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**Zambia**

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# 1 Introduction<sup>1</sup>

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The Republic of Zambia is a landlocked country with a population of just under 18.5 million people.<sup>2</sup> The official language is English, and there are over 70 local languages and dialects. Zambia is a former British protectorate and gained independence in 1964. From 1973 until 1991 Zambia was a one-party state ruled by the United National Independence Party, headed by Kenneth Kaunda. During that time, the Zambian economy contracted severely.

The economic pattern has continued recently. The annual GDP growth between the year 2000 and the year 2014 averaged 6.8% but, between 2015 and 2019, the GDP growth rate dropped to an average of 3.1% per annum. The pressures placed on the economy by the 2020 Covid-19 pandemic put additional pressure on the economy, resulting in a projected economic contraction of 4.5% in 2020.<sup>3</sup> Despite the overall economic growth in Zambia, the country remains extremely poor, with 60% of the population believed to be living below the poverty line and 40% living in extreme poverty. In recent years, Zambia has seen rapid urbanisation which has resulted in roughly 70% of the urban population living in slums with inadequate access to water and sanitation.<sup>4</sup>

The wave of democratisation that swept through southern Africa in the early 1990s resulted in a new democratic constitution coming into force in Zambia in 1991. Shortly after that a new political party, the Movement for Multi-party Democracy (MMD), was voted into power and remained there until late 2011, when its presidential candidate, former President Banda, lost the presidential election to challenger Michael Sata. Edgar Lungu became president of Zambia in 2015 after Michael Sata's death, remaining in power after a disputed election in 2016.

In 1996 many constitutional amendments were enacted, and these were of such a nature that they effectively replaced the 1991 constitution. The Zambian Constitution has since been amended several times, most recently in 2016. Sadly, the post-1991 government did not bring about promised media law reform. Although it set up the Mwanakatwe Constitutional Review Commission in 1993, the government did little to implement the commission's many media reform-related recommendations, including, for example, that the Zambian National Broadcasting Corporation (ZNBC) be removed from government control.

Approximately 26% of households in Zambia have access to a television.<sup>5</sup> Zambia completed its analogue to digital terrestrial television (DTT) transmission in 2015 using the DVB-T2 standard as their television standard.<sup>6</sup> Literacy rates are approximately 83% for women and 90% for men.<sup>7</sup> Internet penetration in Zambia is over 53% of the population with just over 12% having a Facebook account.<sup>8</sup>

In 2002, the Independent Broadcasting Authority Act and the ZNBC Amendment Act were passed. However, it took over a decade to be implemented, and implementation was only effected after further amendments to downgrade the independence of both the Independent Broadcasting Authority and the ZNBC.

Zambia has yet to pass freedom of information legislation although whistle-blower protection legislation has been enacted.

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

- ▶ Media and the constitution
- ▶ Media-related legislation
- ▶ Media-related regulations
- ▶ Media self-regulation
- ▶ Media-related case law

This chapter aims to equip the reader with an understanding of the main laws governing the media in Zambia. Key weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Zambia, to enable the media to fulfil its role of providing the public with relevant news and information better, 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 Zambian 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 Zambian Constitution that ought to be amended to protect the media

## **2.1 Definition of a constitution**

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

The Zambian Constitution sets out the foundational rules for the Republic of Zambia. These are the rules on which the entire country operates. The constitution contains the underlying principles, values and laws of Zambia.

A key constitutional provision in this regard is article 1(1), which states that ‘Zambia is a unitary, indivisible, multi-party and democratic sovereign State’.

## **2.2 Definition of constitutional supremacy**

Constitutional supremacy means that the constitution takes precedence over all other law in a particular country, for example, legislation or case law. It is important to ensure that a constitution has legal supremacy. If a government passed a law that violated the constitution, that is was not in accordance 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 Zambian Constitution makes provision for constitutional supremacy. Part 1 article 1 specifically states that ‘This Constitution is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency’.

## **2.3 Definition of a limitations clause**

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

The Zambian Constitution makes provision for legal limitations on the exercise and protection of rights contained in Part III, Protection of Fundamental Human Rights and Freedoms of the Individual.

Article 11 specifically provides that the various rights provided for in Part III are 'subject to such limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest'.

This is an interesting provision that requires some explanation.

- ▶ Rights can be limited on two main bases, to protect the rights and freedoms of other individuals and to protect the public interest.
- ▶ While article 11 of the constitution contains the general criteria for constitutional limitations, it is not in itself a generally applicable limitations provision because it states that rights are 'subject to the limitations contained in this Part'. As listed in detail below, each of the rights and freedoms contained in Part III of the Zambian Constitution is subject to the specific limitations provided for in the right itself.

Consequently, the rights contained in Part III of the Zambian Constitution are subject to the limitations contained in 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 Zambian Constitution contains several important provisions in Part III, Protection of Fundamental Rights and Freedoms of the Individual, which directly protect the media, including publishers, broadcasters, journalists, editors and producers.

### 2.4.1 Freedom of expression

The most important provision that protects the media is article 20(1), part of the article headed Protection of Freedom of Expression, which states:

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

This provision needs some detailed explanation.

- ▶ This freedom applies to all persons and not just to certain people, such as citizens. Hence everybody (both natural persons and juristic persons, such as companies) enjoy this fundamental right.

- ▶ The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many different examples of this, including physical expression (such as mime or dance), photography or art.
- ▶ Article 20(1) specifies that the right to freedom of expression includes the ‘freedom to hold opinions without interference’, thereby protecting the media’s right to write opinion pieces and commentary on important issues of the day.
- ▶ Article 20(1) specifies that the right to freedom of expression includes the ‘freedom to receive ideas and information without interference’. This freedom of everyone to receive and impart ideas and information is a fundamental aspect of freedom of expression, and this subsection effectively enshrines the right to the free flow of information. Thus, the information rights of audiences, for example, as well as the expression rights of the media, are protected. This right is important because it also protects organisations that foster media development. These organisations facilitate public access to different sources and types of information, particularly in rural areas that traditionally have little access to the media.
- ▶ Article 20(1) specifies that the right to freedom of expression includes the ‘freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons’. This is a vitally important provision because it protects the right to communicate information and ideas to the public, a critically important role of the press and the media more generally. Therefore, although the Zambian Constitution does not mention the press or the media specifically, the freedom to perform that role, to communicate information to the public, is protected.
- ▶ Article 20(1) specifies that the right to freedom of expression includes the ‘freedom from interference with his correspondence’. This protection of correspondence (which would presumably include letters, emails and telefaxes) is an important right for working journalists.

As discussed, constitutional rights are never absolute. Article 20(2) of the Zambian Constitution is a provision which states that ‘Subject to the provisions of this Constitution no law shall make any provision that derogates from freedom of the press’.

This indicates that only limitations that are provided for in the constitution itself may lawfully limit freedom of the press. However, article 20(3) goes on to detail the basis on which the right to freedom of expression set out in article 20(1) may be limited. Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits the right to freedom of expression will not violate article 20(1) of the constitution, provided that it:

- ▶ is reasonably required in the interests of defence, public safety, public order, public morality or public health
- ▶ is reasonably required for:

- ▶ the purposes of protecting:
  - › the reputations, rights and freedoms of other persons
  - › the private lives of persons concerned in legal proceedings
- ▶ protecting information received in confidence
- ▶ maintaining the authority and independence of the courts
- ▶ regulating educational institutions in the interests of persons receiving instruction therein
- ▶ regulating the technical administration or operation of telephony, telegraphy, posts, wireless, broadcasting or television
- ▶ imposes restrictions on public officers
- ▶ is reasonably justifiable in a democratic society.

Although the limitations provisions in article 20(3) are many (indeed, the limitations provisions are much longer than the right itself), they are generally (see exceptions immediately below) following internationally accepted standards. In this regard, it is important to note that the requirement that the limitation is 'reasonably justifiable in a democratic society' qualifies each of the separate grounds for limiting a right. Thus, any law that intends to limit a right on one of the stipulated grounds must also be reasonably justifiable in a democratic society. This is an objective test that a court can apply and is not dependent on a government official's view as to whether or not the limitation is justifiable.

There are, however, at least two provisions in the limitations set out in article 20(3) which stand out as not being internationally acceptable grounds for limiting speech:

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

#### **2.4.2 Protection for privacy of the home and other property**

A second protection is contained in article 17 of the Zambian Constitution, Protection for Privacy of the Home and Other Property. Article 17(1) specifies that

‘Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises’. This right is weak as it essentially only protects against searches.

Furthermore, this right is subject to an internal limitation. Section 17(2) states, in brief that nothing done under any law shall be inconsistent with article 17 if the law in question makes provision:

- ▶ that is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources or to secure the development or utilisation of any property for a purpose beneficial to the community
- ▶ that is reasonably required to protect the rights of others
- ▶ for entries on premises for any tax, rate or due, or to carry out work on government property
- ▶ for enforcing court orders.

The provision itself and anything that is done under the authority of the law is reasonably justified in a democratic society.

#### **2.4.3 Protection of freedom of conscience**

A third protection is contained in article 19(1) of the Zambian Constitution, which provides, in its relevant part ‘Except with his or her own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for this article the said freedom includes freedom of thought.’ Freedom of thought is important for the media as it provides additional protection for commentary on public issues of importance.

As discussed previously, constitutional rights are never absolute. Article 19(5) details the basis on which the right to freedom of conscience set out in article 19(1) may be limited. Although the wording is complicated and legalistic, the essence of these provisions is that a law which limits freedom of conscience will not violate article 19(1) of the constitution provided that it:

- ▶ is in the interests of defence, public safety, public order, public morality or public health; or
- ▶ protects the rights of others.

Furthermore, the limitation must be reasonably justifiable in a democratic society.

#### **2.4.4 Protection of freedom of assembly and association**

Article 21(1) of the Zambian Constitution provides:

*Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say,*



*his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.*

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

As discussed previously, constitutional rights are never absolute. Article 21(2) details the basis on which the right to freedom of association contained in article 21(1) may be limited. Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits freedom of conscience will not violate article 21(1) of the constitution provided that it:

- ▶ is in the interests of defence, public safety, order, morality or health
- ▶ protects the rights of others
- ▶ imposes restrictions on public officers
- ▶ makes provision for the registration of political parties or trade unions.

Furthermore, the limitation must be reasonably justifiable in a democratic society.

#### **2.4.5 Provisions to secure protection of the law**

Article 18(10) of the Zambian Constitution provides:

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

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

As discussed previously, constitutional rights are never absolute. Besides the limitation already contained in article 18(10) allowing the exclusion of the public by the parties involved in the litigation, article 18(11) provides that the above general right to open court hearings shall not prevent a court (or similar body) from limiting public access:

- ▶ to the extent that the court considers this necessary or expedient in circumstances where publicity would prejudice the interests of justice

- ▶ where this is empowered by the law in the interests of defence, public safety, order or morality, the welfare of persons under the age of 18 years or the protection of the private lives of persons involved in the proceedings.

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

Just as there are certain rights or freedoms that protect the media, other rights or freedoms can protect individuals and institutions *from* the media. Journalists need to understand which provisions in the constitution can be used against the media.

The Zambian Constitution does not contain many provisions that ordinarily are used against the media, such as the right to dignity or personal privacy (except concerning the seizure of property). However, some provisions allow for the derogation or departure from fundamental rights and freedoms during declared emergencies, which may affect the media.

It is important to note the provisions of articles 25 and 30 of Part III of the Zambian Constitution which deal with derogations from fundamental rights during a declaration of public emergency.

In terms of article 30, the president may, by proclamation published in the Gazette, declare that a 'state of public emergency exists', which declaration shall cease to have effect after:

- ▶ seven days (if the National Assembly is sitting and does not approve same or if there has been a change of president while a declaration has been in force), or
- ▶ three months from the date of the National Assembly resolution of approval or such earlier date as may be specified in parliament's resolution of approval.

Note that the National Assembly can extend the declaration of public emergency for up to three months at a time.

It is important to note that the emergency provisions of the Zambian Constitution do not follow international best practice standards. This is because there are no objective preconditions to such a declaration. In other words, there is nothing in the constitution which requires that a real threat to the public must exist before a declaration of public emergency or threatened emergency can be made by the president.

Importantly, article 25 of the Zambian Constitution specifically allows laws passed when Zambia is at war or under a state of emergency to derogate from all the rights and protections in the constitution, except for:

- ▶ the right to life
- ▶ protection from slavery and forced labour

- ▶ protection from inhumane treatment
- ▶ protection of the law.

The effect of this is that the right to freedom of expression and several other rights which support the media can be derogated from in a declared public emergency.

## **2.6 Key institutions relevant to the media established under the Zambian Constitution**

While there are no media-specific institutions established under the Zambian Constitution, it does establish three institutions that indirectly affect the media, namely, the judiciary, the Judicial Service Commission (JSC) and the Human Rights Commission.

