be promoted
- Public administration must be development oriented
- Services must be provided impartially, fairly, equitably and without bias
- People’s needs must be responded to within a reasonable time and the public must be encouraged to participate in policy-making
- Transparency must be fostered by providing the public with timely, accessible and accurate information

Section 196 of the Zimbabwe Constitution is headed ‘Responsibilities of public officers and principles of leadership’. Section 196(1) provides that the authority assigned to a public officer is a public trust, which must be exercised in a manner that:

- Is consistent with the Constitution
- Demonstrates respect for the people and a willingness to serve them rather than rule them
- Promotes public confidence

Section 196(3) provides that public officers in leadership positions must abide by the principles of:

- Objectivity and impartiality in decision-making
- Honesty
- Accountability
- Discipline and commitment in the service of the people

Furthermore, section 198 requires that legislation be passed to enforce the provisions of Chapter 9 of the Constitution, which legislation is to include measures:

- Requiring public officers to make regular disclosures of their assets
- Establishing codes of conduct

- Specifying standards for good corporate governance for government-owned entities
- Providing for disciplining of persons who contravene the provisions of Chapter 9 of the Constitution or of any applicable code of conduct

These are relevant to the media because references to transparency, efficient use of resources and the provision of information assist the media in performing its various public information roles.

PROVISIONS REGARDING THE FUNCTIONING OF PARLIAMENT

A number of provisions in the Constitution regarding the functioning of Parliament are important for the media:

- Section 141 of the Zimbabwe Constitution is headed ‘Public access to and involvement in Parliament’. In brief, it provides for a number of mechanisms to facilitate public access to Parliament, including the following:
 - Parliament is to facilitate public involvement in legislative and committee processes.
 - Parliament (including its committees) is to conduct its business in a transparent manner and hold its sittings in public. Parliament is entitled to take measures to:
 - Preserve order
 - Regulate public access, including of the media, and including to exclude them
 - Search persons entering Parliament and, where appropriate, to refuse entry or to remove persons from Parliament

But such measures have to be fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity and freedom.

- Section 148 of the Zimbabwe Constitution is headed ‘Privileges and immunities of Parliament’. It specifically protects freedom of speech of the president of the Senate, the speaker and members of Parliament (MPs). This means that they cannot be arrested, face criminal prosecution, be sued in the civil courts, or face imprisonment or damages for anything said in, produced before, and submitted to Parliament or 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 – in other words, that the

media is physically able to be in Parliament. Second, they protect parliamentarians. The provisions allow MPs to speak freely in front of the media without facing arrest or charges for what they say.

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 51 of the Zimbabwe Constitution, which states that: ‘Every person has inherent dignity in their private and public life, and the right to have that 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 one that is often set up against the right to freedom of the press, requiring a balancing of constitutional rights. The formulation of this right is interesting because it specifically protects dignity in a person’s ‘public life’ as well as private life. This could potentially be used to bolster the rights of public figures in defamation cases.

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. The media has to be careful in this regard and should be aware that there are always ‘boundaries’ in respect of privacy which need to be respected and which are dependent on the particular circumstances, including whether or not the person is a public figure or holds public office, 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 Declaration of Rights that is subject to an ‘internal limitation’.

Section 61(5) provides that the right to freedom of expression and freedom of the media does not extend to four types of expression, namely:

- Incitement to violence
- Advocacy of hatred or hate speech
- Malicious injury to a person’s reputation or dignity
- Malicious or unwarranted breach of a person’s right to privacy

It is important to understand the nature of the provisions of section 61(5). There is a misconception that the Zimbabwe Constitution ‘outlaws’ or makes illegal these kinds of expressions. That is not correct. The Constitution states that these kinds of expression do not fall within the right to freedom of expression – in other words, they are simply not constitutionally protected.

What is the effect of this? Quite simply, it means that government may prohibit these kinds of expression without needing to meet any of the requirements contained in the general limitations clause. Why not? As there is no right to make these kinds of expression, there is no need to justify the limitation of these kinds of expression. 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 these kinds of expression.

Furthermore, it is important to note the provisions of sections 61(5)(c) and (d), which deal with malicious injury to reputation or breach of privacy. These are extremely unusual provisions and could have a negative impact on the actual exercise of freedom of expression by the media if they are interpreted broadly by a court. In our view, dignity and privacy require to be balanced against the rights to freedom of expression in all situations and should not be allowed to ‘trump’ freedom of expression.

2.5.4 States of emergency provisions

It is also important to note the provisions of section 113, which deal with states of public emergency. A state of emergency may be declared by the president for a period of 14 days (although this can be extended for up to three months at a time) with Parliament’s approval. As set out above, section 87 specifically allows for emergency legislation to provide for the derogation of rights laid down in the Declaration 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 Constitution of Zimbabwe

A number of important institutions in relation to the media are established under the Zimbabwe Constitution. These are the judiciary, the Judicial Service Commission, the

Human Rights Commission, the Zimbabwe Media Commission, the National Peace and Reconciliation Commission and the Zimbabwe Anti-Corruption Commission.

2.6.1 The judiciary

In terms of section 162 of the Zimbabwe 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 (the apex court in respect of non-constitutional matters); the High Court; the Labour Court; the Administrative Court; magistrates' courts; customary law 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 media from unlawful action by the state and from unfair damages claims by litigants.

Section 164(1) specifically provides that the courts 'are independent and subject only to this Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice'. In terms of section 180, judges are essentially appointed by the president, acting on the recommendation of the Judicial Service Commission (JSC). In terms of section 182, magistrates are appointed by the JSC. In terms of section 187, judges are removed by the president acting on a finding by a tribunal of suitably qualified people appointed by him and following a recommendation by the JSC to investigate. Grounds for removal are inability to perform the functions of the office, gross incompetence or gross misconduct.

2.6.2 The Judicial Service Commission

The JSC is a constitutional body that is established in terms of Part 3 of Chapter 8 of the Constitution, which chapter is headed 'The judiciary and the courts'. Section 190 sets out the functions of the JSC. These include promoting judicial independence and accountability, tendering advice to government on the judiciary, and functions relating to the employment, discipline and conditions of service of persons employed in the courts.

The JSC is relevant to the media because of its critical role in the judiciary, the proper functioning and independence of which are essential for democracy.

In terms of section 189(1), the JSC is made up of the chief justice, the deputy chief justice, the judge president of the High Court, one judge nominated by the judges of the Constitutional Court, the Supreme Court, the High Court, the Labour Court and the Administrative Court; the attorney-general, the chief magistrate, the chairperson of the Civil Service Commission, three practising legal practitioners with at least seven years' experience designated by the association representing the Zimbabwe legal profession, one professor or senior law lecturer designated by an association representing the majority of law teachers in Zimbabwe; one public accountant or auditor designated by an association representing such auditors and public accountants; and one person with at least seven years' experience in human resources management, appointed by the president.

2.6.3 The Human Rights Commission

The Human Rights Commission is also an important organisation in respect of the media. It is a Chapter 12 body – that is, an independent commission supporting democracy. Its brief is extremely wide, in terms of section 243(1) of the Constitution, and includes:

- Promoting awareness of, respect for, and the protection, development and attainment of human rights
- Monitoring, assessing and ensuring observance of human rights
- Receiving and considering public complaints
- Protecting the public against abuse of power and maladministration by the state
- Investigating the conduct of any authority or person, where it is alleged that human rights have been violated
- Securing appropriate redress, including recommending the prosecution of offenders
- Directing the police to investigate suspected criminal violations of human rights
- Recommending to Parliament effective measures to promote human rights
- Conducting research into issues relating to human rights and social justice
- Visiting and inspecting prisons, refugee camps, and places housing the mentally ill

in order to ascertain conditions and to make recommendations to the responsible minister regarding those conditions

Section 242 provides that the Human Rights Commission consists of a chairperson (who must be a lawyer with at least seven years' experience) appointed by the president after consultation with the JSC and the Committee on Standing Rules and Orders (note that this is a parliamentary committee) and eight other members from a list of not fewer than 12 nominees submitted by the Committee on Standing Rules and Orders. All members are to be chosen for their integrity, and their knowledge and understanding of, and experience in, the promotion of human rights.

In terms of section 237, a member of the Human Rights Commission can be removed only on the grounds of inability to perform the functions of his or her office, gross incompetence, gross misconduct, or if he or she has become ineligible for appointment. Note that the procedure for the removal of judges applies to the removal of a member of the Human Rights Commission.

2.6.4 The Zimbabwe Media Commission

Section 248 of the Zimbabwe Constitution will, hopefully, be critically important for the media in Zimbabwe. It establishes the Zimbabwe Media Commission. It is also a Chapter 12 body – that is, an independent commission supporting democracy. The functions of the Zimbabwe Media Commission are set out in section 249(1):

- (a) to uphold, promote and develop freedom of the media;
- (b) to promote and enforce good practices and ethics in the media;
- (c) to monitor broadcasting in the public interest and, in particular, to ensure fairness and a diversity of views broadly representing Zimbabwean society;
- (d) to encourage the formulation of codes of conduct for persons employed in the media, and where no such code exists, to formulate and enforce one;
- (e) to receive and consider complaints from the public and, where appropriate, to take action against journalists and others employed in the media or broadcasting who are found to have breached any law or any code of conduct applicable to them;
- (f) to ensure that the people of Zimbabwe have fair and wide access to information;
- (g) to encourage the use and development of all the officially recognised languages of Zimbabwe;
- (h) to encourage the adoption of new technology in the media and in the dissemination of information;
- (i) to promote fair competition and diversity in the media; and

- (j) to conduct research into issues relating to freedom of the press and of expression, and in that regard to promote reforms in the law.

It is important to note that section 249(2) provides that an act of Parliament may confer power upon the Zimbabwe Media Commission to:

- Conduct enquiries into circumstances that appear to threaten the freedom of the media and the conduct of the media
- Take or recommend disciplinary actions against media practitioners who are found to have breached any law or any applicable code of conduct

Furthermore, section 249(3) specifically provides that an act of Parliament may provide for the regulation of the media; however, the section is silent as to what kind of regulation this may consist of.

Section 250 specifically provides that the Zimbabwe Media Commission may, through the appropriate minister, submit reports to Parliament on particular matters relating to the media which, in the Commission's opinion, should be brought to Parliament's attention.

Section 248 provides that the Zimbabwe Media Commission consists of a chairperson appointed by the president after consultation with the Committee on Standing Rules and Orders and eight other members from a list of not fewer than 12 nominees submitted by the Committee on Standing Rules and Orders. All members are to be chosen for their integrity, their competence in administration, and their knowledge and understanding of human rights and best practices in media matters.

In terms of section 237, a member of the Zimbabwe Media Commission can be removed only on the grounds of inability to perform the functions of his or her office, gross incompetence, gross misconduct, or if he or she has become ineligible for appointment. Note that the procedure for the removal of judges applies to the removal of a member of the Zimbabwe Media Commission.

2.6.5 National Peace and Reconciliation Commission

Although not directly related to the media, the proposed National Peace and Reconciliation Commission, which is established in terms of section 251, may well prove useful for the media. Its aims, which are set out in section 252, include:

- Bringing about national reconciliation through encouraging people to tell the

truth about the past, and facilitating the making of amends and the provision of justice

- Developing procedures and institutions at a national level to facilitate dialogue among political parties, communities, organisations and other groups, in order to prevent conflicts and disputes arising in the future

The National Peace and Reconciliation Commission is also a Chapter 12 body – that is, an independent commission supporting democracy.

Section 248 provides that the National Peace and Reconciliation Commission consists of a chairperson (who must be a lawyer with at least seven years' experience) appointed by the president after consultation with the JSC and the Committee on Standing Rules and Orders, and eight other members from a list of not fewer than 12 nominees submitted by the Committee on Standing Rules and Orders. All members are to be chosen for their integrity, their knowledge and understanding of, and experience in, mediation, conciliation, conflict prevention and management, post-conflict reconciliation or peace building.

In terms of section 237, a member of the National Peace and Reconciliation Commission can be removed only on the grounds of inability to perform the functions of his or her office, gross incompetence, gross misconduct, or if he or she has become ineligible for appointment. Note that the procedure for the removal of judges applies to the removal of a member of the National Peace and Reconciliation Commission.

2.6.6 Zimbabwe Anti-Corruption Commission

The Zimbabwe Anti-Corruption Commission is established in terms of section 254 of the Constitution and falls under Chapter 13 of the Constitution, headed 'Institutions to combat corruption and crime'. Although not directly relevant to the media, certain of the aims of the Commission are of relevance to the media and will assist in creating an overall climate of transparency and accountability.

Section 255(1) sets out the functions of the Zimbabwe Anti-Corruption Commission. These include:

- Investigating and exposing cases of corruption in both the public and private sectors
- Promoting honesty, financial discipline and transparency in the public and private sectors

Section 254 provides that the Zimbabwe Anti-Corruption Commission consists of a chairperson appointed by the president after consultation with the Committee on Standing Rules and Orders and eight other members from a list of not fewer than 12 nominees submitted by the Committee on Standing Rules and Orders. All members are to be chosen for their integrity and their knowledge of, and experience in, administration or the prosecution or investigation of crime or for their general suitability for appointment.

In terms of section 256, read with section 237, a member of the Zimbabwe Anti-Corruption Commission can be removed only on the grounds of inability to perform the functions of his or her office, gross incompetence, gross misconduct, or if he or she has become ineligible for appointment. Note that the procedure for the removal of judges applies to the removal of a member of the Zimbabwe Anti-Corruption Commission.

2.6.7 Important features of the independent commissions supporting democracy

Three institutions listed above (the Zimbabwe Human Rights Commission, the Zimbabwe Media Commission and the National Peace and Reconciliation Commission) are Chapter 12 bodies – that is, independent commissions supporting democracy. It is important to note that the Zimbabwe Constitution lays out a number of provisions specifically intended to bolster the independence of these bodies.

Section 233 sets out certain general objectives applicable to all the Chapter 12 commissions and for the media. The following are particularly important:

- To support and entrench human rights and democracy.
- To promote transparency and accountability in public institutions.
- To secure the observance of democratic values and principles by the state, and all institutions and agencies of government.

Section 235 states that all such commissions:

- Are independent and are not subject to the direction or control of anyone
- Must act in accordance with the Constitution
- Must exercise their functions without fear, favour or prejudice
- Are accountable to Parliament for the efficient performance of their functions

Section 236 contains a number of provisions designed to ensure that members of the

independent commissions are and remain non-political. Section 237(1) contains additional provisions regarding the appointment of members of these commissions. Importantly, the Committee on Standing Rules and Orders is required to advertise a position, invite public nominations, conduct public interviews of prospective candidates, and prepare a list of appropriate number of nominees for appointment for submission to the president.

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 or declaration of rights, and yet remain empty of substance because they cannot be enforced.

Section 85 of the Constitution provides that rights are generally enforceable through the courts. The Constitution envisages the right of people, including individuals or associations acting on their own behalf or on behalf of one or more others, to assist in the enforcement of rights through having jurisdiction to bring such court action.

Perhaps one of the most effective ways in which rights are protected under the Zimbabwe Constitution is through the provisions of the Constitution which entrench Chapter 4, the Declaration of Rights. Section 328(6) of the Constitution requires that a constitutional amendment to Chapter 4 be passed by two-thirds of the members of the National Assembly and the Senate, and must be submitted to a national referendum, thereby providing significant protection for the Declaration 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 an unusual formulation, section 88(1) of the Zimbabwe Constitution provides that ‘[e]xecutive authority derives from the people of Zimbabwe and must be exercised in

accordance with this Constitution'. Section 88(2) goes on to specify that executive authority vests in the president and is exercised by him, subject to the Constitution, through the Cabinet.

In terms of section 105(1) of the Zimbabwe Constitution, the Cabinet is made up of the president (head of Cabinet), the vice-presidents and ministers appointed by the president. Section 110 sets out the executive functions of the president and Cabinet. These include the following:

■ **President**

- Summoning Parliament, the National Assembly or the Senate to an extraordinary sitting
- Making presidential appointments
- Calling elections in terms of the Constitution
- Calling referendums
- Deploying the defence force

■ **Cabinet**

- Directing the operations of government
- Preparing, initiating and implementing national legislation
- Developing and implementing national policy
- Advising the president

Generally, the role of the executive is to administer or enforce laws, to make governmental policy and to propose new laws.

THE LEGISLATURE

In terms of section 117(1) of the Zimbabwe Constitution, legislative authority in Zimbabwe vests in the legislature. In terms of section 116, the legislature of Zimbabwe consists of Parliament and the president.

In terms of section 118 of the Zimbabwe Constitution, Parliament consists of the Senate and the National Assembly. In terms of section 117(2), this legislative authority has the power to amend the Constitution, to make legislation and to confer subordinate legislative powers (for example, the power to make regulations) upon another body. Parliament also fulfils other important functions. In terms of section 119(3), these functions include being the body that all institutions and agencies of the state and government at every level are accountable to.

In terms of section 120, the Senate consists of 80 senators, of whom:

- Six are elected from each of the provinces by a system of proportional representation in terms of which party lists are made up of male and female candidates, listed alternately and headed by a female candidate
- Sixteen are chiefs, of whom two are elected by the provincial assembly of chiefs from each province other than the metropolitan provinces
- One is the president and another the deputy president of the National Council of Chiefs
- Two are elected to represent persons with disabilities

In terms of section 124, the National Assembly is made up of:

- 210 members elected by secret ballot from constituencies into which Zimbabwe is divided
- an additional 60 members, six from each of the ten provinces elected through a system of proportional representation. This applies only for the life of the first two Parliaments after the effective date of the Constitution

THE JUDICIARY

As already discussed in this chapter, judicial power in Zimbabwe vests in the courts. The role of the judiciary is essentially 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 Zimbabwean Constitution 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

The new Zimbabwe Constitution contains a number of significant improvements upon the previous Constitution, and represents a new era for the media in Zimbabwe. There are, however, still a number of weak points. If these provisions were strengthened, there would be specific benefits for Zimbabwe's media.

2.9.1 Remove internal constitutional limitations

The internal limitation contained in section 61(5) of the Constitution and applicable to the right to freedom of expression and freedom of the media ought to be repealed. These provisions are unnecessary because the provisions of the general limitations clause give the government the power it needs to limit fundamental rights reasonably. Consequently, the legislature already has the power to pass legislation limiting hate speech, unreasonable invasions of privacy and other kinds of expression that are the subject of the internal qualifier found in section 61(5).

2.9.2 Licensing powers to be given to the Zimbabwe Media Commission

Broadcasting is currently regulated by the Broadcasting Authority of Zimbabwe (BAZ); the relationship between the BAZ and the proposed Zimbabwe Media Commission (to be established in terms of the Constitution) is unclear. We believe that the proposed constitutional Zimbabwe Media Commission will be additionally responsible for licensing broadcasting services in order to ensure that broadcasting licensing matters are carried out by a body with real independence.

2.9.3 Constitutional protection for the public broadcaster

The state broadcaster, the Zimbabwe Broadcasting Corporation (ZBC), suffers from a great deal of governmental interference. Most Zimbabweans access news and current affairs information via the ZBC. The Constitution should therefore specifically protect the ZBC's independence and ensure that it operates in the public interest in order to guarantee impartiality and to expose Zimbabweans to a variety of views.

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 news agencies
- Key legislative provisions governing the broadcast 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 the legislature, that is, the president and Parliament. As already discussed, in terms of the Constitution, Parliament in Zimbabwe is made up of the Senate and the National Assembly.

Chapter 6 of the Zimbabwe Constitution deals with the legislature, and Part 6 thereof deals with its legislative and other powers. In respect of legislation, sections 130–133 are important.

In terms of section 130 of the Constitution, both houses of Parliament – that is, the Senate and the National Assembly – have the authority to initiate, prepare, consider or reject legislation.

Section 131(2) provides that an act of Parliament is a bill which has been:

- Presented in and passed by both houses of Parliament
- Assented to and signed by the president

There are detailed rules in Schedule 5 to the Zimbabwe Constitution, headed 'Procedure as to bills and other matters in Parliament', which set out the different law-making processes that apply to different types of legislation. It is important for journalists and others in the media to be aware that the Constitution requires different types of legislation to be passed in accordance with particular procedures. The procedures are complicated and need not be explained here. Journalists should, however, be aware that in terms of the Constitution of Zimbabwe there are three different 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 328 of the Zimbabwe Constitution
- Ordinary legislation – the procedures and/or applicable rules are set out in sections 131–133 of the Constitution
- Legislation that deals with taxation issues – the procedures and/or applicable rules are set out in paragraph 7 of Schedule 5 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 the Zimbabwe 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 signed by the president (signifying his assent to the bill), in terms of section 131 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 132 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. If the president has reservations about the constitutionality of any bill passed by Parliament, she or he may refer it back to the National Assembly for reconsideration, in terms of section 131(6)(b) of the Constitution. After the reconsideration has taken place and it has been re-passed, the president must either accept the bill (that is, sign it such that it becomes an act) or refer the bill to the Constitutional Court for a ruling on its constitutionality, in terms of section 131(8). If the Constitutional Court rules that the bill is constitutional, section 131(9) requires the president to assent to and sign the bill.

3.2 Statutes governing the print media

Zimbabwe’s print media environment has been one of the most repressed and censored, and routinely features extremely low on international barometers of media freedom. There are a number of limitations on the ability to operate as a print media publication in Zimbabwe or even as a journalist. Many of the laws impose obligations upon the print media. They are clearly unreasonable and unjustifiable in a democratic society and impinge greatly upon the public’s right to know. New – and controversial – legislation provides for a statutory body, the Zimbabwe Media Commission, to regulate, among other things, the print media. This is not in line with international

best practice, which does not consider statutory regulation of the print media to be in accordance with the basic principles of press freedom.

3.2.1 Printed Publications Act, 1975

The Printed Publications Act, 1975 (Chapter 25:14) is a pre-independence piece of legislation that has been amended post-independence. There are certain key requirements laid down by the Printed Publications Act in respect of a ‘book’, which is defined in section 2 as including ‘a newspaper, periodical or other printed publication published at regular or irregular intervals’, but specifically excludes parliamentary papers in terms of section 3.

- Section 4(1) requires printers of books printed in Zimbabwe to include the following information in a legible imprint:
 - Full and correct name of the printer and the place where such book was printed.
 - Full and correct name of the publisher and his or her place of business.
 - Year of publication.
- Section 4(2) provides that failure to comply with section 4(1) is an offence, and upon conviction a person would be liable to a fine, imprisonment not exceeding three months or both.
- Note that section 4(3) provides that the minister of home affairs (or whichever minister is responsible for the administration of the Printed Publications Act) may exempt certain books from compliance with section 4(1), where the book is used for the purposes of the state, the courts, statutory bodies, or trade or business, or other books subject to conditions that he may impose.
- Section 5(1) requires a publisher, at its cost, to supply a copy of each book published, within 30 days, to the Directory of the National Archives, the director of the National Library and the authority having control of the Public Library, Bulawayo.
- Section 5(4) provides that failure to comply with section 5(1) is an offence, and upon conviction a person would be liable to a fine, imprisonment not exceeding three months or both.
- Note that the schedule to the Printed Publications Act contains a list of books which are exempt by the minister from being provided by the publisher in terms of section 5(1). These include diaries, bookplates, Christmas cards, colouring

books, forms, postcards, commercial, entertainment or industrial catalogues and the like.

3.2.2 Access to Information and Protection of Privacy Act, 2002

The Access to Information and Protection of Privacy Act, 2002 (AIPPA) (Chapter 10:27) is one of the most notorious pieces of legislation to emanate from the Zimbabwean Government and is seen as symptomatic of the country's descent into undemocratic practices. Despite its name, AIPPA contains numerous sections that do nothing to secure access to information or protect privacy. Many of its other provisions have had severe implications for freedom of the press, particularly of the print media.

REGISTRATION OF THE MEDIA

- Section 65 of AIPPA restricts ownership of 'mass media', which is defined in section 2 as including newspapers, magazines, or broadcasting services that are intended to be read, seen or heard by an unlimited number of people. Sections 65(1) and (2) make it clear that only individuals who are Zimbabwean citizens or permanent residents, or corporate entities which are controlled by Zimbabwean citizens or permanent residents, may hold or acquire shares in a mass media service – that is, a newspaper, magazine or broadcasting service. Note, however, that section 65(4) grants the minister for information sole and absolute discretion to grant exemptions from this local ownership requirement.
- Section 66 provides that a mass media owner may carry on the activities of a mass media service only after registering (in the prescribed manner) and receiving a certificate of registration in terms of AIPPA. Such an application for registration is made to the Zimbabwe Media Commission, which is established in terms of section 38 of AIPPA. The Zimbabwe Media Commission is required to deal with an application for registration within one month of receipt of the application. Note that certificates of registration issued by the Zimbabwe Media Commission are valid for a period of five years and may be renewed upon application.
- Section 67 requires the responsible person of a mass media service to notify the Zimbabwe Media Commission if the:
 - Owner is replaced
 - Co-owners change
 - Name, language, form and frequency of the periodical dissemination of mass media products is altered
 - Area where the mass media products are circulated is changed
 - Editorial office changes its place of location and form

- Section 68 sets out a list of exemptions from registration and includes a:
 - Mass media service founded in terms of an act of Parliament – that is, state media
 - Mass media service licensed in terms of the Broadcasting Services Act
 - Representative office of a foreign mass media service permitted to operate in Zimbabwe in terms of section 90 (which section contains its own registration provisions for foreign mass media entities, which are valid for 12 months)
- Section 69 sets out the grounds upon which the Zimbabwe Media Commission may refuse to register a mass media service. These were amended in 2008 and now deal with essentially administrative details, such as foreign ownership contraventions, incorrect information, failure to pay the prescribed fee, etc.
- Section 72 provides that a person who operates a mass media service without a valid registration certificate is guilty of an offence and is liable, upon conviction, to a fine, imprisonment for a period not exceeding 18 months, or both. Furthermore, all products, equipment or apparatus used in the production of a mass media service may be forfeited to the state.
- Note that sections 75 and 76 of AIPPA also require the publisher's imprint and that free copies of a periodical be sent to the Zimbabwe Media Commission and the National Archives.

REGISTRATION OF JOURNALISTS

- Section 78(4) of AIPPA provides that no mass media service shall employ any journalist on a full-time basis unless such journalist is accredited with the Zimbabwe Media Commission. Furthermore, in terms of section 78(1), only accredited journalists have certain 'privileges', including:
 - Visiting Parliament or any other listed public body
 - Access to records in terms of this act
 - Attending any national event (that is, as prescribed as such by a minister in the Government Gazette) with the purpose of carrying out duties as a journalist
 - Attending any public event (that is, any event which the public is permitted to attend) with the express purpose of carrying out duties as a journalist
 - Making recordings with the use of audio-visual equipment, photography and cinematography in connection with the carrying out of duties as a journalist

- Section 78(2) makes it an offence for any person to hold him or herself out as an accredited journalist without being so accredited. Upon conviction, such person is liable to a fine, a period of imprisonment not exceeding two years or both.
- Section 79 sets out the process of accreditation for journalists. Note that in terms of sections 79(3) and (4), a journalist who is not a citizen or permanent resident of Zimbabwe may not be accredited for a period of longer than 60 days, unless specific exemption is granted by the Zimbabwe Media Commission. Section 82 provides that the Zimbabwe Media Commission is to maintain a roll of accredited journalists. Note that accreditation lasts for only 12 months, in terms of section 84, although this can be renewed.

REGULATION OF THE MEDIA

- Section 38 of AIPPA establishes the Zimbabwe Media Commission. The Commission comprises a chairperson and eight other members appointed by the president from a list of not fewer than 12 nominees submitted by Parliament's Committee on Standing Rules and Orders. Note that section 2 of the Fourth Schedule to AIPPA sets out grounds of disqualification for appointment to the Zimbabwe Media Commission. These include:
 - Not being a citizen of Zimbabwe
 - Having a financial interest in broadcasting
 - Insolvency
 - Previous convictions
 - Being an MP or a member of two or more other statutory bodies
- Section 39 sets out the many functions of the Zimbabwe Media Commission. These include:
 - Upholding and developing freedom of the press
 - Promoting and enforcing good practice and ethics in the press
 - Ensuring that the people of Zimbabwe have equitable and wide access to information
 - Ensuring the equitable use and development of all indigenous languages
 - Commenting on the implications of proposed legislation or programmes of public bodies on access to information and protection of privacy
 - Conducting investigations to ensure compliance with this act
 - Considering accreditation applications by journalists
 - Registering the mass media
 - Monitoring the mass media and raising user awareness of it

- Investigating complaints against any journalist or mass media service
- Besides its accreditation functions, one of the most important functions of the Zimbabwe Media Commission is to appoint the members of the Media Council to exercise disciplinary control on behalf of the Commission, in terms of section 42A.
- The Media Council consists of 15 members, namely:
 - A chairperson who is a member of the Zimbabwe Media Commission (other than the Commission's chair or deputy chair)
 - Two representatives of an association of accredited journalists nominated by associations that, in the opinion of the Commission, are fairly representative of journalists and appointed by the Commission
 - Two representatives of an association of publishers nominated by associations that, in the opinion of the Commission, are fairly representative of publishers and appointed by the Commission
 - Two representatives of an association of advertisers or advertising agencies nominated by associations that, in the opinion of the Commission, are fairly representative of advertisers or advertising agencies and appointed by the Commission
 - A representative of an association of mass media trainers nominated by associations that, in the opinion of the Commission, are fairly representative of mass media trainers and appointed by the Commission
 - A representative of an association of churches or other religious bodies nominated by associations that, in the opinion of the Commission, are fairly representative of churches or other religious bodies and appointed by the Commission
 - A representative of an association of businesspeople nominated by associations that, in the opinion of the Commission, are fairly representative of businesspeople and appointed by the Commission
 - A representative of any trade union or federation of trade unions nominated by associations that, in the opinion of the Commission, are fairly representative of trade unions [Note that the legislation in fact states 'businesspeople', but we think this is an obvious error] and appointed by the Commission
 - A representative of an association of women or women's groups nominated by associations that, in the opinion of the Commission, are fairly representative of women or women's groups and appointed by the Commission

- A representative of an association of youth or youth groups nominated by associations that, in the opinion of the Commission, are fairly representative of youth or youth groups and appointed by the Commission
 - A representative of the legal profession selected by the Commission from a panel of nominees submitted by the Council of the Law Society
 - A representative of the legal profession selected by the Commission from a panel of nominees submitted by the faculties of law in any tertiary educational institution invited by the Commission to make such nominations
-
- In terms of section 42B of AIPPA, the Zimbabwe Media Commission, in consultation with the Media Council, is required to develop a Code of Conduct and Ethics governing the rules of conduct to be observed by journalists and mass media services, including in respect of ‘injurious allegations’ (defined in section 2 as an allegation ‘which is false or which unlawfully infringes [on] a person’s dignity, reputation or privacy’) and penalties to be imposed for breaches of the code.
 - The Zimbabwe Media Commission and the Media Council are responsible for enforcing the Code of Conduct and Ethics and sections 42B-H, along with the administrative aspects of such enforcement. The process is as follows:
 - A complaint regarding an alleged ‘injurious allegation’ or contravention of AIPPA or the Code of Conduct and Ethics is lodged with the Zimbabwe Media Commission.
 - The Zimbabwe Media Commission investigates, hears both parties (by way of written representation) and refers the matter to the Media Council for inquiry.
 - The Media Council conducts the inquiry, including summoning witnesses, etc., and then makes a recommendation to the Zimbabwe Media Commission in respect of actions to be taken by the Zimbabwe Media Commission. These include:
 - *In respect of an accredited journalist:* A caution, payment of a monetary penalty, suspension of accreditation for a maximum period of three months, imposing conditions of practice, deleting his or her name from the roll of journalists, or referring the matter for criminal prosecution.
 - *In respect of a non-accredited journalist:* A caution, payment of a monetary penalty, suspension of practice as a journalist for a maximum period of three months, imposing conditions of practice, or referring the matter for criminal prosecution.

- *In respect of a mass media service:* A caution, payment of a monetary penalty, suspension of its registration certificate for a maximum period of three months, imposing conditions for the breach, cancelling its registration certificate, or referring the matter for criminal prosecution.
 - *In respect of an injurious allegation made or broadcast by any journalist or mass media service:* Requiring the broadcast of an apology and/or a correction or retraction, requiring the complainant to be given a right of reply, imposing a requirement that it not engage in any conduct that might result in a repetition of the injurious allegation.
 - The Zimbabwe Media Commission has wide discretion to accept or not accept the Media Council's recommendations with or without modification. Note that orders of the Zimbabwe Media Commission can be registered in the High Court and enforced in the same way as a judgment of that court.
 - Note that any person aggrieved at any findings, order or penalty of the Zimbabwe Media Commission may appeal to the Administrative Court.
 - A person who fails to comply with an order of the Zimbabwe Media Commission is guilty of an offence, and upon conviction can be sentenced to a fine, a period of imprisonment not exceeding six months or both.
- It is also important to be aware that the Zimbabwe Media Commission has wide powers in terms of section 50 of AIPPA to conduct inquiries, and is granted the same powers, rights and privileges as are conferred upon a commissioner by the Commissions of Inquiry Act.

MEDIA AND INFORMATION FUND

- Part IV of AIPPA is headed 'Media and Information Fund'. Section 43 thereof establishes the Media and Information Fund, which is administered by the Zimbabwe Media Commission.
- Section 44 sets out the objects of the Media and Information Fund. These include:
 - Standardising the mass media services and maintaining high standards of quality in the provision of such services
 - Training of persons in the provision of mass media services
 - Promoting and contributing to research and development in the field of information and mass media

- Promoting public awareness of the right of access to information and the protection of privacy

These objects are to be furthered by way of annual implementation plans prepared by the Zimbabwe Media Commission in consultation with registered mass media services.

- Section 45 sets out the sources of funding of the Media and Information Fund. These include:
 - Levies which are raised from every mass media owner other than a broadcasting licensee
 - Monies appropriated by Parliament
 - Surplus income
 - Accreditation fees
 - Other income to which the Media and Information Fund is lawfully entitled

3.3 Statutes governing news agencies

Section 74 of AIPPA also governs news agencies:

- It is an offence for any person to operate a news agency, defined in section 2 as ‘an organisation that collects and prepares news reports for sale and distribution to the mass media’, without a valid registration certificate (which is valid for three years) issued by the Zimbabwe Media Commission. The penalty for such contravention is a fine, imprisonment for up to two years or both. Furthermore, all products, equipment or apparatus used in the production of a mass media service may be forfeited to the state.
- Section 74(6) requires that any materials belonging to the news agency and distributed by a mass media service shall state the name of the news agency.