### **2.6.1 The judiciary**

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

Part VIII of the Zambian Constitution is headed Judiciary. In terms of article 120(1), the judiciary of Zambia consists of the Chief Justice, Deputy Chief Justice, superior courts, subordinate courts, small claims courts, local courts and courts as prescribed.

In terms of article 122, the judiciary shall be subject only to the constitution and the law and not subject to the control or direction of a person or an authority.

In terms of article 140 of the Zambian Constitution, judges are appointed by the president on the recommendation of the Judicial Service Commission (JSC) subject to ratification by the National Assembly.

- ▶ The Chief Justice is responsible for the administration of the Judiciary.
- ▶ The superior courts: in terms of article 121 of the Zambian Constitution, the Supreme Court and the Constitutional Court rank equivalently as the superior courts of Zambia.
- ▶ The Supreme Court: is, in terms of article 125 of the Zambian Constitution, the final court of appeal, this is subject to article 128.
- ▶ The Constitutional Court, in terms of article 128 of the Zambian Constitution, has original and final jurisdiction to hear matters relating to:
  - ▶ the interpretation of the constitution

- ▶ a violation or contravention of the constitution
  - ▶ the president, vice-president or an election of a president
  - ▶ election of members of parliament and councillors
  - ▶ whether or not a matter falls within the jurisdiction of the Constitutional Court.
- ▶ The High Court:
- ▶ in terms of article 134 of the Zambian Constitution, the High Court has unlimited or original jurisdiction to determine any civil or criminal proceedings under law. Effectively this ambit allows the High Court to enquire into any matter of law in Zambia.
  - ▶ in terms of article 133(2), the High Court includes the:
    - › Industrial Relations Court
    - › Commercial Court
    - › Family Court
    - › Children's Court.

In terms of article 142 of the Zambia Constitution, a judge of the superior courts holds office until the age of 75; however, a judge may retire with full benefits on attaining the age of 65. The Chief Justice and the president of the Constitutional Court may hold office only for ten years, after that they may continue as a judge of either the Supreme or Constitutional Courts.

In terms of section 143 of the Zambian Constitution, a judge may be removed from office on the following grounds:

- ▶ mental or physical disability that makes the judge incapable of performing judicial functions
- ▶ incompetence
- ▶ gross misconduct
- ▶ bankruptcy.

### **2.6.2 The Judicial Service Commission**

The Judicial Service Commission (JSC) is a constitutional body that is established in terms of article 219(1) of the Zambian Constitution. The offices of judge, judicial officer, members of staff of the JSC and other such other officers as prescribed, are offices in the Judicial Service.

In terms of article 220 of the Zambian Constitution, the JSC constitutes the offices of the Judicial Service, and the responsibilities include:

- ▶ making recommendations to the president on the appointment of judges
- ▶ appointing, confirming, promoting, and hearing appeals from judicial officers
- ▶ carry out functions provided for in the constitution, or as prescribed.

The JSC is relevant to the media because of its critical role in the appointment of senior judges to the judiciary, the proper functioning and independence of which are essential for democracy. Unfortunately, the Zambian Constitution does not specify how the JSC is to be appointed and how it is to function. Its level of independence is, therefore, open to question and is not guaranteed by the constitution itself.

Indeed, section 5(1) of the Service Commission Act (2016) provides that the JSC is made up of:

- ▶ the chairperson who is appointed by the president and is a person who holds or is qualified to hold or has held high judicial office
- ▶ a judge nominated by the Chief Justice
- ▶ the Attorney General, with the Solicitor General as the alternate
- ▶ the permanent secretary responsible for public service management
- ▶ a magistrate nominated by the Chief Justice
- ▶ a representative of the Law Association of Zambia, nominated by the association and appointed by the president
- ▶ the Dean of a Law School of a public higher education institution, nominated by the minister responsible for justice
- ▶ a member appointed by the president.

### **2.6.3 The Human Rights Commission**

Article 230(1) of the Zambian Constitution establishes the Human Rights Commission (HRC) and provides that it will have offices in the provinces and progressively the districts of Zambia.

It should be noted that article 216 sets out the principles by which all commissions established by the constitution, including the HRC, shall operate, namely that the commissions are:

- ▶ subject only to the constitution and the law
- ▶ independent and not subject to the control of a person or authority in the performance of its functions
- ▶ to act with dignity, professionalism, propriety and integrity

- ▶ to be non-partisan
- ▶ to be impartial in the exercise of its authority.

Other articles relating to the operation of commissions established by the constitution include:

- ▶ article 238 which provides that commissions are to be self-accounting institutions dealing directly with the ministry responsible for matters relating to finance, and shall be adequately financed in a financial year to perform its functions effectively
- ▶ article 239 which provides that, the expenses of commissions shall be a charge on the Consolidated Fund, essentially the fiscus
- ▶ article 240 which states that a person qualifies for appointment to a commission if that person:
  - ▶ is a citizen and permanent resident of Zambia
  - ▶ has not, in the immediate preceding five years, served a term of imprisonment of more than three years, or is currently serving a term of imprisonment
  - ▶ is tax compliant
  - ▶ does not have a mental or physical disability that would make the person incapable of performing the functions of the office
  - ▶ has the necessary qualifications as prescribed
- ▶ article 242, which states that the functions, composition, appointment of members, tenure of office, processes, procedures, operations, administration, structures, finances and financial management of all commissions shall be prescribed. Given that these will be prescribed by an act of parliament, the level of genuine independence of the HRC is open to question and is not guaranteed by the constitution.

In terms of article 230(2), the HRC must ensure that the Bill of Rights is upheld and protected. In terms of article 230(3) the main functions of the HRC are to:

- ▶ investigate and report on the observance of rights and freedoms
- ▶ take necessary steps to secure appropriate redress where rights and freedoms are violated
- ▶ endeavour to resolve a dispute by negotiation, mediation and conciliation
- ▶ carry out research on rights and freedoms and related matters
- ▶ conduct civic education on rights and freedoms
- ▶ perform such functions as prescribed.

#### 2.6.4 The Public Protector

In terms of article 243(1) of the constitution, there shall be a Public Protector appointed by the president on the recommendation of the JSC, subject to the ratification by the National Assembly. A person may qualify for appointment if they are qualified to be appointed as a judge and does not hold a state or constitutional office in terms of article 243(2).

In terms of article 243(4) of the constitution, the procedures, staff, finances, financial management, administration and operations of the Public Protector shall be prescribed. Given that these will be prescribed by an act of parliament, the level of genuine independence of the Public Protector is open to question and is not guaranteed by the constitution.

Article 244(1–4) of the constitution does provide that the Public Protector may investigate an action or decision taken or omitted to be taken by a state institution that is unfair, unreasonable, illegal or not compliant with natural justice. The Public Protector may bring an action before a court, hear an appeal and make a decision against a public or constitutional office holder which is to be implemented by the appropriate authority.

In terms of article 244(5) of the constitution, the Public Protector has the same powers as those of the High Court in matters relating to:

- ▶ enforcing the attendance of witnesses and examining them on oath
- ▶ examining a witness outside Zambia
- ▶ compelling the production of documents
- ▶ enforcing decisions issued by the Public Protector
- ▶ citing a person or authority for contempt for failure to carry out a decision of the Public Protector.

In terms of article 245 of the constitution, the powers of the Public Protector are limited in that the Public Protector may not investigate matters:

- ▶ before a court, court-martial or a quasi-judicial body
- ▶ relating to an officer in the parliamentary or judicial services
- ▶ involving the relations or dealings of the government with a foreign government or international organisation
- ▶ relating to the exercise of the prerogative of mercy
- ▶ that are criminal.

In terms of article 246 of the constitution, where the Public Protector is absent from Zambia, or unable to perform the functions of his or her office, the president

shall appoint a person qualified to perform the functions until that appointment is revoked or the Public Protector returns to office.

In terms of article 247 of the constitution, the Public Protector must vacate his or her office upon reaching the age of 65; however, the Public Protector may retire with full benefits upon reaching the age of 55. The Public Protector may be removed from office in the same manner as a judge or may resign from office after giving three months written notice to the president.

The office of the Public Protector must report to the National Assembly on matters concerning its affairs in terms of article 248 of the constitution.

Bodies such as the HRC and the Public Protector are important for the media because, if they are truly independent of government, ordinary people, as well as institutions such as the media, can turn to them for protection of their human rights, such as the right to freedom of expression. Such bodies are important in preserving human rights and can act as a bulwark against heavy-handed or illegal government restrictions on fundamental rights. The effectiveness of such institutions is usually linked to the level of genuine independence they enjoy.

## **2.7 Enforcing rights under the constitution**

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

Article 28 of the Zambian Constitution, Enforcement of Protective Provisions, deals specifically with contraventions of the rights contained in Part III, articles 11–26 of the constitution. It allows a person to apply to the High Court when a provision of those articles of Part III ‘has been, is being or is likely to be’ contravened.

Perhaps one of the most effective ways in which rights are protected under the Zambian Constitution is by the provisions of the constitution that entrench the rights contained in Part III, Protection of Fundamental Rights and Freedoms of the Individual. Article 79(3) of the constitution requires that a constitutional amendment of Part III needs to be put to a national referendum and supported by not less than 50% of the persons entitled to be registered as voters. Furthermore, the bill must, thereafter, be supported by not less than two-thirds of all members of the National Assembly.

## **2.8 The three branches of government and separation of powers**

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



### 2.8.1 Branches of government

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

#### The executive

Article 91(2) of the Zambian Constitution provides that the executive power of Zambia is vested in the president and shall be exercised by him or her directly or by officers subordinate to him.

Article 91(1) of the Zambian Constitution provides that the president of the Republic of Zambia shall be the head of state and government as well as the commander-in-chief of the defence force. The president is elected by registered voters per articles 47(1) and 101 of the Zambian Constitution. Article 47 states that elections are conducted directly under the majoritarian electoral system, where the winning candidate must receive over 50% of the vote. In terms of article 101(3), if no candidate receives over 50% of the valid votes cast, the candidates with the highest and second-highest number of votes shall take part in a second ballot. In terms of article 106, the term of office for a president is five years and shall run concurrently with the term of parliament except that the term of office of a president shall end when the president-elect assumes office.

Article 113 of the Zambian Constitution provides for a Cabinet consisting of the president, the vice-president, the ministers and the Attorney-General (as an ex-officio member). The main role of Cabinet is to approve and cause to be implemented government policy, approve government bills for introduction to the National Assembly, approve and cause the national budget to be presented to the National Assembly, and advise the president concerning the policy of the government, in terms of article 114.

In terms of article 110, the vice-president is the running mate to a presidential candidate in a presidential election. In terms of article 112(2) of the constitution, the general role of the vice-president is to perform functions specified in the constitution, any other law and as assigned to him by the president and assume the office of the president if it becomes vacant in terms of article 106.

In terms of article 116 of the Zambian Constitution, there shall be such ministers as may be appointed by the president from among the members of the National Assembly.

#### The legislature

Legislative or law-making power in Zambia is vested in parliament which, in terms of article 62 of the constitution, consists of the president and the National Assembly. Article 63(1) provides that the legislative power of parliament is exercised by bills passed by the National Assembly and assented to by the president.

In terms of article 68 read with article 47(2), the National Assembly consists of:

- ▶ 156 elected members directly elected based on a simple majority vote under the first-past-the-post system in constituencies
- ▶ not more than eight nominated members nominated by the president where he considers it necessary to enhance the representation of special interests, skills or gender in the National Assembly in terms of section 69 of the constitution
- ▶ the vice-president
- ▶ the Speaker
- ▶ the first and second deputy Speakers.

### **The judiciary**

Judicial power, as discussed previously in this chapter, is vested in the courts. Essentially, the role of the judiciary is to interpret the law and to adjudicate legal disputes following the law.

#### **2.8.2 Separation of powers**

In a functioning democracy, it is important to divide government power between different organs of the state to guard against the centralisation of power, which may lead to abuse. This is known as the separation of powers doctrine. The aim, as the Zambian 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 can operate alone, assume complete state control and amass centralised power. While each branch performs several 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 following the constitution.

## **2.9 Weaknesses in the constitution that ought to be strengthened to protect the media**

There are several respects in which the Zambian Constitution is weak. If these provisions were strengthened, there would be specific benefits for media in Zambia.

### **2.9.1 Remove internal constitutional qualifiers to certain rights**

The Zambian Constitution, as has been set out above, makes provision for certain rights to be subject to internal limitations, that is, the provision dealing with rights contains its own limitations clause, setting out ways in which a government can legitimately limit the ambit of the right.

These internal limitations occur in several sections on rights in Part III of the constitution. They deal specifically and only with the limitation or qualification of the particular right that is dealt with in that section. As has been more fully discussed

above, the right to freedom of expression contains such an internal limitation. In other words, the section that contains the right also sets out the parameters or limitations allowable in respect of that right.

The rights contained in the provisions dealing with fundamental human rights and freedoms set out in Part III of the Zambian Constitution would be strengthened if the rights were subject to a single generally applicable limitations clause rather than each having their limitations clause.

Such a limitations clause would apply to all of the provisions of Part III of the constitution, that is to the fundamental rights and freedoms. It would allow the government to pass laws limiting rights generally, provided this is done following the provisions of a limitations clause that applies equally to all rights. It makes the ambit of the rights and the grounds for limitation much clearer for the public because there are no specific limitations provisions that apply to each right separately.

### **2.9.2 Objective grounds for declaring a state of emergency**

The Zambian Constitution at article 30 empowers the president to declare a state of emergency. In so doing, several rights that protect the media can be derogated or departed from, in terms of article 25. However, article 30 does not set out objective grounds for such a declaration. It is, therefore, suggested that amending this provision to provide that there must be an objective emergency would provide additional safeguards to the exercise and protection of several important civil rights.

### **2.9.3 Independent broadcasting regulator and public broadcaster**

There is no doubt that the broadcasting sector would be greatly strengthened if the Zambian Constitution gave constitutional protection for an independent broadcasting regulator and a public broadcaster. Given the importance of both these institutions for ensuring access to news and information by the public, it is suggested that such amendments to the constitution would be in the public interest and would serve to strengthen both the media and democracy more generally in Zambia.

### **2.9.4 Strengthen the independence of institutions**

While it is laudable that the Zambian Constitution makes provision for institutions such as the JSC, the HRC and the Public Protector, the fact that the structural independence and appointment procedures of these institutions are not provided for sufficiently in the constitution is a weakness and undermines their independence.

## **3 The media and legislation**

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In this section, you will learn:

- ▷ what legislation is and how it comes into being
- ▷ legislation governing the publication of print and online media
- ▷ legislation governing the making of films
- ▷ legislation governing the broadcasting media generally
- ▷ legislation governing the state broadcasting sector
- ▷ legislation that threatens a journalist’s duty to protect sources
- ▷ legislation that prohibits the publication of certain kinds of information
- ▷ legislation that codifies and clarifies aspects of the law of defamation
- ▷ legislation that specifically assists the media in performing its functions

### **3.1 Legislation: An introduction**

#### **3.1.1 What is legislation?**

Legislation is a body of law consisting of acts properly passed by parliament, the legislative authority. As already discussed, legislative authority in Zambia is vested in the parliament, which is made up of the president and the National Assembly. It is important to note, however, that in certain limited cases some pieces of legislation can also be referred to a body called the House of Chiefs, established in terms of article 130 of the Zambian Constitution.

As a general rule, the National Assembly and the president are ordinarily involved in passing legislation. There are detailed rules in the constitution which set out the different law-making processes that apply to different types of legislation. Journalists and others in the media need to be aware that the constitution requires different types of legislation to be passed following particular procedures. The

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

- ▶ legislation that amends the constitution, the procedures and applicable rules are set out in article 79 of the constitution
- ▶ ordinary legislation, the procedures and applicable rules are set out in article 63 of the constitution
- ▶ legislation that deals with financial measures, the procedures and applicable rules are set out in article 65 of the constitution
- ▶ legislation that would affect customary or traditional matters, the procedures and applicable rules are set out in section 169 of the constitution.

### **3.1.2 The difference between a bill and an act**

A bill is a piece of draft legislation that is debated and usually amended by parliament during the law-making process. If a bill is passed by parliament following the various applicable procedures required for different types of bills, as set out above, it becomes an act once it is assented to by the president, in terms of article 63(1) of the constitution. An act must be published in the Gazette and becomes law only when it has been so published.

Also, be aware that some laws governing certain media-related aspects came into force before the coming into effect of the 1966 Zambian Constitution. As they were passed by the governing authority of the time and have yet to be repealed, they are still good law.

## **3.2 Legislation governing the print and online media**

No legislation providing for the regulation of online media has been enacted in Zambia.

Unfortunately, in terms of the Printed Publications Act, there are several constraints on the ability to operate as a print media publication in Zambia. In particular, Zambia requires the registration of newspapers, which is out of step with international best practice. These kinds of restrictions effectively impinge on the public's right to know by setting barriers to print media operations.

There are certain key requirements laid down by the Printed Publications Act in respect of a newspaper or book. The definition of a newspaper is extremely broad. It includes 'any periodical publication published in intervals of not more than one month and consisting wholly, or for the greater part, of political or other news ... or to other current topics'. Note that publications which are 'proved not to be intended for public sale or public dissemination' are excluded from the definition. The key aspects of the Printed Publications Act are discussed below.

- ▶ Section 6(1) of the Printed Publications Act requires the director of the National Archives to establish and maintain a register of newspapers.
- ▶ Section 5(2) of the Printed Publications Act makes it an offence to print or publish a newspaper without having registered it before printing and publication. If found guilty, the perpetrator will be liable to a fine.
- ▶ In terms of section 5(1) of the Printed Publications Act, the particulars required for registration are the title of the newspaper, name and residential address of the proprietor (owner), editor, printer or publisher, and a description of the premises where the newspaper is to be published. Any change to these registration details must also be registered.
- ▶ Besides the newspaper registration requirements set out above, section 3(1) of the Printed Publications Act also requires every book (defined extremely broadly to include ‘every part of a ... newspaper’ or document intended to be issued for distribution, by sale or otherwise, to the public or any section thereof in Zambia) printed and published in Zambia to have printed on one of its pages in legible type the names and addresses of the printer and publisher and the year of publication. Any person who prints a book without complying with the requirement of section 3(1) is guilty of an offence and liable to a fine and, in default of payment of such a fine, to imprisonment in terms of section 3(2) of the Printed Publications Act.
- ▶ There is a duty to provide copies of books (including newspapers). Section 4(1) of the Printed Publications Act requires the printer of every book (note again that the definition of book includes a newspaper) to deliver, at his or her own expense, a copy of such book to the director of the National Archives. Any person who fails to comply with section 4(1) is guilty of an offence and liable to a fine, in terms of section 4(3) of the Printed Publications Act.

### **3.3 Legislation governing the exhibition of films**

Section 8 of the Theatres and Cinematograph Exhibition Act provides that no picture or series of pictures shall be presented at any cinematograph exhibition to which the public is admitted, nor shall any advertising posters therefor be displayed, without a permit from the Film Censorship Board (which is appointed by the minister) having been obtained previously. Failure to obtain the necessary permit is an offence and is punishable by a fine or imprisonment.

### **3.4 Legislation governing the broadcast media generally**

#### **3.4.1 Legislation that regulates broadcasting generally**

Generally, broadcasting in Zambia is regulated in terms of the Independent Broadcasting Authority (IBA) Act, Act 17 of 2002, and amendments made in the Independent Broadcasting Authority Amendment Act, Act 18 of 2017. Radio frequency spectrum licensing is regulated in terms of the Information and Communications Technologies (ICT) Act, Act 15 of 2009.

### 3.4.2 Establishment of the IBA

Section 4 of the IBA Act establishes the IBA. Section 7 also constitutes the nine-member IBA Board, which performs the functions of the IBA under the IBA Act.

### 3.4.3 Main functions of the IBA

In terms of section 5(1) of the IBA Act, the overall function of the IBA is to regulate the broadcasting industry in Zambia. Section 5(2) sets out several specific functions of the IBA, and these include:

- ▶ to promote a pluralistic and diverse broadcasting industry
- ▶ to establish various guidelines, including for:
  - ▶ development of broadcasting
  - ▶ issuing of licences
  - ▶ required levels of local content
- ▶ to safeguard the efficient use of the frequencies allocated to broadcasters
- ▶ to grant, renew, suspend and cancel licences and frequencies for broadcasting
- ▶ to enforce compliance with licence conditions
- ▶ to develop programme standards
- ▶ to receive, investigate and decide on complaints concerning broadcasting services
- ▶ to develop regulations concerning advertising, sponsorship, local content and media diversity and ownership.

### 3.4.4 Appointment of IBA board members

In terms of section 7(2) of the IBA Act, all of the nine part-time members of the IBA Board (who hold office for a renewable period of three years, in terms of section 10) are appointed by the minister (although the specific minister responsible is not stated in the IBA Act, it is presumably the minister responsible for the administration of the IBA Act, namely the Minister for Information and Broadcasting Services), on the recommendation of an appointments committee and subject to ratification by the National Assembly.

Section 8(1) requires the minister to constitute an appointments committee consisting of five nominees — one nominated by each of the following:

- ▶ the Law Association of Zambia
- ▶ a non-governmental organisation active in human rights
- ▶ religious organisations

- ▶ a media support organisation
- ▶ the ministry responsible for information and broadcasting.

In terms of section 8(4), the functions of the appointments committee are to:

- ▶ invite applications from persons with suitable qualifications. In terms of section 7(3), a person is not qualified unless he or she 'is committed to fairness, freedom of expression, openness and accountability' and 'when viewed collectively, the persons so appointed shall be representative of a broad cross-section of the population'
- ▶ interview the nominees and applications
- ▶ select candidates for appointment to the IBA Board and submit a recommendation to the minister. (See the cases section at the end of this chapter for a discussion on litigation surrounding the ministerial appointment of IBA board members).

### **3.4.5 Funding for the IBA**

Section 39 of the IBA Act sets out the various sources of funding for the IBA. In brief, these include:

- ▶ sums of money appropriated by parliament, in other words, funding that is specified annually in the national budget
- ▶ sums of money from sources such as grants, levies, subsidies, bequests, donations and gifts
- ▶ sums of money derived from the sale of IBA property
- ▶ fees payable in respect of licences issued under the IBA Act
- ▶ television levies paid to licensees in accordance with section 22A of the IBA Act.

### **3.4.6 Making broadcasting regulations**

In terms of section 47 of the IBA Act, the minister may, on the recommendation of the IBA, make regulations on matters relating to the IBA Act. The effect of this is that the minister cannot make regulations on his or her own as he or she cannot make regulations unless the IBA recommends that such regulations be made.

### **3.4.7 Licensing regime for broadcasters in Zambia**

#### **Broadcasting licence requirement**

Section 19(1) of the IBA Act prohibits any person from providing a broadcasting service otherwise than following the terms and conditions of a licence issued by the IBA.



Anyone who does not comply with section 19(1) (or any other provision of the IBA Act) is guilty of an offence and on conviction is liable to a fine, imprisonment or both, in terms of section 45(i) of the IBA Act.

### Categories of broadcasting licences

Section 19(2) of the IBA Act empowers the IBA to issue five categories of broadcasting licences. These are:

- ▶ Commercial
  - ▶ This is defined in section 1 as 'a broadcasting service operated for profit and controlled by a person who is not a public or community broadcaster'.
  - ▶ Section 21 deals specifically with commercial broadcasting. Important aspects of the regulatory framework for commercial broadcasting are:
    - › that commercial broadcasters provide a diverse range of programming addressing a wide section of the population
    - › that programming be provided in the official language or any other local languages widely spoken in the republic as a whole or any particular area
    - › that they provide comprehensive coverage of all areas they are licensed to serve
    - › that they provide programmes that:
      - › reflect the culture, character, needs and aspirations of the audience in the licence area
      - › contain an appropriate amount of local or national programming
      - › include news and information regularly, including of national, regional and local significance
      - › meet the highest standards of journalistic professionalism.
- ▶ Community
  - ▶ This is defined in section 1 as a broadcasting service which:
    - › is fully controlled by a non-profit entity and carried on for non-profitable purposes
    - › serves a particular community
    - › encourages members of the community serviced by it, or persons associated with or promoting the interests of such community, to participate in the selection and provision of programmes to be broadcast
    - › may be funded by donations, grants, sponsorships, advertising or membership fees, or by any combination of these.
  - ▶ It is also important to note that the IBA Act defines a community in section 1 as including 'a geographically defined community' or 'any group of

persons or sector of the public having a specific, ascertainable, common interest’.