3.4 Statutes governing the broadcast media generally

3.4.1 Statutes that regulate broadcasting generally

Broadcasting in Zimbabwe is regulated in terms of the Broadcasting Services Act, 2001 [Chapter 12:06].

The Broadcasting Services Act establishes and empowers the Broadcasting Authority of Zimbabwe (BAZ) – the authority that regulates broadcasting.

3.4.2 Establishment of the Broadcasting Authority of Zimbabwe

The Broadcasting Services Act establishes, in section 3, the BAZ. In terms of section 4, it operates through a board called the Broadcasting Authority of Zimbabwe Board.

3.4.3 Main functions of the BAZ

In terms of section 2A read with section 3(3) of the Broadcasting Services Act, the main objects of the BAZ and of the Broadcasting Services Act include:

- Ensuring efficient use of the broadcasting service bands
- Encouraging modern and efficient infrastructure
- Promoting the provision of a wide range of broadcasting services that are of a high quality and calculated to appeal to a wide variety of tastes and interests, providing education, information and entertainment
- Providing sufficient broadcasting services throughout Zimbabwe
- Ensuring that broadcasting services provide:
 - Regular news services
 - Public debate on political, social and economic issues of public interest
 - Programmes on matters of local, national, regional and international interest or significanceso as to foster and maintain a healthy plural democracy
- Promoting peace, stability and national cohesion through the provision of broadcasting
- Promoting public, community and commercial broadcasting services in the public interest
- Ensuring the independence, impartiality and viability of public broadcasting services
- Ensuring that providers of broadcasting services are able to do so efficiently, continuously and are independently financially viable
- Developing broadcasting systems in accordance with international standards and public demand

- Promoting the interests of consumers, purchasers and others with regard to quality and variety of broadcasting services
- Maintaining and promoting effective competition
- Ensuring the application of standards to provide adequate protection against:
 - Material that is harmful or offensive to members of the public
 - The unfair treatment of individuals in television or radio programmes
 - Unwarranted infringements of privacy
- Preserving national security and the integrity of Zimbabwe
- Fostering a Zimbabwean national identity and Zimbabwean values

In order to achieve these and other objectives, the BAZ is granted the following powers and functions in terms of section 3(2) of the Broadcasting Services Act:

- Planning and advising on the allocation and distribution of the available frequency spectrum
- Advising the minister on the adoption of standards and codes for broadcasting equipment
- Receiving, evaluating and considering applications for the issuing of any broadcasting licence
- Monitoring tariffs charged by broadcasting licensees
- Advising the minister of ways to improve the regulatory environment so as to ensure the development of a broadcasting industry that is efficient, competitive and responsive to audience needs and the national interest
- Encouraging diversity in the control of broadcasting services
- Ensuring Zimbabweans have effective control of broadcasting services
- Promoting high-quality and innovative programming
- Encouraging providers of commercial and community broadcasting services to be responsive to the need for fair and accurate coverage of matters of public interest

- Ensuring the provision of means of addressing complaints about broadcasting services
- Ensuring that broadcasting services place a high priority on the protection of children from exposure to programme material which may be harmful
- Ensuring compliance with the Broadcasting Services Act and licence conditions
- Carrying out functions as may be prescribed by the minister, subject to the Broadcasting Services Act

3.4.4 Appointment of BAZ board members

In terms of section 4(2) of the Broadcasting Services Act, the BAZ Board is made up of 12 members appointed as follows:

- Nine members (of whom at least three shall be women) are appointed by the president after consultation with the minister of information and publicity and Parliament's Committee on Standing Rules and Orders as follows:
 - Two shall be persons chosen for their experience or qualifications in the field of broadcasting technology and broadcasting content, respectively.
 - One shall be a chief, as defined in the Traditional Leaders Act and nominated by the Council of Chiefs referred to in that act.
 - One shall be a legal practitioner of not less than five years' standing.
 - One shall be a public accountant of not less than five years' standing.
 - One shall be a representative of churches or other religious bodies, chosen from a list of nominees submitted by groups considered by the minister to be representative of churches or other religious bodies.
 - Three other members.
- Three members (of whom at least one must be a woman) are to be appointed by the president from a list of six nominations submitted by the Committee on Standing Rules and Orders.

Section 4(4) read with section 2 of the Third Schedule to the Broadcasting Services Act sets out grounds for disqualification of BAZ board members. These include being foreign, having a financial conflict of interest, prior convictions, or being a member of Parliament or a member of two or more statutory bodies.

3.4.5 Funding for the BAZ

In terms of section 5 read with the Fourth Schedule to the Broadcasting Services Act, the BAZ is funded from a range of sources, including:

- Fees, charges and other income derived from licences issued and other things done by the BAZ in terms of the Broadcasting Services Act
- Proceeds of any monetary penalties imposed by the BAZ for violations by licensees of applicable codes of conduct
- Money appropriated by Parliament – in other words, funding for the BAZ must be provided for in the national budget

3.4.6 Making broadcasting regulations

The Broadcasting Services Act, at section 46, sets out the BAZ's regulation-making powers. The BAZ is given wide powers to make regulations that are required or permitted to be prescribed by the Broadcasting Services Act or that, in the opinion of the BAZ Board, are necessary or convenient to be prescribed for the carrying out or giving effect to the act.

Note, however, that section 46(6) of the Broadcasting Services Act provides that the BAZ's regulations are of no force and effect until they have been approved by the minister of information and publicity and published in the Government Gazette.

3.4.7 Licensing regime for broadcasters in Zimbabwe

CATEGORIES OF BROADCASTING SERVICES

Section 7(2) of the Broadcasting Services Act provides that there are ten categories of broadcasting services:

- *Commercial:* This is a free-to-air radio or television service operated for profit and which is intended to appeal to the general public and is capable of being received by commonly available equipment.
- *Community:* This is a free-to-air radio or television service not operated for profit and which provides programmes for community purposes and is capable of being received by commonly available equipment. It also does not broadcast programmes or advertisements on behalf of any political party.

- *Subscription satellite*: This is a service which transmits programmes by satellite and which is made available to persons on payment of a subscription fee.
- *Subscription cable*: This is a service made available to the general public on payment of a subscription fee and provides programmes intended to appeal to the general public.
- *Subscription narrowcasting*: This is a service which is made available to persons on payment of a subscription fee and the reception of which service is limited by reason of:
 - Being targeted to any special interest group or otherwise not intended to appeal to the general public
 - Being intended only for reception at particular locations
 - Being provided during a limited period or to cover a specific event
- *Open narrowcasting*: This is a service which is not made available to persons on payment of any subscription fee, and where the reception of which service is limited by reason of:
 - Being targeted to any special interest group or otherwise not intended to appeal to the general public
 - Being intended only for reception at particular locations
 - Being provided during a limited period or to cover a specific event or is limited for some other reason
- *Datacasting*: This is an information service that delivers information, whether in the form of data, text, speech, images or any other form, to persons having appropriate receiving equipment, where the delivery of the service uses the broadcasting service bands.
- *Roadcasting*: This is the broadcasting of pre-recorded programmes for reception by passengers of any public service vehicle as defined in the Road Motor Transportation Act.
- *Railwaycasting*: This is the broadcasting of pre-recorded programmes for reception by passengers of any railway service.
- *Webcasting*: This is a computer-mediated broadcasting service.

It is important to note that in terms of section 2(2) of the Broadcasting Services Act, the minister of information and publicity may by notice in the Government Gazette determine other categories of broadcasting services.

BROADCASTING LICENSING PROCESSES

In terms of section 9 of the Broadcasting Services Act, the BAZ must, subject to frequency availability and after having planned the broadcasting service bands, publish a notice in the Government Gazette and in a national newspaper inviting applications for a licence to provide:

- National free-to-air radio broadcasting services
- National free-to-air television broadcasting services

in addition to those provided by the public broadcaster, the Zimbabwean Broadcasting Corporation.

In terms of section 10 of the Broadcasting Services Act, the BAZ must, subject to frequency availability and after having planned the broadcasting service bands, publish a notice in the Government Gazette and in a national newspaper inviting applications for a licence to provide the broadcasting services specified in the notice. An applicant responding to such an invitation must submit its application in the prescribed form and with the prescribed fee.

Within seven days of the submission of its application, an applicant must also publish its application at its own cost in a national newspaper. Written objections by the public must be lodged with the BAZ within 14 days of the publication of any licence application. The BAZ then examines and short-lists qualified applicants. Short-listed applicants are required to attend a public hearing.

The BAZ has the discretion to issue or to refuse to issue a licence. If a licence is issued, the licensee is to publish the licence in a national newspaper at its cost. If a licence is refused, the BAZ must provide reasons for such refusal.

FREQUENCY SPECTRUM LICENSING

Section 27(1) of the Broadcasting Services Act requires the BAZ's authority, whether through licensing or otherwise, to transmit signals, erect broadcasting apparatus, or use a mode of transmission. Section 27(2) makes it an offence to contravene section 27(1), and the punishment, upon conviction, is a fine, a period of imprisonment for up to two years or both. Note that in terms of section 27(5), the minister of information and publicity may order any person having the technological means to do so to stop, scramble, obliterate or interfere with a broadcasting transmission which the minister has reason to believe is being provided in contravention of the Broadcasting Services Act.

3.4.8 Responsibilities of broadcasters in Zimbabwe

ADHERENCE TO LICENCE CONDITIONS, INCLUDING STATUTORY STANDARD TERMS AND CONDITIONS

Section 11 of the Broadcasting Services Act sets out the various conditions that apply to broadcasting licences. The standard terms and conditions are listed in the Fifth and Seventh schedules to the Broadcasting Services Act. These schedules contain hugely detailed provisions regarding a range of topics. A summary of these are given below:

- *Conditions applicable to all broadcasters:*
 - Conditions relating to political matters:
 - During an election period a broadcaster who broadcasts election matter must give reasonable and equal opportunities to all political parties.
 - Conditions regarding the broadcasting of election advertisements – essentially, election advertisements are not allowed.
 - Identification of political matter: Where a broadcaster broadcasts political matter at the request of another person, a number of particular details of the requestor and particulars about the matter must be kept. Details of the requestor and the matter must be announced in a form approved in writing by the BAZ, and specific details thereof must be forwarded to the BAZ upon written request.
 - Records of political subjects, whether provided as part of current affairs, news, statements, commentary, etc. are to be kept in the form approved by the BAZ in writing, for a period of six weeks or until a complaint is resolved or as per the BAZ's specific written request.
 - Conditions relating to medicines: Commercial television/radio and subscription broadcasters must not broadcast a medicine advertisement unless the text has been approved by the relevant government official.
 - News: No broadcaster may broadcast any matter that contains false or misleading news.
 - Advertisements containing political matter: No broadcaster may broadcast these.
- *Conditions specific to commercial licensees:* There is a long list of these in both schedules, the critical ones are the following:
 - Licensee's articles of association must provide for the disposal of

shares held by a person if that shareholding would contravene any of the provisions of the Broadcasting Services Act, and must also provide for director's details to be provided to the BAZ.

- All commercial broadcasters are required to broadcast, free of charge, items of national interest if so required by the minister of information and publicity and, further, even hand over control of all broadcasting facilities to persons authorised by the Ministry during an emergency.
- The broadcaster will not broadcast something which has been refused classification or prohibited in terms of the Censorship and Entertainments Control Act.
- Broadcasting services cannot be used to commit an offence.
- Collectively, they must:
 - Provide a diverse range of programmes
 - Make programmes available in all languages used in the broadcast area
 - Reflect the culture, character, needs and aspirations of the people in the broadcast area
 - Provide a significant amount of Zimbabwean programming
 - Regularly include news and information programmes, including discussions of matters of national, regional and local significance
 - Meet the highest standards of journalism
- *Conditions specific to community licensees:* There is long list of these in both schedules. The critical ones are as follows:
 - Licensees cannot broadcast 'any political matter'. Note this is undefined.
 - Licensees must encourage community participation in operations, programming and membership of its governing body.
 - Time, content and display limits on sponsorship announcements are required.
 - Licensees must provide a distinct service dealing with community issues not normally dealt with by the public or commercial broadcasters.
 - Informational, educational and entertaining programming is required.
 - Licensees are to concentrate on highlighting community issues, such as developmental issues, health care, basic information and general education, environmental affairs, and the promotion of local culture.
 - Licensees are to promote a sense of common purpose within the community.

- *Requirements for public broadcasters:* There is long list of these in the Seventh Schedule, the critical ones being to:
 - Make programmes available in all languages used in Zimbabwe
 - Reflect both unity, and cultural and language diversity
 - Provide news and public affairs programming that meets the highest standards of journalism and which is fair, unbiased and independent of government, commercial or other interests
 - Include significant amounts of educational programming
 - Support traditional and contemporary artistic expression
 - Offer a range of services aimed at women, children, the youth and the disabled
 - Include programmes commissioned by independent producers
 - Include programmes featuring national as well as developmental and minority sports

- *Language requirements:* Section 11(4) of the Broadcasting Services Act imposes the following language requirements:
 - Ten per cent of the total programming of all licensees shall be in any of the national aboriginal languages of Zimbabwe other than Shona and Ndebele.
 - Ten per cent of the total programming of a television licensee must be broadcast in a manner that may be understood by audiences who have a hearing impairment.

- *Government broadcasting rights:* Section 11(5) of the Broadcasting Services Act requires every broadcaster to make available one hour cumulatively per week of its broadcasting time for government to explain its policies to the nation.

- *Copyright compliance:* Section 11(5) of the Broadcasting Services Act requires every broadcaster to comply with the Copyright and Neighbouring Rights Act.

- *Compliance with the Access to Information and Protection of Privacy Act:* Section 11(11) of the Broadcasting Services Act requires all broadcasters to comply with AIPPA in relation to the conduct and accreditation of journalists employed by them. This has already been discussed in detail above.

ADHERENCE TO LOCAL CONTENT CONDITIONS

The Sixth Schedule to the Broadcasting Services Act sets out local content requirements for various broadcasting services. It is also important to note that the minister is empowered in terms of this Sixth Schedule to prescribe other local content

requirements. The local content requirements provided for in the Sixth Schedule are briefly as follows:

■ *Television broadcasting services:*

- Single channel service: 75% of the programming content at all times must be local television content and material from Africa.
- Multi-channel services: 30% of programming content at all times must be local television content.
- In complying with the above conditions, at least:
 - 70% of drama must consist of Zimbabwean drama
 - 80% of current affairs must consist of Zimbabwean current affairs
 - 70% of social documentaries must consist of Zimbabwean social documentaries
 - 70% of informal knowledge-building must consist of Zimbabwean informal knowledge-building
 - 80% of educational programming must consist of Zimbabwean educational programming
 - 80% of children’s programming must consist of Zimbabwean children’s programming

■ *Subscription television broadcasting services:*

- At least 30% of its encoded programming (or a higher figure as determined by the BAZ) must consist of local television content within such programme categories as may be determined by the BAZ.
- At least 50% of its unencoded programming, if any, must consist of local television content within such programme categories as may be determined by the BAZ.

■ *Independent television production:* Television and subscription television broadcasting services must ensure that at least 40% of their local television content consists of independent productions spread reasonably evenly between Zimbabwean drama, social documentary, informal knowledge-building, and children’s and educational programming.

■ *Radio:*

- 75% of music broadcast must be Zimbabwean music
- 10% of music broadcast must be music from Africa

■ *Subscription radio:*

- Encoded services:

- 30% of music broadcast must be Zimbabwean music
- 10% of music broadcast must be music from Africa
- Unencoded services:
 - 75% of music broadcast must be Zimbabwean music
 - 10% of music broadcast must be music from Africa

ADHERENCE TO CODES OF CONDUCT

In terms of section 24(1) of the Broadcasting Services Act, the BAZ ‘in consultation with broadcasters’ must develop codes of conduct governing:

- Rules of conduct to be observed by broadcasters
- Standards and practices to be observed in advertising by broadcasters

In terms of sections 24(6) and (8) of the Broadcasting Services Act, the BAZ is to recommend that such codes be published in the Government Gazette as well as the penalties for breaches of such codes.

ADHERENCE TO OWNERSHIP AND CONTROL REQUIREMENTS

Regulating ownership and control of broadcasting licences is an important part of the BAZ’s regulatory work. The Broadcasting Services Act contains a number of restrictions in relation to ownership and control of broadcasting services:

- *No party political broadcasters or signal distributors:* Section 20 of the Broadcasting Services Act prohibits any broadcasting or signal carrier licence to be given to any political party or organisation.
- *Limitations on foreign ownership, control or funding of broadcasting or signal distribution services:*
 - Section 8(1) of the Broadcasting Services Act prohibits a person who is not a citizen of Zimbabwe or an organisation that is not controlled by citizens of Zimbabwe from being issued a broadcasting licence. However, in terms of section 8(8), the minister of information and publicity has wide discretion to grant exemptions from these prohibitions and to permit the BAZ to grant licences to such approved persons.
 - Section 8(6) also prohibits the granting of a licence to a person whose broadcasting service is funded wholly or in part by foreign donations or contributions.
 - Section 22 of the Broadcasting Services Act prohibits a person who

is not a citizen of Zimbabwe from being a director of a broadcasting licensee.

3.4.9 Is the BAZ an independent regulator?

It is clear from a range of provisions that the BAZ is not an independent regulator. The Broadcasting Services Act does not even use the word ‘independent’ when establishing the BAZ in section 3, and numerous provisions make it clear that the minister of information and publicity has extraordinary powers in relation to the regulation of the media in Zimbabwe. For example:

- Section 4B(1) entitles the minister to give the BAZ Board general directions relating to policy which he considers ‘necessary in the public interest’. The section further requires that the BAZ ‘is to observe [the direction] in the exercise of its functions’. It is, however, important to note that the BAZ Board must be given notice of a proposed policy direction and must have an opportunity to comment in writing thereon in terms of section 4B(2).
- Section 46(6) requires ministerial approval before the BAZ’s regulations or orders have any legal effect.