- ▶ Section 22(3) of the IBA Act requires a community broadcaster’s programming to:
  - › provide distinct programming dealing with issues not dealt with by other broadcasting services in the area
  - › be informative, educational and entertaining
  - › focus on highlighting grassroots community issues, including developmental, educational, environmental, local, international and current affairs
  - › reflect local culture
  - › promote the development of a sense of common purpose and improved quality of life.
- ▶ Religious
  - ▶ This is defined in section 1 as being ‘a broadcasting service which transmits programmes of a religious nature’.
  - ▶ Section 22(5) requires that programming provided by a licensed religious broadcasting service shall reflect the religious beliefs and needs of the people and shall:
    - › provide a distinct service dealing specifically with religious issues
    - › be informative, educational and entertaining
    - › focus on the provision of programmes that highlight grassroots issues, including developmental issues, health care, basic information, general education, environmental affairs and spiritual matters
    - › promote the development of a sense of common religious purpose and improve the quality of life.
- ▶ Subscription Management Service
  - ▶ This term is defined in section 1 of the IBA Act as a ‘subscription service provided by a licensee entitled to provide a digital broadcasting service’.
  - ▶ Section 23 sets out the essential characteristics of subscription broadcasting services, and these are that:
    - › revenues may be drawn from subscriptions, as well as from advertising and sponsorship
    - › subscription broadcasters may not acquire exclusive rights to the broadcasting of ‘any national, sporting, or other event’ that the IBA identifies as being ‘in the public interest’
  - ▶ In terms of section 22A(1) and (2), of the IBA Act, the IBA must charge a

television levy on payments made to a licensee that provides a subscription management service during any period of a subscription at the rate prescribed by the minister by Statutory Instrument. The IBA collects this television licence levy on behalf of public broadcasting services, essentially, the ZNBC. Failure to do so on the part of a subscription broadcaster is an offence, punishable by a fine, imprisonment or both in terms of section 22A(4).

▶ **Public**

This is defined in the IBA Act as:

*the acquisition, production, and distribution by public broadcasting stations of non-commercial educational, instructional, informational, entertainment, advisory or cultural television and radio programmes and information that may be transmitted by means of electronic communications, and related material and services on a non-profit basis.*

Besides these five categories of broadcasting licences, section 25 also empowers the IBA to issue a licence for a diffusion service, which is defined in section 1 as essentially being the provision of a broadcasting service or music or speech using wires.

### **Broadcasting licensing process**

Section 20 of the IBA Act sets out the broadcasting licensing process. In brief, the process is as follows:

- ▶ If the IBA determines that there is a need for an additional broadcasting service, it shall publish a notice in the Government Gazette and in a national newspaper inviting applications for licences to provide the specified broadcasting service.
- ▶ Applications are made to the IBA in the prescribed form and manner and shall be accompanied by the prescribed fee and such information and documents as may be prescribed or as the IBA may require.
- ▶ The IBA examines all applications and shortlists those who, in its opinion, qualify to be licensed.
- ▶ Every shortlisted applicant is invited to attend a public inquiry conducted by the IBA to determine the applicant's suitability to be licensed.
- ▶ After considering an application, the IBA may issue or refuse to issue a broadcasting licence to the applicant and shall notify the applicant in writing of the decision and, if the application is refused, provide reasons for the refusal.

In terms of section 27, the IBA Board may issue a licence 'subject to such conditions as the Board may specify in the licence when it is granted and to such other

conditions as may be prescribed by regulation'. Note that in terms of section 28, the period of each licence is specified therein.

### **Frequency spectrum licensing**

Unfortunately, this issue is confusing because it is dealt with in two different statutes, namely the IBA Act but also the Information and Communication Technologies (ICT) Act, Act 15 of 2009, which regulates electronic communications in Zambia. In terms of section 6(2)(b) of the ICT Act, one of the functions of the Zambia Information and Communications Technology Authority (Zicta) is to 'provide for national frequency ... plans and facilitate the efficient use and allocation of ... frequencies'.

Part IV of the ICT Act deals with radio communication services, and section 29(1) requires a person intending to operate a radio station (note this is a technical term for a transmitter) to apply to Zicta for a licence. While it is important to note that the IBA Act also deals with radio frequency spectrum licensing in the context of broadcasting, the ICT Act contains a supremacy clause.

Section 3 of the ICT Act provides that, where there is any inconsistency between the provisions of it and any other written law relating to the regulation of information and communication technologies, the provisions of the ICT Act shall prevail.

Consequently, concerning radio frequency spectrum issues, the provisions of the ICT Act must be adhered to rather than those of the IBA Act.

Section 29 of the ICT Act sets out the process to be followed when applying for a licence to operate a radio station. The process is simple, namely:

- ▶ make an application for a licence in the prescribed manner to Zicta
- ▶ Zicta must decide within 60 days
- ▶ if Zicta rejects an application, written reasons must be provided by it.

In terms of section 31 of the ICT Act, there are two types of conditions applicable to such a radio communication services licence, namely:

- ▶ licence conditions specified in the licence by Zicta
- ▶ conditions prescribed by the minister, on the advice of Zicta.

#### **3.4.8 Responsibilities of broadcasters under the IBA Act**

The IBA Act contains no substantive provisions setting out responsibilities of broadcasters. However, section 27(1) of the IBA Act provides that a licence issued under the IBA Act shall be subject to such conditions as the IBA Board may specify. This power is very broad. Section 27(2) sets out examples of the kinds of matters that can be contained in licence conditions. These include:

- ▶ transmitter sites and apparatus to be used

- ▶ licence fees
- ▶ requiring the licensee to provide documents, accounts and other information to the IBA
- ▶ providing for the arbitration of disputes
- ▶ the payment of fines and penalties for breaches of licence conditions.

### **3.4.9 Is the IBA an independent regulator?**

The IBA cannot be said to be fully independent. Indeed, while section 6 of the IBA Act states that the IBA 'shall not be subject to the direction of any other person or authority', this is subject to the proviso 'except as otherwise provided in this Act'.

While the appointments process does give a ratification role to parliament, appointments ought to be made by the president on the recommendation of the National Assembly, rather than by the minister on the recommendation of the nominations committee, subject to ratification by parliament.

Furthermore, the National Assembly must require public nominations and must conduct a public interview and short-listing process.

Lastly, it is disappointing that broadcasting regulations are made by the minister. The IBA ought to be able to make broadcasting regulations on its own without any ministerial intervention.

### **3.4.10 Amending the legislation to strengthen the broadcast media generally**

There are several weaknesses with the legislative framework for the regulation of broadcasting generally in Zambia:

- ▶ There ought to be more public participation in the broadcasting service licensing process. While the process of licensing radio frequency spectrum requires a public notice and comment procedure, this is not specified in the broadcasting licensing process.
- ▶ There is concern that the IBA Board is not sufficiently independent. Appointments ought to be made by the president on the recommendation of the National Assembly, following public nominations, interviews and a short-listing process.
- ▶ The IBA should be empowered to make its regulations without ministerial intervention.
- ▶ The legislative overlap in responsibilities in respect of radio frequency spectrum issues between the IBA and Zicta ought to be clarified avoid competing and conflicting applicable regulatory frameworks for broadcasters.

### **3.5 Legislation governing the state broadcast media**

The state broadcaster, the Zambia National Broadcasting Corporation (ZNBC), is ostensibly regulated in terms of the Zambia National Broadcasting Corporation Act, Cap. 154 (the ZNBC Act). In 2002, at the time that new legislation was introducing the IBA, the ZNBC Act was significantly amended to transform it from a state to a public broadcaster. However, that ZNBC Amendment Act was never implemented or operationalised, and the ZNBC continued to report to the Ministry of Information and Broadcasting Services.<sup>9</sup> This was cemented with the passage of the ZNBC Amendment Act of 2010, which entrenched executive influence over the ZNBC, reaffirming its status as a state, as opposed to a public, broadcaster. Who exercises control over ZNBC's operations is also unclear. The funding of Zambia's transition to DTT was provided by a Chinese media conglomerate by a joint venture with ZNBC called TopStar, of which StarTimes controls 60%.<sup>10</sup> It is alleged that, since 2019, StarTimes has been able to exercise significant control over the programming provided by ZNBC.

#### **3.5.1 Establishment of the ZNBC**

Section 3 of the ZNBC Act established the ZNBC as a body corporate with perpetual succession and generally empowered to do all acts necessary for the carrying out of its powers and functions under the ZNBC Act. Section 4 also provides for the ZNBC board, which performs the functions of the ZNBC.

#### **3.5.2 The ZNBC's mandate**

Section 7(1) of the ZNBC Act sets out the functions of the ZNBC. Briefly, these are to:

- ▶ provide varied and balanced programming
- ▶ serve the public interest
- ▶ meet high professional quality standards
- ▶ offer programmes that provide information, entertainment and education
- ▶ contribute to the development of free and informed opinions
- ▶ reflect the range of opinions and political, philosophical, religious, scientific and artistic trends
- ▶ reflect and promote Zambia's national culture, diversity and unity
- ▶ reflect human dignity and human rights, and contribute to the tolerance of different opinions and beliefs
- ▶ further international understanding and the public's sense of peace and social justice
- ▶ defend democratic freedoms

- ▶ contribute to the realisation of equal treatment between men and women
- ▶ broadcast news and current affairs programmes that are comprehensive, unbiased, and independent, and commentary which is clearly distinguished from the news
- ▶ promote local productions
- ▶ operate other services, including diffusion services.

### **3.5.3 Appointment of the ZNBC board**

A board of directors controls the ZNBC. In terms of the newly amended section 4(2) of the ZNBC Act, the ZNBC board is made up of nine part-time directors appointed by the minister, subject to ratification of the National Assembly.

In terms of section 5 of the ZNBC Act, the directors hold office for a renewable period of three years.

It is important to note that the effect of the 2010 amendments to the ZNBC Act is to do away with the role of an appointments committee, which used to be in control of the appointments process and which would make recommendations to the minister on appointments to the ZNBC board in much the same way as the IBA board is appointed. (See the cases at the end of this chapter for a discussion on litigation surrounding the ministerial appointment of ZNBC board members.)

Section 4(3) continues to set out criteria for appointment to the ZNBC board. Essentially, this is a citizen permanently residing in Zambia with a commitment 'to fairness, freedom of expression, openness and accountability, and when viewed collectively the persons appointed shall be representative of a broad section of the population of the Republic'.

Importantly, section 4(5) sets out people who are disqualified from being appointed as a member of the ZNBC board. These include anyone who has been sentenced to imprisonment for more than six months; anyone convicted of an offence involving fraud or dishonesty; an undischarged bankrupt; members of parliament or any local authority; or an office bearer or employee of any political party, or an immediate family member thereof.

### **3.5.4 Funding for the ZNBC**

Section 21 of the ZNBC Act sets out the allowable sources of funding for the ZNBC:

- ▶ funds payable to the corporation in terms of the ZNBC Act. For example, all television levies (which are levied on possession of television receivers) are payable to the ZNBC
- ▶ monies appropriated by parliament, that is, specifically allocated to the ZNBC in the national budget
- ▶ grants or donations

- ▶ other sums of money accruing to the ZNBC.

### **3.5.5 The ZNBC: Public or state broadcaster?**

There are some aspects of the regulatory framework for the ZNBC which suggest an openness to public broadcasting principles, for example, a multiparty body (in this case the National Assembly) has to ratify ministerial appointments to the ZNBC Board. However, the process for this is not set out clearly. Furthermore, the recent legislative amendments which centralised the minister's appointment powers by doing away with the role of the appointments committee also indicate the intention to ensure that the ZNBC operates as a state, as opposed to a public, broadcaster.

In addition, the ZNBC Board is not free to appoint or terminate the services of the director-general without prior consultation with the minister. Also, while the ZNBC Board makes an annual report, this is not made to the National Assembly but rather to the minister, in terms of section 24 of the ZNBC Act.

Thus, the ZNBC's accountability appears to be to the executive rather than to the public's elected representatives in the National Assembly. While it is true that the minister is obliged to lay the report before the National Assembly within seven days, the report ought to be given directly to the National Assembly by the ZNBC.

### **3.5.6 Weaknesses in the ZNBC Act which should be amended**

Several important weaknesses ought to be addressed by legislative amendments:

- ▶ Appointments of ZNBC board members ought to be made by the president on the recommendation of the National Assembly following public nominations, interviews and a short-listing process.
- ▶ The ZNBC Board ought to be able to appoint and dismiss the director-general of the ZNBC without any involvement from the minister.
- ▶ The ZNBC's annual report ought to be made directly to the National Assembly rather than via the minister.

## **3.6 Legislation that undermines 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 who can provide journalists with information regarding illegal activities, whether by company or government personnel.

Consequently, democratic countries often provide special protection for journalists' sources. It is recognised that, without such protection, information that the public needs to know would not be given to journalists.



### **3.6.1 Criminal Procedure Code, 1933**

The Criminal Procedure Code was enacted in 1934, long before Zambia's independence, but has been amended numerous times since then. At least one provision of the Criminal Procedure Code might be used to compel a journalist to reveal confidential sources.

Section 143 of the Criminal Procedure Code empowers a court dealing with any criminal matter to issue a summons to any person requiring his or her attendance before the court if it is made to appear that material evidence is in the possession of such person. The summons can also require the person to bring and produce documents and writings in his possession, which may be specified in the summons. Failure to comply with a summons can result in an arrest warrant being issued to force the person to attend at court, in terms of section 144 of the Criminal Procedure Code.

Section 148 of the Criminal Procedure Code makes it an offence to fail to attend court after having been summoned to do so 'without lawful excuse'. The punishment is a fine.