As Zimbabwe moves into its next phase politically under a new constitution, it remains to be seen whether the constitutionally mandated Zimbabwe Media Commission will become a broadcasting regulator and whether it will steer Zimbabwe’s broadcasting climate in a new and more democratic direction.

3.4.10 Weaknesses in the legislation that should be amended to strengthen the broadcast media generally

In our view, neither AIPPA nor the Broadcasting Services Act complies with international standards of democratic broadcasting regulation.

- First and foremost, the regulatory environment is focused on prohibiting free expression rather than fostering it. This is clear from content prohibitions and from the extremely unusual and problematic registration requirements for media houses and journalists (outside of the context of ordinary broadcasting licensing).
- There is a clear bias against foreigners operating as journalists, media owners, broadcasters or signal distributors. This does not support investment in and growth of the media sector, and is clearly aimed at quashing freedom of expression.

- None of the bodies established by AIPPA (the BAZ, the Media Council or the Zimbabwe Media Commission) is even notionally independent. These bodies ought to be clearly independent and ought to be appointed by the president following a public nominations process and a short-listing process involving a multi-party body such as Parliament.

The laws must be changed to allow for self-regulatory systems, that is, codes of conduct and enforcement mechanisms developed by the media itself.

3.5 Statutes regulating the public broadcast media

3.5.1 Introduction

The Zimbabwean Broadcasting Corporation (ZBC) is Zimbabwe's public broadcaster, although it clearly operates as a state broadcaster.

The activities of the ZBC are governed by the Broadcasting Act [12:01], the Zimbabwe Broadcasting Corporation (Commercialisation) Act, 2001, and the Broadcasting Services Act, which has already been discussed above.

3.5.2 Establishment of the ZBC

The ZBC was originally established in terms of section 3 of the Broadcasting Act. The ZBC started life as a company offering both signal distribution and broadcasting services, but these functions were split between two different corporate entities, in terms of section 3 of the ZBC Commercialisation Act.

3.5.3 The ZBC's mandate

Section 4(2) of the ZBC Commercialisation Act sets out the objects of the ZBC, which are to:

- Provide broadcasting services
- Provide video and audio production services
- Provide integrated datacasting, roadcasting and webcasting services nationally
- Provide online multimedia news and programme services
- Perform any other function as set out in its memorandum of association

The requirements for public broadcasters that are set out in the Seventh Schedule to the Broadcasting Services Act (outlined above) are also applicable and inform the nature of the services that must be provided by the ZBC.

3.5.4 Appointment of the ZBC Board

In terms of section 4(1) of the Broadcasting Act, the operations of the ZBC are controlled by a board of governors consisting of between six and nine members. All board members are appointed by the minister, after consultation with and in accordance with any directions the president may give him/her. In terms of section 4(2) of the Broadcasting Act, the minister also designates one governor as chairman and another as vice-chairman of the board.

Considering the wide appointment discretion given to the minister, it is not surprising that the Broadcasting Act sets out no criteria for board appointments apart from certain usual grounds of disqualification, such as being an un-rehabilitated insolvent, having a criminal record, or not being a citizen or permanent resident.

3.5.5 Funding for the ZBC

Section 19 of the Broadcasting Act provides that the funds of the ZBC shall consist of:

- Money payable to the ZBC in terms of legislation. Note that section 38B of the Broadcasting Services Act requires every ‘listener’ (defined, essentially, as a person, other than a dealer, who is in possession of a ‘receiver’, which in turn is defined as an apparatus ‘capable of being used for the reception of a broadcasting service’) to have a licence issued by the ZBC. The licence fee is determined by the ZBC, with the approval of the minister. Section 38C of the Broadcasting Services Act specifies that licence fees are to be paid into the general funds of the ZBC for its use.
- Money appropriated by Parliament – in other words, funding for the ZBC must be provided for in the national budget
- Money or assets that belong to the ZBC by virtue of its operations

3.5.6 The ZBC: Public or state broadcaster?

There is no doubt that the ZBC is a state broadcaster and that it is clearly used to bolster the fortunes of the long-standing party in power, ZANU-PF. From a legal point of view, the role of the minister is particularly problematic in relation to the appointment of ZBC board members; a genuine public broadcaster is clearly required to have a board appointed with the participation of a multi-party body such as Parliament.

3.5.7 Weaknesses in the Broadcasting Act which should be addressed to strengthen the public broadcaster

There is little doubt that the role and position of the ZBC needs to be addressed as part of the new constitutional dispensation. There are significant hurdles to the ZBC being transformed into a public broadcaster.

Broadcasting statutory reform would require, at the very least, that:

- The ZBC's independence and accountability to the public be provided for
- Parliament and the public in general play a more active role in the appointment, removal and assessment of the board and its members in order to greatly reduce the level of executive interference that currently exists
- The public broadcaster be genuinely only one tier of broadcasting in Zimbabwe. This would require the licensing of free-to-air commercial and community radio and television broadcasters to play their respective roles in the media landscape. The ZBC has dominated the Zimbabwean broadcasting sector in ways that are reminiscent of the pre-liberation Rhodesian regime, which was also characterised by the domination of approved media sources

3.6 Statutes governing broadcasting signal distribution

The Broadcasting Services Act and the Zimbabwe Broadcasting Corporation (Commercialisation) Act have particular relevance to broadcasting signal distribution, 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.

3.6.1 Licences required by broadcasting signal distribution providers

Section 7(1) of the Broadcasting Services Act makes it clear that, apart from the ZBC, no person may operate as a signal carrier in Zimbabwe except in accordance with a signal carrier licence.

In terms of section 7(3), such licence shall authorise a licensee to operate a signal transmitting station for the purpose of transmitting a radio or television broadcasting service. Any person who operates a transmitting station without a signal carrier licence is guilty of an offence and is liable to a fine, a period of imprisonment for up to two years or both, in terms of section 27 of the Broadcasting Services Act.

3.6.2 The regulatory framework for broadcasting signal distributors

The ZBC Commercialisation Act specifically provided for the ZBC to be divided into a broadcasting company and a ‘digital convergence signal carrier company’. The objects of the digital convergence signal carrier company are set out in section 4(1) of the ZBC Commercialisation Act and include:

- Providing signal transmitting services
- Migrating from terrestrial analogue to digital technology
- Expanding multimedia services by providing internet, web development and e-commerce services
- Establishing sound recording studios and facilities for film and video production. This last function is in line with section 3(b) of the ZBC Commercialisation Act, which states that in addition to its function as a signal carrier company, the new digital convergence signal carrier company is to ‘carry on business arising from the convergence of broadcasting, telecommunications and computer technologies’

In relation to ordinary signal carrier companies, it is important to note that section 8(6)(a) of the Broadcasting Services Act provides that no signal transmission station shall be licensed, where it is wholly or partly funded by foreign donations or contributions.

Furthermore, section 22 of the Broadcasting Services Act prohibits a person who is not a citizen of Zimbabwe from being a director of a carrier signal licensee.

3.7 Statutes that undermine a journalist’s duty to protect his or her sources

A journalist’s sources are the lifeblood of his or her profession. Without trusted sources, a journalist cannot obtain information that is not already in the public domain. However, sources will often 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.

3.7.1 Access to Information and Protection of Privacy Act

Section 42C read with section 42B of the Access to Information and Protection of Privacy Act [10:27] empowers the Media Council, established in terms of section 42A of AIPPA, to summon any person as a witness and, where it thinks fit, to require him or her to produce any book, record, document or thing for the purposes of an inquiry into whether or not a journalist or mass media service has committed a breach of the Code of Conduct developed by the Zimbabwe Media Commission.

Note that in terms of section 42C(3), a failure or refusal by any witness so summoned to attend before the Media Council or to refuse to produce any required book, record, document or thing is an offence. The penalty upon conviction is a fine, imprisonment not exceeding six months or both.

3.7.2 Criminal Procedure and Evidence Act

Sections 113C and 232 of the Criminal Procedure and Evidence Act [9:07] (CPEA) entitle a public prosecutor or court, respectively, to subpoena a witness.

Furthermore, sections 113D and 237 of the CPEA, respectively, make it an offence to fail to obey a subpoena issued in terms of the CPEA unless that person had a reasonable excuse for such failure. Upon conviction, the penalty is a fine, a period of imprisonment not exceeding one month or both.

It is also important to note section 295. This oddly-worded section essentially provides that, subject to the CPEA, no witness shall be compelled to give evidence in any criminal proceedings where, if such proceedings were taking place in the Supreme Court of Judicature in England, such witness would not be compelled to give evidence by reason, on the grounds of public policy and with regard to public interest, that the fact, communication, etc. ought not to be disclosed and is privileged from disclosure. We are of the view that journalists may use this section to protect their sources.

However, 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 and whether the information is required for the investigation of a crime.

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.

3.8 Statutes that prohibit the publication of certain kinds of information

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

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

- Identities of minors in court proceedings
- Certain kinds of information regarding legal proceedings
- Information relating to defence, public safety, public order, official secrets, policing, and prisons
- False news
- Insulting the president
- Criminal insult
- Invasion of privacy
- Criminal defamation
- Obscenity
- Threats to public health
- Threats to economic interests of the state
- Causing offence to persons of a particular race, religion, ethnicity, etc.
- Advertising on roadsides or near railways

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

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

Section 195 of the Criminal Procedure and Evidence Act [Chap 9:07] makes it an offence to publish the identity of an accused person in criminal proceedings if that accused person is under 18 years old, unless the court rules that such publication would be just and equitable and in the public interest.

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

Section 197 of the CPEA makes it an offence to publish the identity of a witness in a trial if that witness is under 18 years old, unless the presiding officer has given his or her written consent. The penalty upon conviction is a fine, imprisonment not exceeding one year or both.

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

CENSORSHIP AND ENTERTAINMENTS CONTROL ACT [CHAP. 10:04]

In terms of sections 13(1) and (2) of the Censorship and Entertainments Control Act, it is an offence for a person to import, print, publish, manufacture, make or produce, distribute, display, exhibit, or sell or offer or keep for sale any publication that has been declared undesirable by the Censorship Board in terms of the act. The penalty upon conviction is a fine, imprisonment for up to two years or both. Note that the grounds of undesirability include a publication that is likely to disclose, with reference to any judicial proceeding:

- Any matter which is indecent or obscene or harmful to public morals or any indecent or obscene medical, surgical or physiological details, the disclosure of which is likely to be offensive or harmful to public morals
- Relating to marriage, any particulars other than:
 - The names and occupations of parties and witnesses
 - A concise statement of the allegations, defences or counter-allegations in support of which evidence has been given
 - Submissions on any point of law arising and the decision of the court thereon
 - The judgment and verdict of the court and any observations made by the judge in giving judgment

Note that in terms of section 13, the above grounds do not apply to official court documents such as transcripts, volumes of the law reports, or scientific, professional or religious publications.

Note that the Censorship Board has the power to grant exemptions in writing from section 13 of the act to any person or institution, and these can be subject to conditions.

CRIMINAL PROCEDURE AND EVIDENCE ACT [CHAP 9:07]

Section 9A(1) of the CPEA provides that a court or tribunal may institute proceedings for contempt of court against any person who is alleged to have impaired its dignity, reputation or authority *in the presence of the court or tribunal* (our emphasis). However, in terms of section 9A(2), only the attorney-general or someone acting on his or her express authority shall institute proceedings for contempt of court in circumstances other than those referred to in subsection (1).

Section 196 of the CPEA makes it an offence to publish the identity of any person charged in respect of indecent acts, extortion or who is a witness in such proceedings unless the judge has consented thereto in writing. Upon conviction, the penalty is a fine, imprisonment for a period not exceeding two years or both.

3.8.3 Prohibition on the publication of state security–related information

CENSORSHIP & ENTERTAINMENTS CONTROL ACT [CHAP. 10:04]

In terms of sections 13(1) and (2) of the Censorship & Entertainments Control Act [Chap. 10:04], it is an offence for a person to import, print, publish, manufacture, make or produce, distribute, display, exhibit, or sell or offer or keep for sale any publication which is undesirable. The penalty upon conviction is a fine, imprisonment for up to two years or both. Note that the grounds of undesirability include a publication that is likely to be contrary to, among other things, the interests of defence, public safety and public order. Note that the Censorship Board has the power to grant exemptions in writing from section 13 of the Censorship Act to any person or institution, and these can be subject to conditions.

In terms of section 9 of the Censorship Act, it is an offence to distribute, televise or publicly exhibit any film unless the film has been approved by the Censorship Board. The penalty upon conviction is a fine, a period of imprisonment not exceeding one year or both.

Section 10(2) sets out the grounds upon which the Censorship Board shall not approve a film. In terms of section 10(2)(b), the Censorship Board shall not approve any film which, in its opinion, is likely to be contrary to the interests of defence, public safety and public order.

OFFICIAL SECRETS ACT [CHAP. 11:09]

The Official Secrets Act, at section 4 of the act, sets out a number of provisions relating to the disclosure of security-related information. It 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, imprisonment for a period not exceeding 20 years or both.

THE POLICE ACT [CHAP. 11:10]

Sections 24 and 25 of Schedule 1 to the Police Act do not directly prohibit the

publication of information but do make it an offence for a member of the police to communicate:

- Any secret or confidential information other than to the person for whom such information is officially intended
- Without authority, any matter to the press or to the public, the communication of which results or is reasonably likely to result in any prejudice to the administration, discipline or efficiency of the police force

In terms of section 29 of the Police Act, the penalty upon conviction for any of the above offences is a fine, imprisonment not exceeding five years or both. In our view, these provisions, although not unusual, would impact negatively on the media's ability to obtain information from members of the police.

PRISONS ACT [CHAP 7:11]

Section 84(3) of the Prisons Act makes it an offence to publish, without the authority of the minister of justice, legal and parliamentary affairs, or any other minister tasked with the administration of the Prisons Act, the whole or part of a letter or document which he 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 of the prison in terms of section 84(1). In terms of section 84(4) of the Prisons Act, the penalty upon conviction for such publication is a fine, a period of imprisonment not exceeding six months or both.

3.8.4 Prohibition on the publication of false news

ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT [10:27]

It is an offence in terms of:

- Section 64 of AIPPA, in relation to a person registered under AIPPA, to make use of a mass media service
- Section 80 of AIPPA, in relation to a journalist,

to publish:

- Information which he or she intentionally and recklessly falsified in a manner which:

- Threatens the interests of defence, public safety, public order, the economic interests of the state, public morality or public health
 - Is injurious to the reputation, rights and freedoms of others
- Information which he or she maliciously or fraudulently fabricated
- Any statement:
- Threatening the interests of defence, public safety or public order, the economic interests of the state, public morality or public health
 - Injurious to the reputation, rights and freedoms of others,

In the following circumstances:

- Knowing the statement to be false or without having reasonable grounds for believing it to be true
- Recklessly, or with malicious or fraudulent intent, representing the statement as a true statement

The penalty upon conviction is a fine or a period of imprisonment not exceeding three years, or two years in the case of a journalist.

CRIMINAL LAW (CODIFICATIONS AND REFORM) ACT [CHAP 9:23]

Section 31 of the Criminal Law (Codifications and Reform) Act (Criminal Code) makes it an offence to communicate or publish certain false statements prejudicial to the state. The penalty upon conviction is a fine, a period of imprisonment not exceeding 20 years or both.

The false statements are, in brief, where there is a real risk or possibility of:

- Inciting or promoting public disorder or public violence and endangering public safety
- Undermining public confidence in a law enforcement agency, the prison service or the defence force
- Interfering with any essential service

Section 33 of the Criminal Code makes it an offence to make any statement concerning the president or an acting president with the knowledge or realising that there is a real risk or possibility that the statement is false and that it may:

- Engender feelings of hostility towards
- Cause hatred, contempt or ridicule,

the president, an acting president, whether in respect of the president personally or the President's Office. The penalty upon conviction is a fine, imprisonment not exceeding one year or both.

3.8.5 Prohibition on insulting the president

Section 33 of the Criminal Law (Codifications and Reform) Act [Chap 9:23] makes it an offence to undermine the authority or insult the president by publicly, unlawfully and intentionally making any abusive, indecent or obscene statement about or concerning the president, or an acting president, whether in respect of the president personally or of the President's Office.

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

3.8.6 Prohibition on the publication of criminal insult

Section 95 of the Criminal Law (Codifications and Reform) Act [Chap 9:23] makes it an offence, by words or conduct, seriously to impair the dignity of another person. The penalty upon conviction is a fine, a period of imprisonment not exceeding one year or both.

There are no provisions in this section regarding defences such as truth in the public interest.

3.8.7 Prohibition on invasion of privacy

Section 95 of the Criminal Law (Codifications and Reform) Act [Chap 9:23] makes it an offence, by words or conduct, seriously to invade the privacy of another person by observing that person in a state of partial or complete undress.

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

Note that section 95(5) does provide a defence to this offence, which is that the conduct was motivated solely by the desire to obtain evidence of the commission of adultery and is available to a private investigator or anyone else engaged to obtain evidence of such adultery by the spouse of that person.

3.8.8 Prohibition on the publication of criminal defamation

Section 96 of the Criminal Law (Codifications and Reform) Act [Chap 9:23] makes it an offence to publish a statement with the intention of harming the reputation of another person which:

- He or she knew, when he or she published it, that it was false in a material respect or realised that there was a real risk or possibility that it might be false in a material respect
- Causes, or creates a real risk or possibility of causing serious harm to that other person's reputation.

The penalty upon conviction is a fine, imprisonment for a period not exceeding two years or both. Note, however, that the accused will be entitled to avail him or herself of any defence that would be available to him or her in civil proceedings for defamation.

3.8.9 Prohibition on the publication of obscenity

CENSORSHIP & ENTERTAINMENTS CONTROL ACT [CHAP. 10:04]

The Censorship Act is a pre-liberation piece of legislation that remains on the statute books but which has been amended post-liberation. It is the main mechanism for regulating obscene materials in Zimbabwe.

MATERIALS REGULATED UNDER THE CENSORSHIP ACT

The Censorship Act regulates a wide range of materials including films, video and film material, publications, pictures, statues, records and the giving of public entertainments. Focus here, however, is only on those provisions affecting publications and films.

BODIES ESTABLISHED UNDER THE CENSORSHIP ACT, APPOINTMENT OF MEMBERS, KEY FUNCTIONS

The Censorship Act establishes two key bodies:

- *The Board of Censors:*
 - In terms of section 3, the minister of home affairs or whichever minister is responsible for the administration of the Censorship Act is to appoint a Board of Censors of not fewer than nine members.

- In terms of section 4, the functions of the Board of Censors are to:
 - Examine any article or public entertainment submitted to it
 - Make enquiries it considers necessary in regard to any publication, picture, statue, film, record or public entertainment which is alleged to be or which the Board of Censors has reason to believe may require to be prohibited or to be subject to conditions in terms of section 17
 - Advise the minister
 - Perform any other function assigned to it under the Censorship Act or any other statute

- *The Appeal Board:*
 - In terms of section 18(1), the Appeal Board consists of a president and two members appointed by the minister.
 - In terms of section 19, any person who is aggrieved at a decision of the Board of Censors may appeal to the Appeal Board, which shall enquire into the matter and may confirm, vary, or set aside the decision of the Board of Censors or give any other decision it considers just and, subject to section 20, the Appeal Board's decision shall be final.
 - Note that in terms of section 20, questions of law, whether a matter is a question of fact or law, and questions regarding the admissibility of evidence can be referred to the Supreme Court for determination.

It is, however, critical to point out that the minister plays a significant role in the carrying out of the Censorship Act and is able to intervene in the affairs of the Board of Censors and Appeal Board. Some examples:

- In terms of section 21, the minister has wide discretion to issue certificates prohibiting disclosure to the Appeal Board or to a court of law, with the result that only the actual result of the deliberations of the body concerned is to be disclosed, unless the body specifically orders otherwise.

- In terms of section 23, the minister has the power to overturn a decision by the Board of Censors and the Appeal Board rejecting a film or declaring a film, publication, picture, statue or record to be undesirable if the minister is satisfied that this is in the public interest. Note further that there is no requirement to hear the parties concerned on the matter.

- In terms of section 34, the minister is given wide regulation-making powers regarding numerous aspects of the Censorship Act.

CLASSIFICATION OF PUBLICATIONS

Section 14 of the Censorship Act empowers the Board of Censors to examine any publication (or picture, statue or record) and to declare whether or not it is ‘undesirable’ in the opinion of the Board of Censors.

Section 13(2) sets out the grounds of upon which a publication can be found to be ‘undesirable’; many of these are set out elsewhere in this chapter. In relation to obscenity, it is important to note that in terms of section 13(2)(a), a publication shall be deemed to be ‘undesirable’ if it or any part thereof is indecent, obscene, offensive or harmful to public morals. Section 33 details the definitions of these terms:

- Indecent or obscene – if
 - It has the tendency to deprave or corrupt the minds of persons who are likely to be exposed to the effect or influence thereof, or it is in any way subversive of morality
 - Whether or not related to any sexual conduct, it unduly exploits horror, cruelty or violence
- Offensive to public morals – if it is likely to be outrageous or disgusting to persons who are likely to read, hear or see it
- Harmful to public morals – if it deals in an improper or offensive manner with criminal or immoral behaviour

In terms of sections 13(1) and (2), it is an offence for a person to import, print, publish, manufacture, make or produce, distribute, display, exhibit, or sell or offer or keep for sale any publication that is undesirable. The penalty upon conviction is a fine, imprisonment for up to two years or both. Note that the Board of Censors has the power to grant exemptions in writing from section 13 of the Censorship Act to any person or institution, and these can be subject to conditions.

Note further that in terms of section 26, possession of a publication, picture, statue or record which is indecent or obscene is an offence; however, no prosecution shall be instituted without the written authority of the attorney-general. The penalty upon conviction is a fine, a period of imprisonment not exceeding one year or both.

CLASSIFICATION OF FILMS

In summary, section 9 of the Censorship Act makes it an offence to distribute, televise or publicly exhibit any film unless the film has been approved by the Board of

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

Section 10(2) sets out the grounds upon which the Board of Censors shall not approve a film (some of these are set out elsewhere in this chapter).

In relation to obscenity, it is important to note that in terms of sections 10(2)(a) and (c), the Board of Censors shall not approve any film that in its opinion depicts any matter which is, or depicts any matter in a manner that is, indecent, obscene, offensive or harmful to public morals. Section 33 sets out the definitions of these terms:

- *Indecent or obscene* – if
 - It has the tendency to deprave or corrupt the minds of persons who are likely to be exposed to the effect or influence thereof, or it is in any way subversive of morality
 - Whether or not related to any sexual conduct, it unduly exploits horror, cruelty or violence.
- *Offensive to public morals* – if it is likely to be outrageous or disgusting to persons who are likely to read, hear or see it.
- *Harmful to public morals* – if it deals in an improper or offensive manner with criminal or immoral behaviour.

Note further that in approving a film, the Board of Censors may impose one or more of the following conditions:

- In the case of a film to be televised, that it shall not be televised except:
 - Between specified hours
 - After notices indicating that the film is unsuitable for viewing by a specified class of people
 - After any specified portion has been cut
- In the case of a film other than one to be televised, that it shall not be distributed or exhibited:
 - To persons of a specified age or sex
 - Except after any specified portion has been cut

Failure to comply with the conditions for televising or otherwise exhibiting a film is an offence, and the penalty upon conviction is a fine, a period of imprisonment not exceeding one year or both.

An approved film is given a certificate by the Board of Censors in terms of section 11 of the Censorship Act. Note that the Board has the power to grant exemptions in writing from sections 9 and 10 of the Censorship Act, and these can be subject to conditions. Note further that in terms of section 26, possession of recorded video or film material which is indecent or obscene is an offence; however, no prosecution shall be instituted without the written authority of the attorney-general. The penalty upon conviction is a fine, a period of imprisonment not exceeding one year or both.

3.8.10 Prohibition on the publication of threats to public health

In terms of sections 13(1) and (2) of the Censorship & Entertainments Control Act [Chap. 10:04], it is an offence for a person to import, print, publish, manufacture, make or produce, distribute, display, exhibit, or sell or offer or keep for sale any publication that is undesirable. The penalty upon conviction is a fine, imprisonment for up to two years or both. Note that the grounds of undesirability include a publication that is likely to be contrary to, among other things, the interests of public health.

Note that the Board of Censors has the power to grant exemptions in writing from section 13 of the Censorship Act to any person or institution, and these can be subject to conditions.

In terms of section 9 of the Censorship Act, it is an offence to distribute, televise or publicly exhibit any film unless the film has been approved by the Board of Censors. The penalty upon conviction is a fine, a period of imprisonment not exceeding one year or both.

Section 10(2) sets out the grounds upon which the Board of Censors shall not approve a film. In terms of section 10(2)(b), the Board of Censors shall not approve any film which, in its opinion, is likely to be contrary to, among other things, the interests of public health.

3.8.11 Prohibition on the publication of threats to the economic interests of the state

In terms of sections 13(1) and (2) of the Censorship & Entertainments Control Act [Chap. 10:04], it is an offence for a person to import, print, publish, manufacture, make or produce, distribute, display, exhibit, or sell or offer or keep for sale any publication that is undesirable. The penalty upon conviction is a fine, imprisonment for up to two years or both. Note that the grounds of undesirability include a publication that is likely to be contrary to, among other things, the economic interests of the state.

Note that the Board of Censors has the power to grant exemptions in writing from section 13 of the Censorship Act to any person or institution, and these can be subject to conditions.

In terms of section 9 of the Censorship Act, it is an offence to distribute, televise or publicly exhibit any film unless the film has been approved by the Board of Censors. The penalty upon conviction is a fine, a period of imprisonment not exceeding one year or both.

Section 10(2) sets out the grounds upon which the Board of Censors shall not approve a film. In terms of section 10(2)(b), the Board of Censors shall not approve any film which, in its opinion, is likely to be contrary to, among other things, the economic interests of the state.

3.8.12 Prohibition on the publication of statements causing offence to persons of a particular race, religion, ethnicity, etc.

Section 42 of the Criminal Law (Codifications and Reform) Act [Chap 9:23] makes it an offence to make any insulting or otherwise grossly provocative statement that causes offence to persons of a particular race, tribe, place of origin, colour, creed or religion, intending to cause such offence or realising that there is a real risk or possibility of doing so. The penalty upon conviction is a fine, a period of imprisonment not exceeding one year or both.

3.8.13 Prohibition on advertising on roadsides or near railways

The provisions of the Advertisements Regulation Act [Chap. 14:01] are probably of more interest to media owners than to media practitioners, but it is important to note that this act makes it an offence to erect or display an advertisement on or near a railway or within any area that the minister responsible for the administration of the Advertisements Regulation Act has declared to be a prohibited area. The penalty is a fine, a period of imprisonment not exceeding three months or both.

Note that the act does specifically provide that it does not apply to:

- Advertisements within the area of jurisdiction of a local authority, town ward, or rural district council or upon any station, yard, platform or station approach belonging to the railways
- Advertisements on land and which relate to the sale or lease of such land or the hire of livestock, implements or produce of such land

- Advertisements displayed within 100 metres of any licensed hotel or general dealer's store premises indicating the situation thereof
- Advertisements approved by the minister and displayed by any automobile, publicity or other association approved by the minister

3.9 Legislation prohibiting interception of communication

The legality of monitoring, recording and intercepting communications is governed by the Interception of Communications Act [Chap. 11:20]. Section 3 of the Interception Act makes it an offence to intercept any communication in the course of its transmission by means of a telecommunications or radiocommunications system or through the post. The penalty upon conviction is a fine, a period of imprisonment not exceeding five years or both.

There are certain important exceptions to the general prohibition in section 3 that journalists need to be aware of. Section 3 specifically allows a person to intercept (note the definition of this includes recording or copying of the content thereof) communication if:

- He or she is a party to the communication (defined as meaning a person whose access to the information is or might reasonably be known by all other parties)
- He or she has the consent of the person to whom, or by whom, the communication is sent
- He or she is authorised by a warrant

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 which takes place over a speaker phone in his 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.

3.10 Legislation that specifically assists the media in performing its functions

3.10.1 Access to Information and Protection of Privacy Act [10:27]

In countries that are committed to democracy, governments pass legislation which specifically promotes 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. There is little doubt that Zimbabwe's recent history makes it an unlikely candidate for a country committed to transparency; however, it has in fact passed legislation that provides for a right of access to information.

AIPPA has been roundly and correctly criticised for its draconian provisions on the registration of journalists and media outlets. There is little doubt that it is not a media-friendly statute. However, it is important to recognise that it does, at least ostensibly, provide a statutory right of access to information, and these provisions therefore might be of some assistance to the media.

Section 5(1) of AIPPA grants every person a right of access to any record, including a record that contains personal information that is in the custody or under the control of a public body, provided that such access shall not extend to excluded information. Section 5(2) further provides that where information can be extracted from a record containing excluded information, an applicant may have access to the part of the record that does not contain excluded information.

Note that in terms of section 5(3), the following people do not have rights to access information in terms of AIPPA:

- A person who is not a citizen or permanent resident of Zimbabwe.
- Any unregistered mass media service or unlicensed broadcaster.
- Any foreign state or agency.

Section 4 of AIPPA stipulates that the act applies to records (defined in section 1 as including books, maps, documents, drawings, letters, photographs, vouchers, papers or any other thing on which information is recorded or stored by graphic, electronic or any other means but does not include a computer programme) under the control of a public body (these are set out in the Second Schedule to AIPPA and include government departments, statutory corporations and authorities, government agencies, local authorities and various professional regulatory bodies, such as the Institute of Chartered Accountants of Zimbabwe, the Law Society and others) excluding those records listed in the First Schedule to AIPPA, namely:

- A personal note, communication or draft decision of a person acting in a judicial or quazi-judicial capacity
- Any record that is protected in terms of the Privileges, Immunities and Powers of Parliament Act

- A record created for or in the control of a person in terms of the Children’s Act
- A record or question to be used in an examination or test
- A record containing teaching materials or research information of employees of a post-secondary educational body
- Material placed in the National Archives or the archives of a public body by a person or agency which is not a public body
- Matters relating to the functions and powers of the president

Sections 6 and 7 of APPIA provide that any person requesting information from a public body must make the request in writing and must pay the prescribed fee. Note that section 8 imposes a duty upon the head of a public body to assist an applicant.

Part III of AIPPA, headed ‘Protected information’, sets out the information that is subject to non-disclosure provisions, which appear to be either mandatory (that is, where the head of the public body must not disclose) or discretionary (that is, where the head of a public body has discretion as to whether or not to disclose).

3.10.2 Mandatory non-disclosure provisions

- *Section 14 – Protection of deliberations of Cabinet and local government bodies:*
 - No information relating to the deliberations of Cabinet or any of its committees shall be disclosed to any person who is not authorised to receive same. Note that this prohibition does not apply to records of 25 years or older.
 - No information relating to the deliberations of a local government body which were held in camera shall be disclosed to any person who is not authorised to receive same.
- *Section 15 – Protection of advice relating to policy:* No information relating to advice or recommendations given to the president, a Cabinet minister or a public body shall be disclosed. Note that there are a large number of exceptions, including opinion polls, statistical surveys, employee appraisals, economic forecasts, reports on the state of the environment, audit or performance reports of a public body, consumer test reports, feasibility or technical studies, field research, reports of a committee, council or similar body established to make such reports to a public body, information that has been publicly cited, decisions made in the exercise of discretionary powers, information that is at least ten years old.

-
- *Section 16 – Protection of information subject to attorney-client privilege*

 - *Section 17 – Protection of information whose disclosure will be harmful to the law enforcement process and national security*
 - Information shall not be disclosed if this would:
 - Prejudice the law enforcement process, including:
 - Revealing the identity of a confidential source or law enforcement information
 - Revealing information relating to criminal intelligence that has a reasonable connection with the detection, prevention or suppression of organised criminal activities
 - Compromising the effectiveness of investigation techniques and procedures
 - Endangering the life or physical safety of a law enforcement officer or anyone else
 - Prejudice the defence and national security of the country and the safety or interests of the country
 - Prejudice the defence and national security of a country with which Zimbabwe has entered into a defence pact
 - Prevent the detection, prevention or suppression of espionage, sabotage or terrorism
 - Reveal information relating to prosecutorial discretion
 - Facilitate the escape from custody of a person under lawful detention
 - Harm the security of any property or system, including a building, vehicle, or computer or communications system
 - Prejudice the operations of defence and security forces
 - Result in or facilitate the commission of an offence
 - Result in exposing a person to civil liability for disclosing personal information contained in a law enforcement record
 - Prejudice the custody, supervision or release of a person in custody
 - Note that there are a number of exceptions to the above disclosure prohibitions. These include: the contents of reports prepared in the course of routine inspections by an agency authorised to enforce compliance with any statute; the content of a report on the degree of success of a law enforcement programme; statistical information regarding the prosecution of offences and reasons for a decision not to prosecute.