### **3.6.2 Penal Code, Act 42 of 1930**

The Penal Code was enacted before Zambia's independence but has been amended numerous times since then. Chapter XI of the Penal Code contains offences relating to the administration of justice.

Section 116 makes it an offence, as part of the offence of contempt of court, for any person who has been called upon to give evidence in judicial proceedings, to:

- ▶ fail to attend such proceedings, or
- ▶ refuse to answer a question or produce a document.

Punishment is imprisonment or a fine.

### **3.6.3 Subordinate Courts Act, 1934**

Section 41 of the Subordinate Courts Act empowers a subordinate court to summon any person to give evidence or to produce a document in his possession. In terms of sections 42 and 43, a person failing to attend at court or refusing to answer a question put to him or her shall be guilty of an offence. The penalty is imprisonment or a fine.

### **3.6.4 High Court Act, Act 36 of 1933**

Section 27(1) of the High Court Act empowers the court to summon any person to give evidence or to produce a document in his or her possession. In terms of sections 27(2) and 28, any person failing to attend court or refusing to answer a question put to him or her shall be guilty of an offence.

### **3.6.5 Supreme Court of Zambia Act, Act 41 of 1973**

Section 25(1)(b) of the Supreme Court of Zambia Act empowers the court, on hearing an appeal in a civil matter, to:

- ▶ order the production of any document or any other thing connected with the proceedings, which is necessary for the determination of the case
- ▶ order any witness who would have been a compellable witness at the trial to attend and be examined before the court, whether or not he was or was not called at the trial.

### **3.6.6 National Assembly (Powers and Privileges) Act, Act 34 of 1956**

Section 10 of the National Assembly Act empowers the National Assembly or any authorised committee to order any person to attend before the National Assembly or a committee and to give evidence or produce any paper, books, record or document which is in that person's possession.

Note that section 13 of the National Assembly Act empowers such a person to raise privacy objections to such an order.

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

## **3.7 Legislation that prohibits the publication of certain kinds of information**

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

- ▶ information regarding legal proceedings
- ▶ the publication of state security-related issues
- ▶ expression which is obscene or contrary to public morality
- ▶ expression which constitutes criminal defamation
- ▶ expression which poses a danger to public health
- ▶ expression which promotes hatred
- ▶ expression relating to corruption

- ▶ expression relating to voting
- ▶ publication of information relating to parliamentary proceedings.

### **3.7.1 Prohibition on the publication of information relating to legal proceedings**

#### **Publication that constitutes contempt of court**

Penal Code, Act 42 of 1930

The Penal Code was enacted before Zambia's independence but has been amended numerous times since then. Chapter XI of the Penal Code contains offences relating to the administration of justice. Section 116, Contempt of Court, contains various instances of the offence of contempt of court, which is punishable by imprisonment or a fine.

- ▶ In terms of section 116(1)(d), it is an offence, while a judicial proceeding is pending, to make use of writing:
  - ▶ misrepresenting such proceeding
  - ▶ capable of prejudicing any person in favour of or against any parties to the proceeding
  - ▶ calculated to lower the authority of the presiding officer.
- ▶ In terms of section 116(1)(e), it is an offence and contempt of court to publish a report on evidence taken in any judicial proceeding which has been directed to be held in private.

Contempt of Court Act, Act 32 of 1965

Section 3(1) of the Contempt of Court Act provides that the publication of information (other than the actual court order) relating to any court sitting in private shall constitute contempt of court in respect of:

- ▶ proceedings involving adoption, guardianship, custody and maintenance of an infant
- ▶ proceedings involving the control, care, detention and property of mentally disordered people
- ▶ where the court sits in private for national security reasons
- ▶ where the information relates to a secret process, discovery or invention in issue in the proceedings
- ▶ where the court expressly prohibits the publication of such information
- ▶ where the proceedings constitute an income tax appeal.

#### Local Courts Act, 1966

Section 47(1) of the Local Courts Act sets out conduct that, without lawful excuse, constitutes the offence of contempt of court. This includes:

- ▶ intentionally insulting the court or any member or assessor thereof
- ▶ misrepresenting, in writing, court proceedings while they are pending
- ▶ writing anything about the court proceedings, while they are pending, which is capable of prejudicing any person in favour of or against any party to such proceedings
- ▶ wilfully disobeying a lawful court order.

The offence is punishable by a fine, imprisonment or both.

#### **Publication of sketches or photographs that deal with court proceedings**

Chapter XI, section 117 of the Penal Code, Act 42 of 1930, is headed Prohibition on Taking Photographs. Section 117(1)(b) makes it an offence to publish any photograph, portrait or sketch of any person involved in court proceedings, whether these are civil or criminal, including, judges, jurors, witnesses or parties. The offence is punishable by a fine. Note, however, that there is an exception for photographs taken with the consent of the Chief Justice, or where the occasion is the opening of any session of the High Court and with the consent of the presiding judge.

#### **Publication of information regarding matrimonial proceedings**

Section 4(1)(b) of the Contempt of Court Act, Act 32 of 1965, provides that it is not lawful to publish any particulars about judicial proceedings for the dissolution or nullity of marriage, judicial separation or restitution of conjugal rights. However, names, addresses and occupations of the parties and witnesses, concise statements of charges and defences in support of which evidence has been given, submissions on points of law and the decisions of the court on these, the judgment of the court and provided that such details do not constitute indecent matters may be published. The penalty is a fine, imprisonment or both. Note, however, that in terms of section 4(2) only a proprietor, editor, master printer or publisher is liable to conviction (in other words, not the journalist involved).

#### **Publication of information regarding indecent matters in legal proceedings**

Section 4(1)(a) of the Contempt of Court Act, Act 32 of 1965, provides that it is not lawful to publish, concerning any judicial proceedings, any indecent matter or any indecent medical, surgical or physiological details, where publication is calculated to injure public morals. The penalty is a fine, imprisonment or both. Note, however, that in terms of section 4(2), only a proprietor, editor, master printer or publisher is liable to conviction (in other words, not the journalist involved).

### 3.7.2 Prohibition on the publication of state security-related information

#### Penal Code, Act 42 of 1930

The Penal Code was enacted before Zambia's independence but has been amended numerous times since then. Part II of the Penal Code deals with crimes, and Division I sets out a list of offences against public order, which is divided into three parts.

- ▶ Treason and other offences.
- ▶ Offences affecting relations with foreign states and external tranquillity.
- ▶ Unlawful assemblies, riots and other offences against public tranquillity.

The prohibitions on publication relating to the above grounds contained in each are dealt with in turn.

#### Treason and other offences

##### *Prohibited publications*

Section 53 of the Penal Code falls under the heading Treason and other Offences and deals with prohibited publications. In terms of section 53(1), if the president believes that a publication is contrary to the public interest (which is defined in section 62 of the Penal Code as including the interest of defence, public safety and public order), he may, in his absolute discretion, declare it to be a prohibited publication. Note that:

- ▶ The order must be published in the Gazette and such local newspapers as he considers necessary.
- ▶ The order can declare the following to be prohibited publications:
  - ▶ a particular publication
  - ▶ a series of publications
  - ▶ all publications published by a particular person or association.
- ▶ If the order specifies the name of a periodical publication, then all subsequent issues and any substitution thereof will also be prohibited publications, section 53(2).
- ▶ If the order prohibits the publications of any class published by a specified person, then the order applies to all publications published by that person after the date of the order too, section 53(3).
- ▶ Any person who prints, imports, publishes, sells, supplies or even possesses a prohibited publication is guilty of an offence and is liable, on conviction, to a period of imprisonment, or the payment of a fine or both, section 54.

- ▶ Section 56 empowers any police or administrative officer, such as a post-master or a collector in the Department of Customs and Excise, to seize any suspected prohibited publication.

A clear problem with the provisions of section 53 of the Penal Code is that they are not objective. In other words, the publication does not have to pose a genuine, realistic or objective threat to the public interest in defence, public safety or public order; the president just has to believe that this is the case before he makes an order prohibiting a publication. This does not comply with internationally accepted standards for prohibiting the publication of information.

### *Seditious publications*

Section 57(1) of the Penal Code provides, among other things, that any person who prints, publishes, sells, distributes or even possesses a seditious publication is guilty of an offence and is liable to imprisonment, a fine or both. Furthermore, any seditious publication is to be forfeited to the state. Note the following:

- ▶ In terms of section 60(1), a seditious intention is an intention, among other things, to:
  - ▶ advocate the desirability of overthrowing the government by unlawful means
  - ▶ bring into hatred or contempt or to excite disaffection against the government established by law
  - ▶ excite the inhabitants of Zambia to procure the alteration, by illegal means, of any matter established by law
  - ▶ excite disaffection against the administration of justice in Zambia
  - ▶ raise discontent or disaffection among the inhabitants of Zambia
  - ▶ promote feelings of ill-will or hostility between different classes of the population of Zambia
  - ▶ advocate the desirability of any part of Zambia becoming an independent state
  - ▶ incite resistance, either active or passive, or disobedience to any law or the administration thereof.
- ▶ However, section 60(1) also explicitly provides that a publication is not seditious by reason only that it intends to:
  - ▶ show the president has been misled or is mistaken in any of his measures
  - ▶ point out errors or defects in the government or Zambian Constitution, or the legislation or administration of justice in Zambia, to remedy these
  - ▶ persuade the inhabitants of Zambia to attempt to procure changes by lawful means

- ▶ point out with a view to their removal, any matters which are producing feelings of ill-will between different classes in the population.

#### *Alarming publications*

Section 67(1) of the Penal Code provides, among other things, that any person who publishes any false statement, rumour or report that is likely to cause fear and alarm to the public or to disturb the public peace is guilty of an offence and is liable, on conviction, to imprisonment. However, note that section 67(2) specifically provides a defence to this offence, namely, that before publication, the person took measures 'to verify the accuracy of such statement, rumour or report'.

#### *Insulting the national anthem*

Section 68 of the Penal Code provides, among other things, that any person who publishes any writing with intent to insult or bring into contempt or ridicule the official national anthem of Zambia is guilty of an offence and is liable to imprisonment.

#### *Insulting the president*

Section 69 of the Penal Code provides, among other things, that any person who, with intent to bring the president into hatred, ridicule or contempt, publishes any defamatory or insulting matter is guilty of an offence and is liable to be imprisoned. (See the case law section at the end of this chapter for a discussion of a case dealing with this provision.)

#### Offences affecting relations with foreign states and external tranquillity

##### *Defamation of foreign princes*

Section 71 of the Penal Code falls under the heading Offences Affecting Relations with Foreign States and External Tranquillity. It makes it an offence to, with such justification and excuse as would be sufficient in the case of the defamation of a private person, publish anything tending to degrade, revile, expose to hatred or contempt any foreign prince, potentate, ambassador or other foreign dignitary with intent to disturb the peace and friendship between Zambia and that person's country.

#### Unlawful assemblies, riots and other offences against public tranquillity

##### *Inducing a boycott*

Section 92 of the Penal Code makes it an offence to print, publish, sell, distribute or reproduce a publication to further a designated boycott. A designated boycott is one which the president has identified as being conducted with the intention or effect of:

- ▶ bringing into hatred or contempt or undermining the authority of the government

- ▶ endangering law and order
- ▶ jeopardising the economic life of the country
- ▶ raising discontent or feelings of ill-will among the inhabitants of Zambia.

The offence is punishable by imprisonment, in terms of section 92(2).

#### **Prisons Act, Act 56 of 1965**

Subsections 79(3) and (4) of the Prisons Act make it an offence to publish any part of a letter or document which the person has reasonable cause to believe was written in prison by or on behalf of a prisoner, and which has not been endorsed by the officer in charge (stating the name of the prison and authorising the removal of the document from the prison). The penalty is a fine, imprisonment or both.

#### **Zambian Security Intelligence Service Act, Act 14 of 1998**

Section 11(3) of the Zambian Security Intelligence Service Act makes it an offence to publish any information obtained in contravention of section 11(1). Section 11(1) prohibits any intelligence officer or employee of the Intelligence Service from disclosing any information obtained as a result of his office without the written consent of the president. The penalty for such publication is a fine, imprisonment or both.

#### **Preservation of Public Security Act, Act 5 of 1960**

Section 3 of the Preservation of Public Security Act deals with a public emergency declared under the constitution. Section 3 empowers the president to make regulations prohibiting the publication or dissemination of matter prejudicial to public security (defined as including safety of persons and property, maintenance of essential supplies and services, prevention and suppression of violence, intimidation, disorder, crime, mutiny, rebellion, defiance of law and lawful authority and the maintenance of the administration of justice). Section 3 also empowers the president to make regulations for the control of production, publishing, sale, distribution and possession of publications.

#### **State Security Act, Act 36 of 1969**

The State Security Act contains several provisions which not only prohibit the publication of certain information but which would also hinder the media's ability to perform its news-gathering functions.