- *Section 20 – Protection of research information:* No research information shall be disclosed if disclosure will result in the loss by the researcher or the right of first publication of the results of such research or any intellectual property rights.
- *Section 24 – Protection of information relating to business interests of a third party:*
 - In terms of section 24(2), the head of a public body shall not disclose information contained in a tax return form or gathered for the purposes of determining a person’s tax liability or collecting outstanding tax.
 - There are exceptions to the above ground for non-disclosure, namely where the:
 - Third party consents to the disclosure
 - Information is contained in the national archives
 - Information is contained in a record that is at least 30 years old
- *Section 25 – Protection of personal privacy:* The head of a public body shall not disclose personal information to an applicant if the disclosure will result in the unreasonable invasion of a third party’s personal privacy. Note that this long provision contains provisions detailing:
 - The consideration of relevant circumstances
 - When disclosure would be presumed to be an unreasonable invasion of privacy
 - When disclosure would not be presumed to be an unreasonable invasion of privacy

3.10.3 Discretionary non-disclosure provisions

- *Section 18 – Information relating to inter-governmental relations or negotiations*
 - The head of a public body may, on the advice of the minister of home or foreign affairs, refuse to disclose information if such disclosure may affect relations between the government and/or divulge confidential information received by:
 - A municipal or rural district council
 - The government of a foreign state
 - An international organisation of states
 - Note that the above does not apply to records 20 years old or older.
- *Section 19 – Protection of information relating to the financial or economic or financial interests of a public body or the state*
 - The head of a public body may refuse to disclose information which

may result in harm to the planning, financial or economic interests of a public body or the state, including:

- Trade secrets
 - Financial, commercial, scientific or technical information that belongs to a public body or to the state and has monetary value
 - Plans that relate to the management of personnel, the administration of a public body or the state, and that have not yet been implemented or made public
 - Information whose premature disclosure may result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party
 - Information relating to a public body or the state's negotiations
- Note that the above grounds do not apply as a general rule to results of product or environmental testing unless this was done as a service to a specific person or organisation who paid a fee therefor or for the purposes of developing testing methods.
- *Section 21 – Protection of information relating to the conservation of heritage sites:* The head of a public body may refuse to disclose information if the disclosure will result in damage to or interference with the conservation of:
- Fossil sites, natural sites or sites that have an anthropological or heritage value
 - An endangered, threatened or vulnerable species, subspecies or race of plants, vertebrates or invertebrates
 - Any other rare or endangered living species
- *Section 22 – Protection of information relating to personal safety:* The head of a public body may refuse to disclose personal information concerning the applicant if such disclosure will result in a threat to the applicant's or another person's safety or mental or physical health.
- *Section 23 – Information is otherwise available to the public:*
- The right of access to information shall not be held to be denied where the head of a public body refused to disclose information:
 - That is otherwise available to members of the public upon payment of a specific fee
 - That will be published or released to members of the public within 60 days of the date of receiving the request for access to the information

■ *Section 24 – Protection of information relating to the business interests of a third party:*

- In terms of section 24(1), the head of a public body may refuse to disclose information that will reveal the trade secrets or commercial, financial, scientific or technical information of a third party that was supplied in confidence to the public body and the disclosure of which could reasonably be expected to:
 - Significantly harm the competitive position or interfere with the negotiating position of the third party
 - Result in similar information no longer being available to the public body when it is in the public interest that such information continues to be provided
 - Result in undue financial loss or gain to any person or organisation
 - Reveal information supplied to an arbitrator, mediator, labour official or other person or body appointed to enquire into a labour dispute
 - Reveal information that will harm the economic interests of the state
- There are exceptions to the above grounds of non-disclosure, namely where the:
 - Third party consents to the disclosure
 - Information is contained in the national archives
 - Information is contained in a record that is at least 30 years old

The access to information provisions of AIPPA could be critically important for the media and, if used properly (particularly in respect of on-going investigative journalism), could provide access to extremely valuable information.

4 REGULATIONS AFFECTING THE BROADCAST MEDIA

In this section you will learn:

- What regulations are
- Key regulatory provisions governing broadcasting
- Other key media-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 the Zimbabwe Media Commission (ZMC) or the Broadcasting Authority of Zimbabwe (BAZ) to make legally binding rules governing an industry or sector, without parliament having to pass a specific statute thereon. The empowering statute will empower the minister or a body such as the ZMC or BAZ 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

The BAZ has made the Broadcasting Services (Licensing and Content) Regulations, 2004, which have been approved and published by the minister in terms of section 46 of the Broadcasting Services Act. For our purposes, the most important aspect of the Broadcasting Regulations is Part IV thereof, headed 'Programme content and presentation'. This part contains numerous provisions regulating content, many of which are repetitive. However, it also contains important regulatory provisions regarding records to be kept and consumer protection issues. A brief summary of the key provisions of this part are detailed below.

- *Section 13 – Programme content and presentation:* Every licensee shall ensure that programming:
 - Upholds national sovereignty, national unity, national interest, national security and Zimbabwe's economic interests
 - Projects Zimbabwean national values and national points of view
 - Observes good taste and decency
 - Upholds public morality
 - Avoids intrusion into private lives
 - Does not injure the reputation of individuals
 - Protects children from negative influences
 - Does not incite or perpetuate hatred against or vilify any group or persons on the basis of ethnicity, race, gender, religion or disability
- *Section 14 – News and current affairs programmes:*
 - Every licensee shall ensure that where issues of public importance are discussed, reasonable effort is made to present a fair, accurate, balanced and impartial view.
 - Where the licensee allows the expression of personal views, the audience should be informed thereof in advance and should have an opportunity to respond to such views.
 - Advance audience advisories are required for news items containing accounts of extraordinary violence, sexual conduct or gruesome accounts of death.

- Court and parliamentary proceedings must be reported accurately and reporting must not contain premature conclusions which might prejudice the outcome of a case.
- *Section 15 – Political broadcast during an election:*
 - During an election period, every broadcaster shall give reasonable and equal opportunities for the broadcasting of election matter to all political parties contesting an election.
 - Every broadcaster shall be guided by the provisions of the Broadcasting Services Act when dealing with election advertisements, identification of election matter and keeping records of matters broadcast.
- *Section 16 – Investigative reporting:* Investigative reporting should be balanced fair, accurate and complete.
- *Section 17 – Privacy:*
 - A licensee shall not use material relating to a person's personal or private affairs or which invades an individual's privacy, other than where there is a compelling public interest.
 - The identities of rape victims and victims of other sexual offences shall not be divulged without the prior written consent of the victim.
 - The identities of minors who are victims of rape or any other crime shall not be divulged.
- *Section 18 – Live programmes:* Every licensee must:
 - Be technically equipped in handling live programmes so as to avoid broadcasting obscene and undesirable comments from participants, callers and audiences
 - Ensure that contributors and participants are treated fairly and avoid discrimination or denigration
- *Section 19 – Retractions, corrections or apologies:* Where the broadcaster recognises that a programme has been biased, alleges wrongdoing or incompetence, or was a damaging critique of an individual or organisation, the opposing views or those aggrieved should be given a timely opportunity to respond or comment and the broadcaster shall promptly correct errors with due prominence.
- *Section 20 – Sponsorship:*
 - Every licensee shall adopt and deposit with the BAZ a sponsorship policy, which will ensure that:

- Advertising material from the sponsor is clearly distinct from programming
 - The content and format of individual programmes is not influenced by the sponsors thereof
 - Sponsorship of news and current affairs programmes is prohibited.
- *Section 21 – Programme repeats:* Programmes may be repeated during suitable times. For subscription broadcasting services, an adult programme can be re-transmitted only between 22h00 and 05h00.
- *Section 22 – Scheduling:*
- There is a need to protect children from unsuitable programme material.
 - For a subscription broadcasting service, programmes dealing with extreme violence, sexual conduct and disturbing social and domestic friction should not be broadcast between the hours of 05h00 and 22h00.
- *Section 23 – National languages:* Every free-to-air licensee shall:
- Ensure that not less than 10% of its total programming content shall be in any of the national languages of Zimbabwe other than Shona or Ndebele
 - Refrain from using language meant to mislead or unnecessarily cause alarm and despondency
 - Take particular care to avoid blasphemy and to take account of cultural and religious sensitivities
- *Section 24 – Explicitness:*
- Every licensee is required to ensure that in programmes broadcast, sexual activity shall be:
 - Suggested only in discreet visual or verbal reference and never in graphic detail
 - Infrequent and not gratuitous
 - Broadcasters must take into account community values on exposure to unsolicited sexual material.
 - For subscription services, discussion of sexual matters must be broadcast during the watershed period (22h00 to 05h00) although educational material targeted at children may be broadcast before the watershed period.
 - No programme may depict actual sexual activity but may depict simulation of sexual activity.

- Nude scenes showing the genitals shall not be broadcast.
 - Where a news story has a sexual aspect, it should be presented without undue exploitation. The extent of explicitness in the report should be measured against the time of day of the broadcast.
- *Section 25 – Programme classification, labels or warnings:*
- During the early hours of the watershed period (22h00 to 05h00) audience advisories must be provided prior to the commencement of each programme. These are to be both verbal and displayed in writing on the screen.
 - During the normal viewing period (that is, not during the watershed period), broadcasters are also required visually to display classification symbols and what these denote.
 - The regulations set out various warning symbols for such things as offensive language, violence, etc.
 - The regulations set out various age restriction classifications.
- *Section 26 – Violence: Free-to-air-broadcasters shall:*
- Protect children from violent material
 - Ensure that programmes broadcast do not:
 - Incite or glamorise violence or brutality
 - Contain gratuitous violence
 - Show methods of inflicting injury which are capable of easy imitation
 - Portray conduct likely to encourage antisocial behaviour, and abuse of drugs or alcohol
 - Contain frightening and excessive special effects featuring violence
 - Contain a titillating combination of violence and sex
 - Portray violence against women so as to encourage the idea that women are to be exploited or degraded through violence, or are the willing victims of violence
 - Portray violence against women as erotic
- *Section 27 – Advertising content:*
- There shall be a clear separation between programming and advertising content.
 - Every licensee shall:
 - Broadcast a maximum of five minutes of advertising in any 30 minutes of broadcasting

- Insert a maximum of two advertising breaks in a 30 minute programme
- Ensure that every advertisement does not exceed 30 seconds in duration
- A presenter broadcasting a live advertisement must clearly state at the beginning and end of the advert that it is a commercial or public service announcement.
- No licensee shall broadcast an advertisement which:
 - Is contrary to good morals
 - Discriminates against or vilifies a person or group
 - Promotes the consumption of alcohol without warning of the hazards of such consumption
 - Promotes smoking tobacco or consuming intoxicating drugs without warning of the hazards of such consumption
 - Is misleading or is likely to cause damage to a competitor
- *Section 28 – Stereotypes and portrayal:*
 - Broadcasters shall:
 - Not broadcast material which promotes or glamorises discrimination based on race, ethnicity, origin, colour, religion, race, mental or physical disability
 - Ensure that the programmes portray the intellectual and emotional equality of the sexes
 - Portray men and women as having equal capabilities in performing societal functions
 - Avoid:
 - Identifying people by their colour or ethnic origin
 - Using derogatory terms when speaking about people or a particular ethnicity or race
 - Presenting a group as an undifferentiated mass rather than a collection of people with different interests and beliefs
 - Depicting women as sexual objects
 - Be sensitive to the rights and dignity of people who are mentally or physically challenged
- *Section 30 – Community service:* Every licensee shall:
 - Provide sufficient coverage of national events, including various public holidays
 - When providing information services, provide a fair, balanced, accurate and complete service

- *Section 31 – Complaints handling procedure:* Every licensee shall:
 - Establish a complaints handling procedure, a copy of which is to be lodged with the BAZ
 - Acknowledge the right of audiences to make complaints
 - Make arrangements to ensure that:
 - Both verbal and written complaints are recorded
 - Complaints are investigated and addressed within 14 days
 - Advise complainants of their right to refer the complaint to the BAZ
 - Make the records of complaints available for inspection at the request of the BAZ

- *Section 32 – Programmes not to be broadcast:* This section essentially repeats a number of previous prohibitions on violence and sexual content. Two that have not been mentioned previously are prohibitions on broadcasting:
 - Simulated news or events which mislead or alarm viewers
 - The actual process of hypnosis

- *Section 34 – Programme schedules and recordings to be kept:*
 - Licensees are required to publish their programme schedules in a national newspaper one month in advance and must adhere thereto unless the licensee is obliged to broadcast spontaneous events of national and international significance.
 - Licensees shall submit to the BAZ:
 - A quarterly programme schedule 14 days before each quarter
 - Monthly transmission reports detailing programmes actually broadcast and music play-lists detailing all the music broadcast within seven days of the end of each month
 - Licensees shall maintain copies of all off-air transmission recordings for at least six calendar months.

- *Section 35 – Disabling of services and consumer protection for subscribers:*
 - Subscribers to a service must be connected within 24 hours of payment for such service.
 - Licensees must:
 - Respond timeously to repairing faults
 - Compensate subscribers for downtime caused by the licensee
 - Have a duty of confidentiality towards subscribers
 - Not, without the subscriber's consent, disclose personal information to anyone other than a related entity for the purpose of providing the service

- Accept a monthly minimum subscription fee
- *Section 36 – Community broadcasting codes:* Community broadcasting stations shall:
 - Provide their services in the public interest
 - Have organisational mechanisms to provide for active community participation
 - Demonstrate independence in programming as well as in editorial and management decisions
 - Present programmes that contribute to the social and economic development of the community
 - Seek to widen the community's involvement in broadcasting and encourage participation by those not adequately served by other media
 - *Section 37 – Violations and penalties:* After affording a licensee a reasonable opportunity to be heard, the BAZ shall impose monetary or other penalties for breaches of the regulations.

4.3 Other key media-related regulations

One of the most important of these is the Access to Information and Protection of Privacy (Registration, Accreditation and Levy) Regulations, 2002.

It is important to note that these contain, among other things, the application forms for accreditation or renewal of accreditation as a mass media service, news agency, journalist and representative office of a foreign mass media service.

5 MEDIA SELF-REGULATION

Besides the quazi-governmental Media Council of Zimbabwe established in terms of the Access to Information and Protection of Privacy Act, there is in fact a proper self-regulatory body, the Voluntary Media Council of Zimbabwe (VMCZ).

The VMCZ has established a Media Complaints Committee (MCC), which aims to promote and protect a set of common professional standards of conduct for media practitioners, whether these are members of the VMCZ or not. The MCC therefore will hear a complaint against any media practitioner or institution in Zimbabwe.

The VMCZ has developed a complaints procedure for the MCC, which requires complaints to be made in writing and within 30 days of the cause of complaint. In

brief, the complaints procedure contains a number of provisions regulating, among other things, the:

- Lodging of complaints
- Fact that a complainant who uses the procedure must waive his or her rights to institute legal action in regard to the complaint
- Ability of the chairperson to reject complaints upon grounds such as frivolousness, failure to take steps to settle the matter amicably, the institution of legal action, no apparent breach
- Adjudication procedure and the powers of the MCC in adjudication. These include that adjudication must be provided in writing and that the MCC has the power to:
 - Dismiss the complaint
 - Find in favour of the complainant
- Issue a reprimand
- Order the publication of a prompt retraction and apology

Note that the MCC does not have the power to impose a financial penalty, but it may order the unsuccessful party to pay the costs of the complaint. While there is no appeal from a ruling of the MCC, its decisions are reviewable for procedural irregularities in the High Court.

In brief, the VMCZ's Code of Conduct for Zimbabwean Media Practitioners provides for the following to apply to media practitioners and institutions:

- **General standards**
 - To maintain the highest professional and ethical standards in performing their functions of informing, educating and entertaining.
 - To defend the principle of freedom of the media to freely access, collect and disseminate information and to publish comments and criticisms. To oppose censorship, suppression of news and the dissemination of propaganda.
- **Accuracy and fairness**
 - To report and interpret news with scrupulous honesty and take all

reasonable steps to disseminate accurate information, to depict events fairly and without distortion.

- Never to publish information known to be false or maliciously make unfounded allegations with intent to harm reputations.
 - To check facts and take care not to publish inaccurate material. Editors are to ensure that all steps that a reasonable media practitioner would take to check accuracy of facts have been taken.
 - Special care must be taken in regard to stories that may cause harm to individuals, organisations or the public interest. Before publishing a story of alleged wrongdoing, all reasonable steps must be taken to obtain a response from the alleged wrongdoer, and any response must be published together with the report in question.
 - To provide full, fair and balanced reports of events and not suppress essential information. Avoid distortion by exaggeration, one-sidedness, improper emphasis, reporting facts out of context or suppressing relevant facts. Avoid misleading headlines or billboard postings.
- **Correction of inaccuracy or distortion**
- Upon discovery that it has published a report containing significant inaccuracy or distortion, a media institution must publish a correction at the earliest opportunity and with comparable prominence.
 - Upon discovery that it has published an erroneous report that has caused harm to a person or institution, it must publish an apology promptly and with due prominence.
 - Media institutions must report fairly and accurately on the outcome of a defamation action against it.
- **Right of reply**
- Where a person or institution believes that a media report contains inaccurate information or unfair criticism, the media institution concerned must provide a fair opportunity to reply to enable the correction of inaccuracies and to respond to criticism.
- **Comment**
- A comment or expression of opinion must be a genuine and honest comment or opinion relating to established fact.
 - Comment or conjecture must not be presented so as to create the impression that it is established fact.
- **Bribes and inducements**
- Media practitioners and institutions must not suppress or distort

reports or omit or alter vital facts in return for the payment of money or other gifts or rewards.

■ **Pressure or influence**

- Media practitioners and institutions must not suppress or distort information because of pressure or influence from their advertisers or others who have a corporate, political or advocacy interest in the media institution concerned.

■ **Hatred or violence**

- Media practitioners and institutions must not publish material that is intended or likely to engender hostility or hatred towards persons on the grounds of race, ethnic origin, nationality, gender, sexual orientation, physical disability, religion or political affiliation.
- Media institutions must take utmost care to avoid contributing to the spread of ethnic hatred or political violence.

■ **Reporting of elections**

- Election reporting must be fair and balanced.
- Before reporting a damaging allegation against a candidate or political party, a media practitioner must obtain, wherever possible, a comment from the candidate or party concerned.
- Media practitioners and institutions must not accept gifts, rewards or inducements from a politician or candidate.
- As far as possible, media practitioners report the views of candidates or political parties directly and in their own words.
- Media practitioners must take care when reporting on opinion polls. Where possible, they must include details of the methodology used in conducting the poll and by whom it was conducted.

■ **Reporting on police investigations and criminal court cases**

- The media must refrain from publishing articles prejudging the outcome in criminal cases or seeking to influence the outcome of cases.
- The media is entitled to inform the public about arrests of suspects and the trials of accused persons, but should avoid naming suspects until formal charges have been filed against them, unless the public interest requires otherwise.
- Where the media has begun to report on a criminal case, it must follow up and report subsequent developments with due prominence.

■ Privacy

- It is normally wrong for a media practitioner to intrude into and report upon a person's private life without his or her consent.
- Reporting on a person's private life can be justified only when it is in the public interest to do so, including:
 - Exposing criminal conduct
 - Exposing seriously antisocial conduct (note this is not defined)
 - Protecting public health and safety
 - Preventing the public from being misled by a statement or action of an individual
- The media may probe and publish details about the private moral behaviour of a public official, where this conduct has a bearing on his or her suitability as a public official.

■ Intrusion into grief or shock

- In cases involving personal grief or shock, sympathy and tact are required when making enquiries.
- Members of the media must identify themselves to a responsible official and must obtain permission before entering non-public areas of hospitals or similar institutions.

■ Interviewing and photographing children

- The media should not normally interview or photograph children under the age of 16 in the absence of a parent or adult responsible for the child.
- Special sensitivity and sympathy is required when interviewing or photographing children in difficult circumstances or with disabilities.
- Children at a school, crèche or similar institution should not be interviewed or photographed without the permission of the appropriate authorities.

■ Children in criminal cases

- Media institutions must not publish the names of any person under 16 who is arrested or on trial.

■ Victims of crime

- Media institutions must not identify victims of sexual assault or publish material likely to contribute to such identification unless the victim has consented to such publication or the law authorises such publication.

■ Innocent relatives or friends

- Media institutions should avoid identifying relatives or friends of persons accused or convicted of a crime unless this is necessary for the full, fair and accurate reporting of the crime or legal proceeding.

■ Surreptitious gathering of information

- Open methods of gathering information in which media practitioners clearly identify themselves should be used. Generally, media practitioners should not seek or obtain information through misrepresentation, deception, subterfuge or undercover techniques.
- Surreptitious methods of information gathering may be used only where open methods have failed to yield information which is in the public interest. Surreptitious methods may be used if they will help to detect or expose criminal activity or bring to light information that will protect the public against serious threats to public health and safety.

■ National security

- Media institutions must not prejudice the legitimate national security interests of Zimbabwe or place members of the defence force who are on active military duty at risk.
- However, this does not prevent the media from exposing corruption in security or defence agencies, or from commenting on levels of defence expenditure.

■ Plagiarism

- Media practitioners must not engage in plagiarism. Plagiarism consists of making use of another person's words, pictures or ideas without permission and without proper acknowledgement and attribution of the source of those words, pictures or ideas.

■ Protection of sources

- Where a person has agreed to supply information on condition of anonymity and the media practitioner agrees to this, the media practitioner must respect this undertaking and refuse to reveal the identity of the source.
- However, the media practitioner may tell the source that his or her identity might have to be revealed if it becomes clear that this information is needed to prevent or expose serious criminal conduct.

6 COMMON LAW AND THE MEDIA

In this section you will learn:

- The definition of common law
- How the Zimbabwe courts have ruled on certain key aspects of the law of defamation, namely organ of states' rights with regard to defamation and assessing the amount of damages
- How the Zimbabwe courts have ruled on the constitutionality of provisions prohibiting the publication of false news
- How the Zimbabwe courts have ruled on a journalist's right to protect his or her sources
- How the Zimbabwe courts have ruled on the constitutionality of the statutory monopoly given to the Zimbabwe Broadcasting Corporation

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 Zimbabwe'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.

6.2 Defamation

6.2.1 Can an organ of state sue for defamation and does a statutory corporation constitute an organ of state?

In *PTC v Modus (Pvt) Ltd 1997 (2) ZLR 492 (S)*, the issue was whether the Posts and Telecommunications Corporation (PTC), a statutory corporation incorporated under Zimbabwean law, could sue a newspaper for defamation. The Supreme Court, in a unanimous judgment, confirmed three key issues in relation to defamation.

- It confirmed that an 'artificial person' [that is, a juristic person such as a company] can sue for defamation – at page 494.
- It held that the state cannot sue for defamation – at page 494. It is important to note that a number of common law jurisdictions have upheld the principle that 'it would be contrary to the public interest for the organs of government, whether

central or local to have that right' [that is, the right to sue for defamation] – see page 497.

- It held that the PTC could not sue for defamation because the PTC, although having a separate legal personality, was nonetheless an 'organ of State' and therefore had no basis to sue – at page 502.

6.2.2 Factors to be taken into account in assessing damages

In *Shamuyarira v Zimbabwe Newspapers (1980) Ltd & Another 1994 (1) ZLR (H)*, the High Court set out (at page 502) a list of relevant factors in determining damages in relation to the defamation in question, many of which are of general application:

- The content of the article, which includes the defamatory matter.
- The nature and extent of the publication, including the aspect of the re-publication of the defamatory matter.
- The plaintiff's standing – that is, his reputation, character and status.
- The nature of the defamation.
- The probable consequences of the defamation.
- The conduct of the defendants from the time the defamatory matter was published up to the time of judgment, including:
 - Their reliance on and persistence in a plea of justification
 - The question of any malice on their part
 - The question of any retraction and apology for the publication of the defamatory matter
- The recklessness of the publication.
- Comparable awards of damages in other defamation suits and the declining value of money.

6.3 Constitutionality of provisions prohibiting the publication of false news

In *Chavunduka & Another v Minister of Home Affairs and Another 2000 (1) ZLR 552 (S)*, the applicants (an editor and senior reporter of a weekly newspaper) challenged the constitutionality of section 50(2)(a) of the Law and Order Maintenance Act

[Chap. 11:07] – a pre-independence piece of legislation still on the statute books in Zimbabwe.

Section 50(2)(a) made it an offence to publish a false statement, rumour or report which is likely to cause fear, alarm or despondency among the public or any section of the public. The Supreme Court unanimously declared section 50(2)(a) unconstitutional in that it infringed on the right to freedom of expression guaranteed by section 20(1) of the Constitution. (Note that the Constitution being referred to in this judgment is not the one that is dealt with in this chapter and which was recently approved in a public referendum in Zimbabwe.)

6.4 A journalist's right to protect sources

In *Shamuyarira v Zimbabwe Newspapers (1980) Ltd & Another 1994 (1) ZLR (H)*, the High Court upheld the right of a journalist not to reveal his or her sources during a civil defamation trial. The High Court made the following important statement on the issue:

[U]nless our courts are seen to be prepared to lean over backwards to protect, in the public interest, a journalist's source where the journalist has publicly uncovered corruption or some other form of iniquity on the part of those holding high office, whether in government or elsewhere, the courts will be guilty of a grave disservice to Zimbabwean society and to the principles of democracy upon which that society is founded [at page 483].

It is, however, also important to note that the High Court did set out instances where it would be appropriate to require a journalist to reveal his or her sources.

6.5 Constitutionality of provisions granting the Zimbabwe Broadcasting Corporation a monopoly in respect of broadcasting

In *Capital Radio (Pvt) Ltd v Minister of Information (1) 2000 (2) ZLR 243 (S)*, the Supreme Court declared that section 27 of the Broadcasting Act [Chap. 12:01], which provided that '[n]o person other than the [Zimbabwe Broadcasting] Corporation shall carry on a broadcasting service in Zimbabwe', was inconsistent with the freedom of expression guarantee contained in section 20(1) of the Constitution. (Note that the Constitution being referred to in this judgment is not the one that is dealt with in this chapter and which was recently approved in a public referendum in Zimbabwe.)

14

Media law in the region: Where to from here?



In this chapter you will learn:

- What a bird's-eye view of the countries surveyed reveals about compliance with the:
 - Ten key principles of democratic media regulation
 - Eight key principles of democratic broadcasting regulation
- What international organisations on the continent are doing to promote media freedom
- What key challenges to media freedom remain

1 INTRODUCTION

Chapter 2 (found in Volume 1 of this handbook) examined the internationally accepted hallmarks of democratic media regulation – in other words, the legal regime that establishes a democratic media environment. It identified 11 instruments, charters, protocols or declarations adopted by international bodies (such as the United Nations, the African Union and the Southern African Development Community), civil society organisations focusing on the media (such as Article 19), and at significant conferences held under the auspices of international bodies (such as the United Nations Education, Scientific and Cultural Organisation).

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, as is set out more fully in Chapter 2. 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.

The information contained in this concluding chapter is derived from the country-specific chapters in volumes 1 and 2 of the handbook.

2 A BIRD’S-EYE VIEW OF COUNTRY COMPLIANCE WITH THE TEN KEY PRINCIPLES OF DEMOCRATIC MEDIA REGULATION

2.1 Principle 1: Freedom of the press and other media

In all the countries surveyed, the right to freedom of expression – the foundational right to a free press – is provided for in the constitution of that country. In some countries – the Democratic Republic of the Congo (DRC), Malawi, Namibia, South Africa, Swaziland and Zimbabwe – the constitutions also expressly mention and protect the right to freedom of the press or the media, in some cases generally, and in the case of Zimbabwe with a particular focus on the broadcast media.

However, there are instances where the constitution does not fully protect the right to freedom of expression because the right is effectively subject to legislation passed to regulate freedom of expression or the press. In the DRC, for example, the right to press freedom expressly states in section 24 of the Constitution that ‘legislation is to govern the exercise of these rights’.

The constitutions of other countries are less explicit about essentially subverting the right to press freedom. These constitutions contain broad limitations clauses (whether these are general limitations clauses or so-called internal limitations clauses that apply only in respect of a particular right) which give governments extensive powers to pass legislation to limit rights. Broad powers are given not only in wide grounds for restricting rights but by not having limitations requirements, such as necessity or proportionality. The DRC and Tanzania have extremely broad limitations provisions.

Botswana, Lesotho, Malawi, Namibia, South Africa, Swaziland, Zambia and Zimbabwe have fairly carefully crafted limitations clauses which, in theory, allow for appropriate limiting of rights. It is important to note, however, that certain of the internal limitations provisions to Zimbabwe’s freedom of expression right are problematic (this is discussed more fully in Chapter 13).

2.2 Principle 2: An independent media

In terms of an independent media environment, it is clear from the country chapters that practice varies considerably among the different countries surveyed. South Africa has a great deal of independent media sources, while a country such as Zimbabwe has almost no independent broadcasting media and a severely constrained independent print media landscape.

Most countries do, however, recognise the need for independent media sources and for the establishment of independent (commercial or community) print and broadcast

media houses. Only Zimbabwe has an express statutory prohibition against licensing broadcasters other than the state broadcaster, and this prohibition was overturned by the courts.

2.3 Principle 3: Diversity and pluralism in the media

Again, it is clear from the country chapters that diversity and pluralism in the media vary significantly among the countries reviewed. South Africa has a great deal of diversity and pluralism while Zimbabwe, for example, has almost no independent broadcasting media and a severely constrained independent print media landscape.

One of the biggest obstacles to the creation and growth of a diverse media is the registration requirement imposed on the print media. Botswana, the DRC, Lesotho, Malawi, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe still require newspaper registration. Indeed, of the countries surveyed, only South Africa does not require the formal registration of print media publications. Even worse is that certain countries (Botswana, the DRC and Zimbabwe) also require the registration of working journalists. While not legally preventing the functioning of an independent media, these registration mechanisms discourage the development of a thriving pluralistic media environment.

2.4 Principle 4: Professional media

There is little doubt that the development of a professional corps of reporters, investigative journalists and editors has been slow in most of the countries surveyed. Until recently, many of the countries lacked tertiary educational courses or training facilities dedicated to journalism and the media, and which were able to develop and equip journalism as a genuine profession. This is slowly changing; however, development is far from uniform.

While South Africa, for example, has a number of excellent training courses and facilities run by various institutions, ranging from universities and colleges to in-house cadet courses operated by media houses, some countries battle to provide even basic training in journalism skills and ethics. On a positive note, the establishment of self-regulatory bodies, such as media councils, in most of the countries reviewed has had an impact on the professionalisation of the media in those countries.

2.5 Principle 5: Protecting confidentiality of sources

It is interesting to note that certain of the constitutional limitations provisions of the countries surveyed allow for limitations on the right to freedom of expression to be

limited to ‘protect information received in confidence’. Botswana, Lesotho, Swaziland and Zambia have these kinds of provisions. It is unclear though whether such a provision can be used by the media, or only by government when protecting its own confidential sources.

All ten countries included in the handbook have laws that could be used to compel a journalist or media house to reveal confidential sources of information. However, it is not possible to state that the law is inherently problematic. This is because each case has to be determined on its own merits when considering whether or not forcing a journalist to reveal a source will, in the particular circumstance concerned, violate international standards for such compulsion.

2.6 Principle 6: Access to information

Sadly, only a few of the countries under review – the DRC, Malawi, South Africa and Zimbabwe – explicitly protect the right of access to information (as a right separate from the right to freedom of expression) in the constitution.

These rights are formulated in different ways:

- The DRC has a general right of access to information.
- South Africa has a general right of access to government-held information.
- Malawi and Zimbabwe have a right of access to government-held information, where this is required for the exercise and protection of rights.
- Zimbabwe has a right of access to government-held information, where this is in the interests of public accountability.
- South Africa has a right of access to privately-held information, where this is required for the exercise and protection of rights.

However, all of the countries surveyed (with the notable exception of Namibia) include the right to receive and impart information and ideas as part of the constitutional right to freedom of expression.

Besides the constitutional provisions, only South Africa, Tanzania and Zimbabwe have passed some form of access to information legislation. Of these, in our view, only South Africa’s legislation would meet international standards for access to information legislation.

2.7 Principle 7: Commitment to transparency and accountability

Transparency and accountability are very difficult to measure as these issues are more often than not reflected in a political culture rather than in specific legal provisions. There are, however, a number of legal mechanisms which infer a commitment to accountability and transparency, some of which are dealt with below.

It is important to note that the mere fact that a country has constitutional or even legal provisions regarding an accountability measure is not in itself indicative of a genuine political commitment to transparency and/or accountability.

- A clear way that a commitment to transparency can be determined is from a country's commitment to access to information, as discussed above.
- Only the constitutions of Malawi, South Africa, Swaziland and Tanzania contain general provisions stating a commitment to transparency and/or accountability.
- The constitutions of Malawi, Swaziland and South Africa also contain a right to administrative justice, which is a critical right for holding public power accountable. In this regard, at least one country – South Africa – has enacted administrative justice legislation. This legislation is extremely effective in forcing the government to engage in decision-making in a transparent and accountable manner.
- South Africa and Zambia have passed whistleblower protection legislation, which is also effective in combatting corruption and other crimes that hinder transparent and accountable government.

2.8 Principle 8: Commitment to public debate and discussion

A commitment to public debate and discussion is also difficult to measure as these issues are more often than not reflected in a political culture rather than in specific legal provisions. However, legal provisions dealing with freedom of expression, a free press, access to information and the establishment of a genuine public broadcaster, as opposed to a state broadcaster (all issues dealt with elsewhere in the chapter), indicate at least an ostensible commitment to public debate and discussion.

2.9 Principle 9: Availability of local content

Local content is available in the countries surveyed. In addition, Botswana, the DRC, Namibia, South Africa, Tanzania and Zimbabwe have specific local content requirements for broadcasting services.

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

This principle is not respected in the countries under review and no statutory mechanisms have been enacted to deal with the problem. Interestingly, this practice has been successfully challenged in the courts of at least one country, Botswana, where a directive banning government advertising in two newspapers was ruled to contravene the right to freedom of expression of the newspapers.

3 A BIRD'S-EYE VIEW OF COUNTRY COMPLIANCE WITH THE EIGHT KEY PRINCIPLES OF DEMOCRATIC BROADCASTING REGULATION

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

All the countries studied have enacted national frameworks in the form of legislation to regulate broadcasting. However, as discussed in Chapter 8, Zambia's broadcasting legislation has yet to become operational.

3.2 Principle 2: Independent regulation of broadcasting

Given the increasing levels of convergence between traditional broadcast and telecommunications infrastructure and services, in terms of which content is available to audiences over a range of platforms, it is not unusual to find 'converged regulators' – that is, regulators who are responsible for electronic communications (and in some instances postal regulation) as a whole. This is not contrary to international requirements. What is required, however, is that these converged regulators are independent in terms of appointments and removals processes. Converged regulators should not be beholden to the executive branch of government. They should have the authority to regulate the sector, including granting licences and making regulations, without commercial or government interference.

Few of the countries surveyed have an independent broadcasting or communications sector regulator. Only the DRC, South Africa and Zimbabwe provide for a level of constitutional protection for a broadcasting regulator. However, one should be aware that there is a clear distinction between what is provided for in legislation or in a constitution and the actual practice thereof. The cases of Zambia and Zimbabwe are instructive in this regard.

Swaziland's regulator position is extremely poor as the regulator is also an operator, namely the state broadcaster, the Swaziland Television Authority.

Indeed, of the countries reviewed, only South Africa has independent regulation of broadcasting. The Independent Communications Authority of South Africa is:

- Actually appointed in accordance with international best practice, namely, a public nominations process, short-listing by a multi-party body such as parliament, appointment by the president
- Generally able to regulate the sector without ministerial involvement in licensing and/or making regulations

3.3 Principle 3: Pluralistic broadcasting environment with a three-tier system for broadcasting: public, commercial and community

Most of the countries surveyed have a legislative and/or regulatory environment that specifically provides for community, commercial and public broadcasting as three separate tiers of available broadcasting services: however, implementation thereof is uneven.

The DRC, Namibia and Swaziland do not provide specifically for the three tiers in law, although both the DRC and Namibia have licensed broadcasters on all three tiers.