##### Activities prejudicial to Zambia

Section 3 of the State Security Act sets out a list of activities which are prejudicial to Zambia if they are done for 'any purpose prejudicial to the safety or interests of the Republic'. The penalty for violating this provision is imprisonment for up to 30 years. The activities that are particularly relevant to the media include:



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

#### Wrongful communication of information

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

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

#### Protection of classified information

Section 5 of the State Security Act makes it an offence to communicate any classified matter to any person other than someone to whom he is authorised by an authorised officer to communicate it or to whom it is, in the interests of Zambia, his duty to communicate it.

### **3.7.3 Prohibition on the publication of expression that is obscene or contrary to public morality**

#### **Penal Code, Act 42 of 1930**

##### Public morality

Section 53 of the Penal Code falls under the heading Treason and Other Offences and deals with prohibited publications. In terms of section 53(1), if the president believes that a publication is contrary to the public interest (which is defined in section 62 of the Penal Code as including the interest of public morality), he may, in his absolute discretion, declare it to be a prohibited publication. Note that:

- ▶ the order must be published in the Gazette and such local newspapers as he considers necessary
- ▶ the order can declare the following to be prohibited publications:
  - ▶ a particular publication
  - ▶ a series of publications
  - ▶ all publications published by a particular person or association.
- ▶ if the order specifies the name of a periodical publication, then all subsequent issues and any substitution thereof will also be prohibited publications, section 53(2)
- ▶ if the order prohibits all the publications of any class published by a specified person, then the order applies to all publications published by that person after the date of the order too, section 53(3)
- ▶ any person who prints, imports, publishes, sells, supplies or even possesses a prohibited publication is guilty of an offence and is liable, on conviction, to imprisonment, the payment of a fine or both, section 54
- ▶ section 56 empowers any police or administrative officer, such as a postmaster or a collector in the Department of Customs and Excise, to seize any suspected prohibited publication.

A clear problem with the provisions of section 53 of the Penal Code is that they are not objective. In other words, the publication does not have to pose a genuine, realistic or objective threat to the public interest or public morality; the president just has to believe that this is the case before he makes an order prohibiting a publication. This does not comply with internationally accepted standards for prohibiting the publication of information.

##### Obscenity

Section 177 of the Penal Code falls under the broad heading, Offences Injurious to the Public in General and deals with 'obscene matters or things'. In terms of section

177(1)(a), it is an offence to make, produce or possess obscene writings, drawings, printed matter, photographs, cinematograph film or any other object 'tending to corrupt morals'. The punishment is imprisonment or a fine.

### **3.7.4 Prohibition on the publication of expression that constitutes criminal defamation**

Part II of the Penal Code, Act 42 of 1930, contains Offences Injurious to the Public in General. Chapter XVIII, which falls within Division III, is headed Defamation and makes criminal defamation an offence.

#### **What is criminal defamation?**

Section 191 of the Penal Code provides for the misdemeanour offence of libel, which is, in the part that is relevant for the media, the unlawful publication by print or writing of any defamatory matter (defined in section 192 as matter 'likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation') concerning another person, with the intent to defame that person.

#### **When is the publication of defamatory matter unlawful?**

Section 194 provides that any publication of defamatory matter will be unlawful unless:

- ▶ the matter is true, and publication was for the public benefit
- ▶ publication is privileged.

Two types of privilege are recognised under the Penal Code, absolute privilege and conditional privilege.

#### **Absolute privilege**

In terms of section 195 of the Penal Code, the publication of defamatory matter is absolutely privileged in the following cases:

- ▶ publications published by the president
- ▶ publications published by the Cabinet or the National Assembly in any official document or proceeding
- ▶ publications published by a minister or any member of the National Assembly in Cabinet or the National Assembly
- ▶ publications to and by a person having authority over an individual who is subject to military or naval discipline about that person's conduct
- ▶ publications arising out of judicial proceedings
- ▶ fair reports of anything said, done or published in Cabinet or the National Assembly

- ▶ if the publisher was legally bound to publish the matter.

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

### **Conditional privilege**

In terms of section 196 of the Penal Code, the publication of defamatory matter is conditionally privileged provided:

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

In any of the following cases as well if the matter published:

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

- ▶ in good faith for the protection of the rights or interests of:
  - ▶ the person publishing it
  - ▶ the person to whom it was published.

### **Definition of good faith**

In terms of section 197 of the Penal Code, a publication of defamatory matter will not be deemed to have been made in good faith if it appears that either:

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

However, there is a presumption of good faith if the defamatory matter was published on a privileged occasion, unless the contrary is proved, in terms of section 198 of the Penal Code.

### **3.7.5 Prohibition on the publication of expression that poses a danger to public health**

Section 53 of the Penal Code, Act 42 of 1930, falls under the heading Treason and other Offences and deals with prohibited publications.

In terms of section 53(1), if the president believes that a publication is contrary to the public interest (which is defined in section 62 of the Penal Code as including the interest of 'public health'), he may, in his absolute discretion, declare it to be a prohibited publication. Note that:

- ▶ the order must be published in the Gazette and such local newspapers as he considers necessary
- ▶ the order can declare the following to be prohibited publications:
  - ▶ a particular publication
  - ▶ a series of publications
  - ▶ all publications published by a particular person or association
- ▶ if the order specifies the name of a periodical publication, then all subsequent issues and any substitution thereof will also be prohibited publications, section 53(2)
- ▶ if the order prohibits all the publications of any class published by a specified person, then the order applies to all publications published by that person after the date of the order too, section 53(3)
- ▶ any person who prints, imports, publishes, sells, supplies or even possesses

a prohibited publication is guilty of an offence and is liable, on conviction, to imprisonment, the payment of a fine or both, section 54

- ▶ section 56 empowers any police or administrative officer such as a postmaster or a collector in the Department of Customs and Excise, to seize any suspected prohibited publication.

A clear problem with the provisions of section 53 of the Penal Code is that they are not objective. In other words, the publication does not have to pose a genuine, realistic or objective threat to the public interest in public health the president just has to believe that this is the case before he makes an order prohibiting a publication. This does not comply with internationally accepted standards for prohibiting the publication of information.

### **3.7.6 Prohibition on the publication of expression that promotes hatred**

Division I of Part II of the Penal Code, Act 42 of 1930, contains Offences against Public Order, which are divided into three parts, one of which is Treason and other Offences. Section 70 of this part makes it an offence to publish any writing expressing or showing hatred, ridicule or contempt for any person mainly because of their race, tribe, place of origin or colour. The penalty is imprisonment.

### **3.7.7 Prohibition on the publication of expression that relates to corruption**

Section 14(3) of the Anti-Corruption Commission Act, Act 46 of 1996, makes it an offence to publish any information obtained in contravention of section 14(1). Section 14(1) prohibits any person (note that in terms of section 25 this specifically includes the staff of the Anti-Corruption Commission) from disclosing any information obtained as a result of his or her duties under the Anti-Corruption Commission Act without the written consent of the Anti-Corruption Commission. The penalty for such publication is a fine, imprisonment or both.

### **3.7.8 Prohibition on the publication of expression relating to voting**

Section 90(2) of the Electoral Act, Act 12 of 2006, is an important provision for the media. While it does not prohibit the publication of voting-related information, it does prohibit any person (except for certain election officials) from attempting to obtain information in a polling station as to the candidate for whom any person in the polling station is about to vote or has voted, and it prohibits the communication of such information. Any contravention of this provision is an offence, and the penalty is a fine, imprisonment or both, in terms of section 90(4). This affects the media's ability to conduct exit polls in polling station precincts.

### **3.7.9 Prohibition on the publication of information relating to parliamentary proceedings**

Section 25 of the National Assembly (Powers and Privileges) Act, Act 34 of 1956, makes it an offence to:

- ▶ publish a report of any proceedings of the National Assembly or any committee which were not held in public
- ▶ publish any false or scandalous libel on the National Assembly or any report which wilfully misrepresents its proceedings
- ▶ publish any paper, report or other document prepared expressly for submission to the National Assembly before it has been laid on the table of the National Assembly, without the general or special leave of the National Assembly
- ▶ publish or print any libel on any member concerning his character or conduct as a member.

The penalty for any such publication is a fine, imprisonment (with or without hard labour) or both. Note, however, that in terms of section 32, such publication must have been made in bad faith and with malice to be liable for publication in civil or criminal proceedings.

## **3.8 Legislation that codifies and clarifies aspects of the law of defamation**

### **3.8.1 Introduction**

Most of the countries examined in this handbook deal with defamation or libel (other than criminal defamation or libel) as a matter of common law, that is judge-made law by the cases. Zambia is different because it enacted the Defamation Act, Act 46 of 1953, to consolidate and amend the civil libel laws. Thus, the Zambian Penal Code (dealt with above) addresses criminal libel while the Defamation Act deals with many issues concerning civil libel.

Note, however, that the Defamation Act specifically states that its provisions do not affect privilege in respect of parliamentary or Cabinet proceedings, section 19(2).

Many of the provisions of the Defamation Act are extremely legalistic and deal with the burden of proof issues involving damages. The focus here, however, will be on the key aspects of the Defamation Act, which indicate the areas of defamation law that give guidance to the media on what can be published. The term privileged, in this context, means that the subject matter is allowed to be published, even if it is defamatory.

### **3.8.2 Justifications for libel or slander**

#### **Fair comment**

Section 7 of the Defamation Act provides that the defence of fair comment will be good even if some of the facts that form the basis for the commentary are not true. Thus, a defence will exist provided the expression of opinion constitutes fair comment, having regard to the facts that are proved.

### **Newspaper and ZNBC reportage of court proceedings absolutely privileged**

In terms of section 8 of the Defamation Act, a fair and accurate report by any newspaper or by the ZNBC of any court proceedings is absolutely privileged provided it is:

- ▶ published contemporaneously with the proceedings
- ▶ not blasphemous or obscene.

### **Qualified privilege for newspapers and the ZNBC**

Section 9 of the Defamation Act read with the schedule to it, gives a qualified privilege to newspaper and ZNBC reportage of all matters set out in the schedule, provided that the publication was made without malice, and subject to certain other exceptions. The matters set out in the schedule include:

Statements that are privileged without explanation or contradiction

- ▶ fair and accurate reporting of the legislatures of British dominions outside Zambia
- ▶ fair and accurate reporting of public proceedings of international organisations in which Zambia or the United Kingdom is a member or is participating
- ▶ fair and accurate reporting of the proceedings of the International Court of Justice or any other judicial or arbitral tribunal deciding matters in dispute between states
- ▶ fair and accurate reporting of the court(s) martial proceedings in British dominions outside Zambia
- ▶ fair and accurate reporting of any public enquiry proceedings in British dominions outside Zambia
- ▶ a fair and accurate copy of or extract from:
  - ▶ any public register required to be kept by Zambian law that is open to public inspection or
  - ▶ any other document required to be kept open to public inspection
- ▶ a notice or advertisement published on the authority of any Zambian court, judge or court officer.

Statements privileged subject to explanation or contradiction

- ▶ A fair and accurate report of a decision of any of the following bodies:
  - ▶ a Zambian association promoting art, science, religion or learning and empowered to exercise control over matters of concern or the conduct of people subject to its control



- ▶ a Zambian association promoting trade, business, industry or profession and empowered to exercise control over matters of concern or the conduct of people subject to its control
- ▶ an association formed for safeguarding the interests of any game, sport or pastime to which the public is invited, and which is empowered to exercise control over matters of concern or the conduct of people subject to its control
- ▶ any lawful public meeting held in Zambia, whether admission is general or restricted
- ▶ any Zambian local authority, public enquiry or tribunal, board, committee or body established by law that is not closed to the public
- ▶ a general meeting of any registered company or association, except for a private company as defined in the Companies Act
- ▶ a notice issued for public information by the government, a local authority or superior police officer.

The exceptions to these statements being privileged are as follows:

- ▶ statements privileged subject to explanation or contradiction will not be privileged if the defendant newspaper or ZNBC was requested by the plaintiff to also publish a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so or has done so in an unreasonable manner
- ▶ none of the statements in the schedule will be privileged if the publication is:
  - ▶ prohibited by law
  - ▶ not of public concern
  - ▶ not for the public benefit
- ▶ defence of publication without malice and with an apology.

A newspaper may defend itself in a libel action by pleading that publication took place without actual malice and gross negligence and that a full apology was published.

#### **Limitation on privilege at elections**

A defamatory statement published by or on behalf of a candidate in any local or national election shall not be deemed to be published on a privileged occasion.

## **3.9 Legislation that specifically assists the media in performing its functions**

### **3.9.1 Introduction**

In countries that are committed to democracy, governments pass legislation which specifically promotes accountability and transparency of both public and private institutions. Such statutes, while not specifically designed for use by the media, can and often are used by the media to uncover and publicise information in the public interest. One piece of legislation that assists the media is the National Assembly (Powers and Privileges) Act, 2006, and another is the Public Interest Disclosure (Protection of Whistleblowers) Act, Act 4 of 2010.