3.4 Principle 4: Public as opposed to state broadcasting services

Most of the countries reviewed do not have ‘public’ as opposed to ‘state’ broadcasting services, and do not provide for genuine public broadcasting in legislation.

- Botswana does not have legislation establishing a public broadcaster. The state broadcaster operates as an arm of the Department of Broadcasting Services in the Office of the President.
- The DRC’s Congolese National Radio and Television Broadcaster is not stated to be a public broadcaster and clearly operates as a state broadcaster.
- Lesotho has yet to pass legislation establishing a public broadcaster. The Lesotho National Broadcasting Service operates as an arm of the Ministry.
- The Board of the Namibian Broadcasting Corporation is appointed entirely by the minister.
- The Swaziland Television Authority is also clearly a state broadcaster and its members are appointed by various ministers.

- Tanzania has clearly recognised the need to move towards having a public as opposed to a state broadcaster, but the minister’s critical role in board appointments means that the Tanzania Broadcasting Corporation remains a state broadcaster.
- The Zimbabwe Broadcasting Corporation is also clearly a state broadcaster as all of its board members are appointed by the minister.
- While Zambia has enacted public broadcasting legislation, it has yet to implement the provisions, meaning that the Zambia National Broadcasting Corporation remains a state broadcaster.

Indeed, of the countries surveyed, only the South African Broadcasting Corporation is:

- Actually appointed in accordance with international best practice, namely, a public nominations process, short-listing by a multi-party body such as parliament, appointment by the president
- Required to broadcast in the public interest in accordance with a statutory mandate

Although the Malawi Broadcasting Corporation (MBC) also meets most of the above requirements, there is no public nominations process and the secretary for information sits on the MBC Board as an *ex officio* member, which is not in accordance with good practice.

3.5 Principle 5: Availability of community broadcasting services

Most of the countries reviewed have a legislative and/or regulatory environment that specifically provides for community broadcasting as a separate tier of available broadcasting services, although implementation thereof is uneven. Countries that do not provide specifically for community broadcasting in law are the DRC, Namibia and Swaziland, although both the DRC and Namibia have licensed community broadcasters.

3.6 Principle 6: Equitable, fair, transparent and participatory licensing processes, including of frequencies

International best practice requires that broadcasting services and, where these use frequencies, associated frequencies be licensed by an independent regulatory

authority. As already discussed, few of the countries surveyed have genuinely independent broadcasting regulatory authorities. Furthermore, the legal environment in many of the countries studied is problematic. For example:

- In Botswana, spectrum or frequency licences associated with the provision of a broadcasting service are granted by the minister not the regulator
- In the DRC, licences are granted by the minister or by regional governmental entities, and the Regulatory Authority licences spectrum after consulting with the minister
- In Lesotho, the minister has to approve all licensing decisions (both in respect of broadcasting services and spectrum) of the regulator
- In Swaziland, the Swaziland Television Authority (which also operates a state broadcaster) is responsible for issuing licences to other competitor broadcasters
- In Zambia, the regulator has yet to be established and so regulatory functions continue to be performed by the executive

Of the countries surveyed, South Africa has the most transparent and independent licensing system in respect of both services and frequencies. However, no invitations to apply for an individual infrastructure licence (required to provide broadcasting signal distribution) can be issued by the South African regulator in the absence of a ministerial policy direction. Theoretically, this undermines the independence of the licensing process in respect of the broader landscape even though it is limited to signal distribution.

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

Most of the countries included in the handbook have provisions promoting universal access to broadcasting services and equitable access to signal distribution, but the actual realisation of universal access is still far from achieved.

One of the biggest reasons for the lack of universal access to broadcasting services is the poor quality of electricity infrastructure. Africa has experienced falling electricity access rates since the 1970s.¹ Indeed, only 24% of the population of sub-Saharan Africa has access to electricity.²

Given that people do not have access to reliable electricity, radio (which can easily be

accessed on battery-operated devices) still plays a critical role in meeting the communication needs of the populations of the countries surveyed.

3.8 Principle 8: Regulating broadcasting content in the public interest

All the countries surveyed regulate broadcasting-specific content, and many of the restrictions or requirements are in accordance with international norms and standards. However, only a few countries have a commitment to self-regulation of broadcasting content by the broadcasters themselves. Indeed, South Africa is the only country reviewed where a commitment to self-regulation is enshrined in the governing broadcasting legislation. In addition, many of the countries studied regulate all content (including broadcasting content) in terms of extremely outdated colonial-era legislation, which does not comply with international standards for limiting or prohibiting the right to freedom of expression. These are dealt with in the general content prohibitions below.

4 WHAT ARE INTERNATIONAL ORGANISATIONS ON THE CONTINENT DOING TO PROMOTE MEDIA FREEDOM?

In 2001, the African Commission on Human and People's Rights (ACHPR) passed Resolution 54 on Freedom of Expression.³ The resolution expressed the ACHPR's concern at the widespread violation of the right to freedom of expression by state parties to the African Charter on Human and People's Rights, including through:

- The harassment of journalists
- The victimisation of media houses deemed critical of the establishment
- Inadequate legal frameworks for regulating electronic media, especially broadcasting
- Criminal and civil laws that inhibit the right to freedom of expression

The ACHPR, in Resolution 54, decided to develop a Declaration on Principles of Freedom of Expression, which it duly adopted⁴ and which is dealt with in detail in Chapter 2 of this handbook.

In 2004, the ACHPR established the Special Rapporteur on Freedom of Expression with a mandate to:⁵

- Analyse national media legislation, policies and practices within member states

- Monitor their compliance with freedom of expression standards and advise member states accordingly
- Undertake investigative missions to member states, where reports of massive violations of the right to freedom of expression are made, and make appropriate recommendations to the African Commission
- Undertake country missions and any other promotional activity that would strengthen the full enjoyment of the right to freedom of expression in Africa
- Make public interventions, where violations of the right to freedom of expression have been brought to his or her attention
- Keep a proper record of violations of the right to freedom of expression and publish this in his or her reports submitted to the African Commission
- Submit reports at each ordinary session of the African Commission on the status of the enjoyment of the right to freedom of expression in Africa

In 2010, the ACHPR adopted Resolution 169 on Repealing Criminal Defamation Laws in Africa.⁶ The resolution calls on state parties to, among other things:

- Repeal criminal defamation laws or insult laws which impede freedom of speech, and to adhere to the provisions of freedom of expression articulated in the African Charter, the Declaration, and other regional and international instruments
- Refrain from imposing general restrictions that are in violation of the right to freedom of expression

At the time of writing, no country had yet responded directly to the call to repeal criminal defamation or insult laws, which are extremely common on the continent. Of the countries surveyed only Lesotho, Namibia and South Africa do not have such laws.

In May 2013, the Pan-African Parliament (PAP) adopted the Midrand Declaration on Press Freedom in Africa,⁷ by which the PAP resolved to, among other things:

- Launch a campaign entitled ‘Press Freedom for Development and Governance: Need for Reform’ in all five regions of Africa
- Establish an annual PAP Award on Media Freedom in Africa for individuals, organisations and member states

- Establish an annual PAP Index on Media Freedom in Africa
- Call upon African Union member states to use the ACHPR Model Law on Access to Information in adopting or reviewing access to information laws

These are exciting developments and are likely to have far greater impact than declarations on press freedom from countries or organisations outside of Africa.

However, the initiatives are new and it will take years, if not decades, to rid a country of laws and practices that are contrary to the right to freedom of expression.

5 WHAT KEY CHALLENGES REMAIN TO MEDIA FREEDOM?

5.1 Introduction – the censorship legacy of colonialism

The PAP, in a statement on its Press Freedom for Development and Governance: Need for Reform campaign, believes that:

The right to freedom of the press is one of the most important human rights. It is indeed an integral part of the right to freedom of expression. It is also seen as one of the cornerstones of democracy. Unfortunately, Africa does not fare very well when it comes to press freedom. In many African countries, authorities have little or no tolerance for press freedom. The media legislation which is in place in many African countries is either inherited from the colonial times, or was instituted by former military and civilian dictatorships to clamp down on criticism and dissenting voices.⁸

This is harsh criticism, but it is not unfair. The *Media Handbook for Southern Africa* focuses on media law rather than general governmental practice towards journalists and media houses. Such practice has included instances of repression, threats, intimidation, arrest, torture and even murder, as numerous indices on press freedom and alerts from non-governmental organisations that support journalists indicate.

Governments and intergovernmental organisations must begin (as indeed some are starting to) the hard work of creating a genuinely free press across the continent – a press that can and does champion good governance, development and the inherent dignity of African people, as well as the importance of protecting the human rights of each individual African person. But this cannot happen without a wholesale updating of the continent's media laws in every country.

Seven types of media laws are dealt with below, almost all of which are colonial era

laws that need to be repealed, amended or updated to enable a professional free African press to flourish for the benefit of all.

5.2 Media registration laws

As has been set out elsewhere in this chapter, media registration laws (whether applicable to publications or journalists) discourage the development of a thriving pluralistic media environment and ought to be abolished. They are purely mechanisms for government control and are not necessary in a democratic country.

Botswana, the DRC, Lesotho, Malawi, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe still require such publication registration. Furthermore, Botswana, the DRC and Zimbabwe also require the registration of working journalists.

5.3 Broadcasting laws

As already discussed, almost every country surveyed ought to review its broadcasting laws to provide for a:

- Genuinely independent broadcasting regulator (whether or not this regulator also regulates other communications services too), whose members are appointed and removed in accordance with international best practices, and who are free to regulate the sector without commercial or political interference
- Broadcasting regulator who regulates in the public interest
- Broadcasting sector that is made up of three distinct tiers of broadcasting: public, community and commercial broadcasting services
- Genuinely independent public broadcaster whose board members are appointed and removed in accordance with international best practice
- Public broadcaster that provides radio and television broadcasting services in the public interest and which does so without commercial or political interference
- Public broadcaster that provides public broadcasting services in accordance with a public mandate developed by parliament

5.4 Criminal defamation laws

The issue of criminal defamation has been taken up by the ACHPR. The Commission,

in Resolution 169, has requested member states to repeal all criminal defamation laws.

Defamation is an issue that can and should be dealt with as a civil matter. In other words, damages, or in extreme cases prior restraints on publication, can be obtained to deal with the unlawful publication of defamatory material. To criminalise speech – that is, to make defamation a crime punishable by, potentially, stiff prison sentences – has an unjustifiable chilling effect on journalists and media houses across the continent.

Criminal defamation laws should be repealed in their entirety and replaced with a civil action in which the rights to free speech and to dignity and reputation are appropriately balanced.

Botswana, Malawi, Swaziland, Tanzania, Zambia and Zimbabwe still have criminal defamation on the statute books.

5.5 Insult laws

The issue of insult laws is another that the ACHPR has taken up. In Resolution 169, it has requested member states to repeal all insult laws.

Insult laws are a particular type of law aimed not at defamation in general but at insults levelled at particular people, usually the head of state, such as the president, but also foreign dignitaries. The publication of material which insults these types of people is criminalised. These laws fundamentally undermine the concept of equality before the law, placing a person, due to his or her political position, above criticism. While there is no doubt that politicians have a right not to be defamed, they have access to ordinary civil remedies to defamation. Furthermore, insult laws are often abused by governments to silence legitimate criticism of political leaders in relation to corruption, cronyism and other barriers to development.

Unfortunately, these laws are extremely common on the continent. Of the countries surveyed only Lesotho, Namibia and South Africa do not have such laws.

5.6 Obscenity laws

With the notable exception of South Africa, all the countries surveyed have obscenity laws that are extremely outdated and problematic from a freedom of expression point of view. In this regard:

- Obscenity laws are often framed subjectively. In other words, they are dependent

on the viewpoint of a particular official rather than on any objective grounds that can be tested in a court of law

- Control of obscene publications are often simple prohibitions rather than so-called time, manner and place restrictions, which would make certain content available to adults only but during times, and in a manner (opaque packaging for publications, for example) and in particular places (adult shops, for example) that does not impact unduly on the general public
- The grounds for prohibiting publications are often far too wide, allowing for the prohibition of an extremely broad range of material when in fact adults have a right to receive publications of their choice other than those that are clearly harmful, such as child pornography and degrading or inhumane portrayals of explicit sex accompanied by extreme violence

A revision of these laws is long overdue given that many countries' obscenity laws date from the early decades of the last century and predate even the Universal Declaration of Human Rights.

5.7 Sedition laws

International norms on security legislation allow for restrictions on freedom of the press where a country's existence or territorial integrity is actually threatened. However, many of the countries surveyed have sedition laws that are overbroad and which do not relate to clear threats to the country itself. Furthermore, overbroad sedition laws have a chilling effect: they silence legitimate comment or reporting on maladministration, corruption and the like.

Botswana, Lesotho, Malawi, Swaziland, Tanzania and Zambia have overbroad sedition laws.

It is important to note that many countries' sedition laws are a holdover of their colonial pasts, and a revision of these laws, in line with democratic norms and standards, is long overdue.

5.8 Other security laws

International norms on security legislation allow for restrictions on freedom of the press where a country's existence or territorial integrity is actually threatened. However, many of the countries reviewed have security, public order and related security laws that are overbroad and which do not relate to clear threats to the

country itself. Furthermore, overbroad security laws have a chilling effect: they silence legitimate comment or reporting on maladministration, corruption and the like.

Every country researched for the handbook has such overbroad security laws. It is also important to note that many countries' security laws are a holdover of their colonial pasts, and a revision of these laws, in line with democratic norms and standards, is long overdue.

But updating security laws is not an easy or a smooth process. An example is South Africa. Its Protection of Information Act, 1982, is a height-of-apartheid statute that is clearly unconstitutional. The government is obviously aware of this and of the need to bring it in line with the South African Constitution. However, the Protection of State Information Bill, which is meant to repeal and replace the Protection of Information Act, has been subject to significant political protest and criticism because of draconian provisions that could be used to silence legitimate reporting. It has yet to be passed into law.

6 CONCLUSION

There is no doubt that democracy is taking root in post-independence Africa, and that more and more countries are at least paying lip service to a free press, a pluralistic media environment and the independent regulation of broadcasting; however, much remains to be done.

Media owners, editors and journalists as well as media activists must use the opportunities that have arisen as a result of the PAP's and the ACHPR's campaigns for media freedom and for the removal of insult and criminal defamation laws. They must challenge these and other laws in court, as well as push for wholesale amendments to pernicious censorship laws that still exist across Africa.

It is perhaps instructive to consider the 2012 Freedom House media freedom ratings for the ten countries included in the handbook. Not a single country surveyed had a media freedom rating of 'free'. Most countries were 'partly free' while some were 'not free':

- Botswana – 'partly free'⁹
- DRC – 'not free'¹⁰
- Lesotho – 'partly free'¹¹
- Malawi – 'partly free'¹²
- Namibia – 'partly free'¹³

- South Africa – ‘partly free’¹⁴
- Swaziland – ‘not free’¹⁵
- Tanzania – ‘partly free’¹⁶
- Zambia – ‘partly free’¹⁷
- Zimbabwe – ‘not free’¹⁸

Notes

- 1 Martin Zhuwakinyu, Falling African Electricity-Access Levels Could Undermine Growth. Available at: <http://www.engineeringnews.co.za/article/falling-african-electricityaccess-levels-could-undermine-growth-2004-02-13> [Accessed 22 June 2013]
- 2 Fact Sheet: The World Bank and Energy in Africa. Available at: <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/,,contentMDK:21935594~pagePK:146736~piPK:146830~theSitePK:258644,00.html> [Accessed 22 June 2013]
- 3 <http://www.achpr.org/sessions/29th/resolutions/54/> [Accessed 22 June 2013]
- 4 <http://www.achpr.org/sessions/32nd/resolutions/62/> [Accessed 22 June 2013]
- 5 <http://www.achpr.org/mechanisms/freedom-of-expression/> [Accessed 22 June 2013]
- 6 <http://www.achpr.org/sessions/48th/resolutions/169/> [Accessed 22 June 2013]
- 7 http://blog.pan-africanparliament.org/wp-content/uploads/2013/05/Midrand-Declaration-on-Press-Freedom_FINAL_En.pdf [Accessed 22 June 2013].
- 8 <http://blog.pan-africanparliament.org/wp-content/uploads/2013/05/MISA-PAP-statement.pdf> [Accessed 22 June 2013]
- 9 <http://www.freedomhouse.org/report/freedom-press/2012/botswana> [Accessed 24 June 2013]
- 10 <http://www.freedomhouse.org/report/freedom-press/2012/congo-democratic-republic-kinshasa> [Accessed 24 June 2013]
- 11 <http://www.freedomhouse.org/report/freedom-press/2012/lesotho> [Accessed 24 June 2013]
- 12 <http://www.freedomhouse.org/report/freedom-press/2012/malawi> [Accessed 24 June 2013]
- 13 <http://www.freedomhouse.org/report/freedom-press/2012/namibia> [Accessed 24 June 2013]
- 14 <http://www.freedomhouse.org/report/freedom-press/2012/south-africa> [Accessed 24 June 2013]
- 15 <http://www.freedomhouse.org/report/freedom-press/2012/swaziland> [Accessed 24 June 2013]
- 16 <http://www.freedomhouse.org/report/freedom-press/2012/tanzania> [Accessed 24 June 2013]
- 17 <http://www.freedomhouse.org/report/freedom-press/2012/zambia> [Accessed 24 June 2013]
- 18 <http://www.freedomhouse.org/report/freedom-press/2012/zimbabwe> [Accessed 24 June 2013]