### **3.9.2 National Assembly (Powers and Privileges) Act, 2006**

The National Assembly Act governs the operations of the National Assembly. Several provisions assist the media in reporting on the activities and proceedings of the National Assembly.

- ▶ Section 3 provides that there shall be freedom of speech and debate in the National Assembly and that that freedom cannot be questioned in any court or place outside the National Assembly.
- ▶ Section 4 provides that no civil or criminal proceedings may be instituted against any member of the National Assembly for words spoken before or written in a report, motion, bill or resolution to (a committee of) the National Assembly.
- ▶ Section 32 provides that, provided a court is satisfied that publication was in good faith and without malice, no civil or criminal liability may result from the publication of an extract of any report, paper, votes or proceedings referred to in section 25.

### **3.9.3 Public Interest Disclosure (Protection of Whistleblowers) Act, Act 4 of 2010**

#### **Institutions to which the Whistleblowers Act applies**

Section 3(2) specifies that the Whistleblowers Act applies to any government agency, any private or public company, institution, organisation, body or organ established under any law. Hence, it applies to virtually every type of institution.

#### **Protection given to whistleblowers**

Section 10 provides that an employer shall not subject an employee to any occupational detriment on account of the employee having made a protected disclosure or public interest disclosure. The following definitions are important.

- ▶ ‘occupational detriment’ includes disciplinary action, dismissal, suspension,

demotion, harassment or intimidation, forced transfer, being refused transfer or promotion, disadvantageous changes in employment or retirement conditions, being refused a reference or threats of any of the above

- ▶ ‘protected disclosure’ means a disclosure made to a legal practitioner or employer
- ▶ ‘public interest disclosure’ means a disclosure that the person believes shows, among other things public wastage, environmental risk or danger, unlawful reprisal, public health or safety danger, evidence of a criminal offence, failure to comply with a legal obligation, the occurrence of a miscarriage of justice or deliberate concealment of any of the above.

Who are public interest disclosures made to?

Section 11 of the Whistleblowers Act provides that a person may make a public interest disclosure to an investigating authority. Section 12 provides that these may be made anonymously, and section 25 provides that these must be made voluntarily. An investigating authority means the auditor-general, the Anti-Corruption Commission, the Drug Enforcement Commission, the investigator-general, the Police Public Complaints Authority, the Judicial Complaints Authority or any other person prescribed by law.

### **On what grounds can an investigating authority decline to act on a public interest disclosure?**

In terms of section 13(1), an investigating authority may decline to act if it believes:

- ▶ the disclosure is malicious, frivolous, vexatious or made in bad faith
- ▶ the disclosure is lacking in substance
- ▶ the disclosure is trivial
- ▶ there is a more appropriate method of dealing with the matter
- ▶ the disclosure has already been dealt with adequately
- ▶ the disclosure is made for monetary gain or other illegal reasons.

Making a disclosure such as those listed above is, in terms of section 13(3), an offence and a person is liable, on conviction, to a fine, imprisonment or both.

### **Remedies to ensure that a whistleblower’s claims are investigated**

Section 19 empowers a person who makes a public interest disclosure to request the investigating authority to provide a progress report. This must be provided within 14 days of the request, and additional reports must be provided at least once every 90 days after that and on completion of the action. Furthermore, section 58 specifies that an investigating authority must notify the person disclosing the action taken, or proposed to be taken, within six months.

### **Provisions relating to defamation in the Whistleblowers Act**

Section 56 states that in proceedings for defamation arising out of public interest disclosure, the person making such a disclosure, and in providing additional information to an investigating authority, has a defence of absolute privilege unless the disclosure constitutes an offence in terms of section 13.

## **4 Regulations affecting the media**

In this section, you will learn:

- ▷ what regulations are
- ▷ regulations that affect the media when covering elections

### **4.1 Definition of regulations**

Regulations are subordinate legislation. They are legal rules made in terms of a statute. Regulations are legal mechanisms for allowing a body other than parliament to make legally binding rules governing an industry or sector, without needing parliament to pass a specific statute thereon.

### **4.2 Regulations governing the media when covering elections**

Section 109 of the Electoral (Code of Conduct) Regulations, 2006, empowers the Electoral Commission of Zambia to issue an Electoral Code of Conduct. Many of the provisions of the Code of Conduct relate specifically to obligations of election candidates and contesting parties. Several provisions are, however, relevant to the media:

- ▶ Regulation 6 gives every person the right to:
  - ▶ express political opinions
  - ▶ debate the policies and programmes of political parties
  - ▶ publish and distribute notices and advertisements.
- ▶ The rights in regulation 6 are subject to regulation 7 of the Code of Conduct. In the parts that are relevant to the media, sub-regulation 7(1) prohibits a person from:
  - ▶ causing violence or using language that is likely to lead to violence or intimidation during election campaigns or elections

- ▶ making false, defamatory or inflammatory allegations concerning any person or party in connection with an election
- ▶ propagating any opinion which is prejudicial to:
  - › the sovereignty, integrity or security of the country
  - › maintenance of public order
  - › the independence of any institution.
- ▶ In terms of sub-regulation 7(2), any person who does not comply with sub-regulation 7(1) commits an offence, and the penalty on conviction is a fine, imprisonment or both.
- ▶ Regulation 12 sets out the duties of the media. It requires all print and electronic media to:
  - ▶ provide fair and balanced reporting of campaigns, policies, meetings, rallies and press conferences of registered parties and candidates during the campaign period
  - ▶ provide news of the electoral process up to the declaration of results
  - ▶ abide by this code and by regional codes of conduct, provided these do not conflict with this code
  - ▶ recognise, in liaison with the Electoral Commission of Zambia; a representative media body authorised to receive complaints and provide advice regarding fair coverage of the elections
  - ▶ endeavour to:
    - › undertake capacity building of media personnel in their organisations;
    - › accurately report election news and not make abusive editorial comment, incite violence or advocate hatred based on race, ethnicity, tribe, gender, political or religious conviction
    - › identify editorial comment they wish to make and separate it from the news.
  - ▶ Heads and other management staff of public or private media organisations are not to intimidate media practitioners and must allow them to exercise professional judgment without undue influence.
  - ▶ Public and private media personnel shall:
    - › conduct interviews with candidates with fairness in respect to both interview style and amount of time given
    - › refrain from broadcasting their own political opinion, commentary or assessment and, where they wish to do so, they shall identify the opinion, commentary and assessment as their own and shall carefully balance it to avoid bias.

- ▶ Section 13 deals with public radio and television broadcasters and the key provisions are as follows:
  - ▶ air-time must be allocated equally to all political parties for their political broadcasts
  - ▶ a political party may buy no more than 30 minutes of air-time in any one language in any week on public television or radio
  - ▶ no party-political broadcasts, political discussions or interviews, opinion poll results or predictions of the result may be scheduled on radio or television on polling day until after the polls have closed
  - ▶ broadcasters must inform the public as to the source of a public opinion poll and shall indicate the margin of error.
- ▶ Section 14 provides for the media's handling of election results, and the main provisions are as follows:
  - ▶ All media must disclose accurate election results and provide updates on the vote-counting process. The media must not speculate on results, but broadcast confirmed election results as presiding officers announce them.
  - ▶ Television and radio stations must
    - › maintain full records of news bulletins and recordings of all programming relating to the election, including party political broadcasting
    - › institute a monitoring system to ensure balance throughout the campaign until the close of the poll
    - › provide the Electoral Commission of Zambia with recordings as it may require to fulfil its monitoring role.
  - ▶ The print media must make available back copies of newspapers for inspection by the Electoral Commission of Zambia in the event of a complaint.
  - ▶ A process for making written complaints to the Electoral Commission of Zambia regarding media coverage is set out. This includes that where a right of reply, a retraction or correction is necessary, it shall be made in a like manner and with equal prominence as the original report or publication.
- ▶ Section 17 sets out general penalties for contravening the Electoral Code of Conduct, and where no specific penalty is provided, a contravention is punishable by a fine, imprisonment or both.

## 5 Media self-regulation

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In this section, you will learn:

- ▷ what self-regulation is
- ▷ key self-regulatory provisions intended to govern the media in Zambia

### 5.1 Definition of self-regulation

Self-regulation is a form of regulation that is established voluntarily. A grouping or body establishes its mechanisms for regulation and enforcement that are not imposed, for example, in a statute or regulation. Media bodies often introduce self-regulation in the form of codes of media ethics and good governance.

### 5.2 The Zambia Media Council

The Zambia Media Council (Zamec) was officially launched in May 2011. Zamec sees media self-regulation as ‘a social contract between media practitioners and society at large’, according to its Rationale for Media Codes of Ethics. Unfortunately, to date, it appears that media outlets which are operated by the Zambian government, including newspapers and the ZNBC, will not participate in Zamec. This raises doubt about its effectiveness and whether it will be able to operate as a self-regulatory body for the Zambian media as a whole.

Nevertheless, the Zamec Draft Code of Ethics has six main aims, which are, in brief to:

- ▶ protect the public from irresponsible, anti-social or propaganda use of the media
- ▶ enable the public to enjoy basic rights, especially the freedom to receive and impart information
- ▶ protect media practitioners from being forced to act in ways that are contrary to the dictates of their conscience
- ▶ keep open communication channels within the media industry and the public sphere
- ▶ ensure public access to information, and that ordinary people can register their opinions via the media
- ▶ help practitioners understand the principles and values that give the profession credibility.

### 5.3 Key provisions of the Zamec Draft Code of Ethics

The key provisions of the Zamec Draft Code of Ethics are, in summary, as follows:

#### ▶ Reporting of news

- ▶ Report news truthfully, accurately and fairly.
- ▶ Use fair methods in obtaining news, photographs and documents, except where an overriding public interest justifies the use of other methods. News must be presented in context and a balanced manner, without any intentional or negligent departure from the facts, whether by distortion or exaggeration.
- ▶ Present as fact only what may be reasonably true having regard to the sources of the news, and such reports shall be published fairly with due regard to context and importance. Where a report is founded on opinion, allegation or supposition, this must be indicated clearly.
- ▶ Promptly rectify any harmful inaccuracies, and ensure the corrections and apologies receive due prominence and afford the right of reply to persons criticised when the issue is of sufficient importance.
- ▶ Seek the views of the subjects of serious critical reportage in advance of publication, unless there are reasonable grounds for believing that by doing so a media organisation would be prevented from publication or where evidence may be destroyed or witnesses intimidated.
- ▶ Reports, photographs or sketches relating to matters involving indecency or obscenity shall be presented with due sensitivity to the prevailing moral climate.
- ▶ A visual presentation of sexual conduct may not be published unless a legitimate public interest dictates otherwise.
- ▶ Pornography shall not be published.
- ▶ The identity of victims of rape or other forms of sexual violence shall not be published without their consent unless there is an overriding public interest in doing so.
- ▶ The identities of child victims of sexual assaults shall not be identified, whether directly or indirectly.
- ▶ News obtained by dishonest or unfair means or breach of confidence should not be published unless a legitimate public interest dictates otherwise.
- ▶ In both news and comment, the media shall exercise exceptional care and consideration in matters involving the private lives and concerns of individuals, bearing in mind that the right to privacy may be overridden only by legitimate public interest.
- ▶ Journalists must respect the moral and cultural values of Zambian society.



▶ **Discrimination and hate speech**

- ▶ The media should avoid discriminatory references to people's race, colour, ethnicity, religion, gender, sexual orientation, physical or mental disability, illness or age.
- ▶ The media should not refer to a person's race, colour, ethnicity, religion, gender, sexual orientation, physical or mental disability, or illness in a prejudicial or pejorative context, except where it is strictly relevant to the matter reported or added significantly to the reader's understanding of the matter.
- ▶ The media has the right and the duty to report on all matters of legitimate public interest. This must be balanced against the obligation not to publish hate speech.

▶ **Advocacy**

A media organisation may advocate its views on controversial topics provided that it treats its readers fairly by:

- ▶ making fact and opinion distinguishable
- ▶ not misrepresenting relevant facts
- ▶ not distorting the facts in text or headlines.

▶ **Comment**

- ▶ The media is entitled to comment on or criticise any actions or events of public importance provided such comment is fair and honestly made.
- ▶ Comment shall be presented as such and shall be made on facts truly stated, referred to or fairly indicated.
- ▶ Comment shall be an honest expression of opinion without malice or dishonest motives and shall take fair account of all available material facts.

▶ **Headlines, posters, pictures and captions**

- ▶ Headlines and captions to pictures shall give a reasonable reflection of the content of the report or picture in question.
- ▶ Posters shall not be misleading and shall give a reasonable reflection of the content of the report in question.
- ▶ Pictures shall not misrepresent or mislead and shall not be manipulated to do so.

▶ **Confidential sources**

The media must protect confidential sources of information.

▶ **Payment for articles**

No payment shall be made for articles to persons involved in crime or other

notorious behaviour, or to convicted persons and their family, friends or associates, except where the publication is in the public interest and payment is necessary.

▶ **Violence**

Due care and responsibility shall be exercised concerning the presentation of brutality, violence and atrocities.

It is also important to note that Zamec has published a draft Sector Codes of Ethics for specialised fields in the media, namely:

- ▶ media owners or publishers
- ▶ media managers and editors
- ▶ broadcasters
- ▶ media photographers and video producers
- ▶ news agency journalists
- ▶ public information and media advertisers.

The codes contain additional provisions that focus specifically on the responsibilities of these particular media sectors. However, given that the codes are currently in draft form, details of the provisions are not included here.

## **6 Case law and the media**

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In this section, you will learn:

- ▷ the definition of common law
- ▷ how Zambia’s courts have dealt with several media-related common law issues, including
  - › deportation of foreign journalists
  - › the right to freedom of expression by a member of parliament
  - › ministerial discretion regarding appointments to independent media bodies
  - › the publication of classified documents

- › defamation, including remedies for defamation and criminal defamation of the president

## 6.1 Definition of common law

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

This section focuses on several judgments that have a bearing on media law or freedom of expression in some way.

## 6.2 Deportation of foreign journalists

In the 2004 case of *Attorney-General v Roy Clarke* (Appeal No 96A/2004), the Supreme Court of Zambia judicially reviewed a judgment of a lower court, which had nullified a deportation order made by the Minister of Home Affairs of a foreign journalist resident in Zambia. The journalist had written an article in which he referred to the president and several senior ministers in offensive terms, including their being 'red-lipped, long-fingered baboons'.

Although the Supreme Court dismissed the appeal, finding that deportation was disproportionate, it is important to note that the Supreme Court made it very clear in several pronouncements that it considered that the right to freedom of expression has limits. Indeed, the court found that the trial judge misdirected himself when he held that the minister's action to deport the journalist violated article 20 of the constitution. Article 20 contains several important limitations on the right to freedom of expression.

The court went on to comment that what it found 'irritating and offending' were the references to the concerned persons' physical appearance in crude language. The court made it clear that the journalist ought to be sensitive to 'the cultural values and norms of the Zambian people'. Nevertheless, the court did hold that deportation was disproportionate and too extreme an action and dismissed the appeal.

## 6.3 The right to freedom of expression by a member of parliament

In *Attorney-General, the Speaker of the National Assembly v Dr Ludwig Sondashi, MP* (SCZ No 6 of 2003), the Supreme Court reviewed a judgment by the High Court that found in favour of Ludwig Sondashi against the decision to suspend Mr Sondashi from the National Assembly, for contempt, following published remarks he made

outside parliament to a journalist. The High Court found that holding or forming an opinion by a member of parliament when that opinion has nothing to do with the proceedings in parliament or the National Assembly, does not amount to contempt and cannot warrant disciplinary action. The High Court also held that the oath of allegiance taken by members of parliament does not stand against holding or forming of opinions by members of parliament and does not fetter their freedom of expression.

In the appeal to the Supreme Court, the appellants argued that article 89 of the constitution (since repealed and replaced by article 260) was on the derogations of the right to freedom of expression envisaged in article 20(1) of the constitution which states that a person shall not be hindered in the enjoyment of his or her freedom of expression except with his consent. It was argued that the oath of allegiance was such consent.

In the court's judgment, it held that the argument overstretched and exaggerated the envisaged derogations in article 20 of the constitution. The judgment found that the arguments using the oath of allegiance as grounds to argue that any comment made either within the precincts of parliament or not are grounds for contempt of the House warranting suspension is untenable. The Supreme Court refused to accept that taking the oath of allegiance entailed a derogation of freedom of speech and that members of parliament cannot be stopped from making opinions and the publication of those opinions, in cases where the opinion has nothing to do with the procedures of parliament is not grounds for suspension from the National Assembly. The Supreme Court held to the judgment of the High Court and dismissed the appeal with costs.

#### **6.4 Ministerial discretion regarding appointments to independent media bodies**

In *Minister of Information and Broadcasting and Another v Fanwell Chembo and Others* (Appeal No 76/2005), the Supreme Court of Zambia reviewed a judgment of a lower court, which had nullified the refusal by the then-minister of information and broadcasting services to forward some of the names of candidates to sit on the boards of the Independent Broadcasting Authority and the ZNBC, recommended by an *ad hoc* appointments committee to the National Assembly. The wording of the relevant sections at that time essentially provided that the boards consist of members appointed by the minister, on the recommendation of the appointments committee, subject to ratification by the National Assembly.

The Supreme Court found that the lower court had not considered the proper meaning of the term recommendation. The Supreme Court held that the word recommendation 'implies a discretion in the person to whom it is made to accept or reject the recommendation' and that 'In constituting the boards, the minister is not bound to accept the names recommended by the *ad hoc* Appointments Committee'. The Supreme Court found that there was no illegality in the minister vetting certain names recommended to her and that her decision could not be said

to have been outrageous or irrational. Consequently, the Supreme Court allowed the appeal and set aside the judgment of the lower court.

## 6.5 Publication of classified documents

In *The People v M'membe and Others 1996/HP/38*, the High Court considered a case in which three people (either owners or senior staff of a newspaper) were arrested and charged under the State Security Act. The Post newspaper had published an article in issue number 401 revealing an alleged plot by the government to hold a secret referendum on the proposed constitutional amendments. The three accused were charged with publishing a classified document.

The court found that the document in possession of the accused, and which had given rise to the article, was not marked secret and was not classified. However, it allegedly contained information from a classified document. The High Court held that the document in possession of the accused 'bore no indication whatever that it could be a secret document. Neither could the contents of the document make the accused have reasonable grounds to believe that the document ... could be secret'. Furthermore, the High Court cast doubt on whether or not the classified document was properly classified as it 'may not, by reason of its contents, be brought within the ambit of the State Security Act' given that it dealt with referendum issues, the contents of which 'cannot subvert the interests of the State' and that it 'contains nothing new and secret but [are] matters that were publicly discussed during the constitutional reform debates, which matters are common knowledge and which I take judicial notice [of]'. All charges against the accused were dismissed.

## 6.6 Defamation

This chapter has already dealt extensively with the general issue of defamation as it arises in respect of criminal defamation. However, it is important to note that defamation is more usually dealt with as a civil matter, where a person who has been defamed seeks damages to compensate for the defamation. All of the cases dealt with in this section arise in the context of civil cases of defamation, which is also known as libel in Zambia. That term will be used in this section.

### 6.6.1 The defence of fair comment to an action for libel

This case deals with the fair comment defence to an action for libel. In *Sata v Post Newspapers Ltd and Another (1995) High Court*, the plaintiff was a minister in the government. The defendants published various articles and a cartoon in their newspapers, which gave rise to the libel action. Before considering the merits of the case, the judge dealt with an argument put forward by the defendants that the common law of defamation in Zambia needed to change as a result of the constitutional right to freedom of the press. After discussing the development of the common law of defamation or libel in countries such as the United States, the United

Kingdom and Australia, the judge stated as follows:

*There is no need to formulate a new set of principles to impose new fetters on the right of a public official to recover damages. However, in order to counter the inhibiting or chilling effect of litigation, I am prepared to draw a firm distinction between an attack on the official public conduct of a public official and imputations that go beyond this and attack the private character of such an official, which attack would be universally unsanctioned. I am also prepared, when considering the defence of fair comment on a matter of public interest arising from the conduct of a public official, to be more generous and expansive in its application ... it seems to me that where an allegation complained of can be regarded as comment on the conduct of a public official in the performance of his official duties or on conduct reflecting upon his fitness or suitability to hold such office, freedom of speech and press can best be served in Zambia by the courts insisting upon a higher breaking point, or a greater margin of tolerance than in the case of a private attack, before an obvious comment based on facts which are substantially true can be regarded as unfair.*

The court proceeded to examine the facts of the case and the various defamatory or libellous instances. Certain of these are highlighted here:

- ▶ One of the articles said the plaintiff's 'political prostitution prompted the former President's decision to fire him'. The defendants said that this was comment based on fact, but the court found that no facts supporting the statement were to be found in the newspaper articles. Furthermore, the judge said that even if the facts relied on had been published, that is, that the plaintiff had changed political parties at some earlier point in his career after the abolition of the one-party system, 'I cannot imagine that anyone would consider a person to be a political prostitute for joining a party of his own choice after the re-introduction of a new political dispensation allowing for the formation of other parties'.
- ▶ Another article went on to describe the plaintiff in terms that the judge described as 'extravagantly uncomplimentary'. Nevertheless, the judge found there was a sufficient substratum of facts on which to base the comments made. The judge held that the global conclusion in the article about the plaintiff not being honourable:

*was certainly harsh and probably an opinion not shared by anyone else but ... was prefixed by the examples which were listed. The law protects even the minority opinion of a defendant who honestly comments on a public official and has facts to lean on.*

Consequently, the court found for the defendants on these issues.

- ▶ An article dealt with a bar brawl involving the plaintiff and another minister. The court quickly rejected any libel here (the plaintiff argued that it insinuated that he was unable to defend himself) and found for the defendants.

- ▶ Another article was an editorial, which labelled the minister greedy. In finding for the plaintiff, the court held that this was a 'very personal characteristic' and that 'No evidence was lead to support greed on the part of the plaintiff. Consequently, the court held that greed was not an inference 'which a fair-minded person might reasonably draw from such facts and could not ... represent the honest opinion of the writer'. The court reiterated the principle that 'fair comment cannot avail the defendant where the allegation made cannot fairly and reasonably be inferred from the facts'.
- ▶ The next issue concerned two articles and a cartoon regarding financial irregularities involving the plaintiff. The court found that given that the Anti-Corruption Commission had handed over a docket to secure the prosecution of the plaintiff, the report was substantially the truth and that the inferences and comments on such true representations of the facts were not actionable.

### 6.6.2 Remedies for defamation

*Sata v Post Newspapers Ltd and Another (1995) High Court* is an important decision in respect to the remedies for defamation. At the end of the case, the court found that the plaintiff was successful in respect of certain of the defamatory instances and awarded him compensatory damages in the form of money. Importantly, the court refused to order that a perpetual injunction be imposed upon the defendants preventing them from repeating the libel, saying 'The plaintiff is a political public figure and a permanent injunction, like any excessive award, would be certain to inhibit free debate'.

### 6.6.3 Criminal defamation

*The People v Bright Mwape and Another (1995) High Court* was a case of criminal defamation charges being brought against two journalists in respect of derogatory statements having been made against the president in an article. The defendants challenged the constitutionality of section 69 of the Penal Code (creating the offence of defamation of the president and which has already been dealt with elsewhere in this chapter), under which they were being charged. They argued that the provision violated the right to freedom of expression as well as the right to equality because it established a particular defamation offence concerning the president. The High Court rejected both arguments, saying that legitimate criticism would not constitute an offence under section 69, and therefore their freedom of expression rights was sufficiently protected. Furthermore, the High Court rejected the argument that an offence aimed at a particular person, namely the president, violated the equality provisions of the constitution. The High Court held that parliament was entitled to:

*emphasize the status of these categories of people [such as the President, foreign princes, etc] and the seriousness of the matter. The repercussions that follow the defaming of the President or a foreign potentate are not the same as those that follow the defamation of an ordinary person.*

## Notes

- 1 See generally Patrick Matibini, *The Struggle for Media Law Reforms in Zambia*. Media Institute of Southern Africa–Zambia Chapter, 2006 and <http://www.state.gov/r/pa/ei/bgn/2359.htm>.
- 2 <https://www.worldometers.info/world-population/zambia-population/> [Last accessed on 11 September 2020].
- 3 <https://www.worldbank.org/en/country/zambia/overview> [Last accessed on 11 September 2020].
- 4 <https://www.habitatforhumanity.org.uk/country/zambia/> [Last accessed on 11 September 2020].
- 5 <https://www.nationmaster.com/country-info/profiles/Zambia/Media> [Last accessed on 11 September 2020].
- 6 <https://www.itu.int/en/ITU-D/Spectrum-Broadcasting/DSO/Pages/dataminer.aspx> [Last accessed on 11 September 2020].
- 7 <http://uis.unesco.org/en/country/zm> [Last accessed on 11 September 2020].
- 8 <https://www.internetworldstats.com/africa.htm#zm> [Last accessed on 11 September 2020].
- 9 See Fackson Banda, *Key Issues in Public Service Broadcasting in sub-Saharan Africa*. Paper commissioned by the Open Society Institute, 2006.
- 10 <https://www.cnbc.com/2020/01/14/zambias-spiraling-debt-and-the-future-of-chinese-loan-financing-in-africa.html> [Last accessed on 25 September 2020]